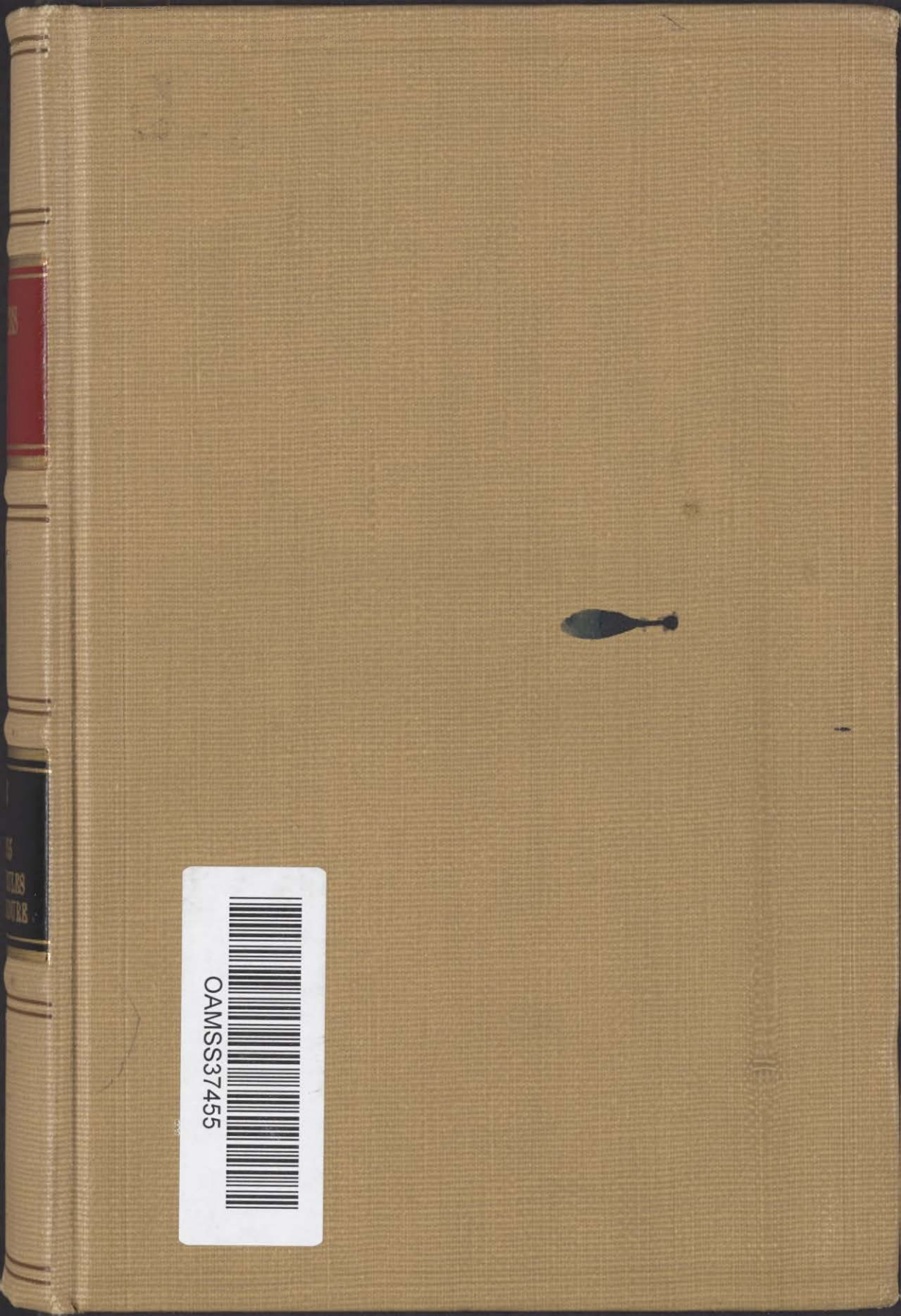

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UNITED STATES REPORTS

VOLUME 350

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1955

OCTOBER 3, 1955, THROUGH APRIL 9, 1956

WALTER WYATT
REPORTER OF DECISIONS

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ERRATA.

328 U. S. 303, syllabus, paragraph 2, line 1: "§ 3, cl. 9" should read "§ 9, cl. 3".

348 U. S. 814, No. 236: "277 Pa. 58" should read "377 Pa. 58".

349 U. S. 367, line 18: "48 Stat. 926" should read "48 Stat. 1185".

349 U. S. 946, No. 741: "222 Miss. —" should read "223 Miss. 56".

349 U. S. 951, No. 790: "220 F. 2d 150" should read "221 F. 2d 150".

40262

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.
JOHN M. HARLAN, Associate Justice.

HERBERT BROWNELL, Jr., Attorney General.
SIMON E. SOBELOFF, Solicitor General.
HAROLD B. WILLEY, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

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

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

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

For the Fourth Circuit, EARL WARREN, 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.

April 4, 1955.

(For next previous allotment, see 347 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1955.

LUCY ET AL. *v.* ADAMS, DEAN OF ADMISSIONS, UNIVERSITY OF ALABAMA.

APPLICATION TO VACATE ORDER GRANTING STAY OF INJUNCTION PENDING APPEAL AND TO REINSTATE INJUNCTION PENDING APPEAL.

No. 294, Misc. Decided October 10, 1955.

The injunction which the District Court issued in this case, but suspended pending appeal to the Court of Appeals, is reinstated to the extent that it enjoins and restrains the respondent and others designated from denying these petitioners, solely on account of their race or color, the right to enroll in the University of Alabama and pursue courses of study there.

134 F. Supp. 235, injunction reinstated in part.

Arthur D. Shores, Constance Baker Motley, Robert L. Carter and *Thurgood Marshall* for petitioners.

Frontis H. Moore for respondent.

PER CURIAM.

Petitioners, Autherine J. Lucy and Polly Anne Myers, citizens of Alabama, have been seeking admission to the University of Alabama since September 1952. Respondent William F. Adams is Dean of Admissions of the University. After hearings, United States District Judge Grooms of the Northern District of Alabama found that petitioners had been denied admission to the University "solely on account of their race and color." Holding this

denied petitioners equal protection of state laws, the court permanently enjoined respondent Adams, his agents, employees and others acting in concert with respondent "from denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race or color." 134 F. Supp. 235. Respondent's motion to suspend the injunction pending appeal to the United States Court of Appeals for the Fifth Circuit was granted by the District Judge. A judge of that court denied a motion to vacate the suspension and reinstate the injunction. A similar motion is now before us.

The motion is granted and the injunction is reinstated to the extent that it enjoins and restrains the respondent and others designated from denying these petitioners, Autherine Lucy and Polly Anne Myers, the right to enroll in the University of Alabama and pursue courses of study there. *Sipuel* v. *Board of Regents of the University of Oklahoma,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U. S. 637. In other respects, the motion is denied.

CHESSMAN *v.* TEETS, WARDEN.

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

No. 196. Decided October 17, 1955.

Petitioner applied to a Federal District Court for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. *Held:* His application alleged a denial of due process of law in violation of the Fourteenth Amendment; it should not have been summarily dismissed; and the case is remanded to the District Court for a hearing.

221 F. 2d 276, reversed.

Jerome A. Duffy for petitioner.

PER CURIAM.

Petitioner applied to the United States District Court, Northern District of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription of his stenographic notes of the trial, and petitioner alleges that the prosecuting attorney and the substitute reporter selected by him had, by corrupt arrangement, prepared the fraudulent transcript. On the record before us, there is no denial of petitioner's allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F. Supp. 600. The Court of Appeals affirmed the order of the District Court. 221 F. 2d 276. The charges of fraud as such set forth a denial of due process of law in violation of the

Fourteenth Amendment. See *Mooney* v. *Holohan*, 294 U. S. 103. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing.

MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE CLARK dissent.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MISSISSIPPI *v.* LOUISIANA.

No. 11, Original. Argued October 11, 1955, on exceptions to the Report of the Special Master.—Decree entered October 17, 1955.

Final decree fixing the true boundary between Mississippi and Louisiana at certain points on the Mississippi River.

D. K. McKamy served as Special Master by appointment of the Court, 346 U. S. 862.

Gerard H. Brandon and *James D. Thomas,* Special Assistant Attorneys General, argued the cause for the State of Mississippi, plaintiff. With them on the brief were *J. P. Coleman,* Attorney General, and *Clarence Clifton* and *Charles Kohlmeyer,* Associate Attorneys.

Ashton L. Stewart, Special Assistant Attorney General, argued the cause for the State of Louisiana, defendant. With him on the brief were *Fred S. LeBlanc,* Attorney General, *John L. Madden,* Assistant Attorney General, and *Edgar H. Lancaster, Jr.* and *Lane Fuller,* Special Assistant Attorneys General.

DECREE.

This cause having been submitted upon the pleadings, evidence and exhibits after arguments by counsel upon the exceptions of the State of Louisiana to the Report of the Special Master, the Court, having duly considered the same and being fully advised in the premises, now enters the following order:

The exceptions to the Report of the Special Master are overruled. The Report of the Special Master is adopted and his proposed decree is approved and

It is Ordered, Adjudged and Decreed that the true boundaries between the States of Mississippi and Louisiana at the places involved in this case be and they hereby are found and concluded to be as follows:

Description by geodetic positions (North American Datum) of the line that forms the Mississippi-Louisiana state boundary between Latitude 32° 15′ and 32° 09′ and Longitude 90° 58′ to 91° 07′, that is, in the area commonly known as Reed-Bedford, Oak Bend, Diamond Island and Diamond Point.

Beginning at a point where the live thalweg of the Mississippi River crosses the line 32° 15′ North Latitude;

Thence Southward along the live thalweg of the Mississippi River to a point where the live thalweg crosses the line that runs South 60° East from the point that is at Lat. 32° 11′ 34″—Long. 90° 59′ 47″.

Thence leaving the thalweg of the Mississippi River and running North 60° West to the point being at Lat. 32° 11′ 34″—Long. 90° 59′ 47″;

Thence running Westward along the dead thalweg of the abandoned channel of the Mississippi River (lower Oak Bend) to a point that is at Lat. 32° 11′ 29″—Long. 91° 00′ (S–5, Smith Exhibit 5).

Thence leaving the dead thalweg of the abandoned channel of lower Oak Bend and running Northward (along the Suter line, Smith Exhibit 5) to a point that is at Lat. 32° 11′ 46″—Long. 91° 00′ 09″ (S–4, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 11′ 51″—Long. 91° 00′ 11″ (S–3, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 12′ 44″—Long. 91° 00′ 20″ (S–2, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 13′ 09″—Long. 91° 00′ 14″ (S–1, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 13′ 21″—Long. 91° 00′ 10″ (S, Smith Exhibit 5).

Thence running Westward along the dead thalweg of the abandoned channel of the Mississippi River that loops around the Northern side of Diamond Island (Diamond Island Towhead) to a point that is at Lat. 32° 13′ 22″—Long. 91° 00′ 13″;

Thence Westward to a point that is at Lat. 32° 13′ 26″—Long. 91° 00′ 22″;

Thence Westward to a point that is at Lat. 32° 13′ 31″—Long. 91° 00′ 30″;

Thence Westward to a point that is at Lat. 32° 13′ 36″—Long. 91° 00′ 37″;

Thence Westward to a point that is at Lat. 32° 13′ 44″—Long. 91° 00′ 47″;

Thence Westward to a point that is at Lat. 32° 13′ 49″—Long. 91° 00′ 53″;

Thence Westward to a point that is at Lat. 32° 13′ 55″—Long. 91° 01′;

Thence Westward to a point that is at Lat. 32° 14′—Long. 91° 01′ 05″;

Thence Westward to a point that is at Lat. 32° 14′ 09″—Long. 91° 01′ 15″;

Thence Westward to a point that is at Lat. 32° 14′ 17″—Long. 91° 01′ 29″;

Thence Westward to a point that is at Lat. 32° 14′ 23″—Long. 91° 01′ 43″;

Thence Westward to a point that is at Lat. 32° 14′ 29″—Long. 91° 02′;

Thence Westward to a point that is at Lat. 32° 14′ 32″—Long. 91° 02′ 16″;

Thence Southward to a point that is at Lat. 32° 14′ 31″—Long. 91° 02′ 33″;

Thence Southward to a point that is at Lat. 32° 14′ 26″—Long. 91° 02′ 48″;

Thence Southward to a point that is at Lat. 32° 14′ 16″—Long. 91° 03′;

Thence Southward to a point that is at Lat. 32° 14′ 00″—Long. 91° 03′ 06″;

Thence Southward to a point that is at Lat. 32° 13′ 54″—Long. 91° 03′ 08″ ("C" Smith Exhibit 5).

Thence running Southward (along Smith line "C" Exhibit 5) to the point that is Lat. 32° 13′ 41″—Long. 91° 03′ 10″ (C–1 Smith Exhibit 5);

Thence Southward to the point that is at Lat. 32° 13′ 31″—Long. 91° 03′ 16″ (C–2 Smith Exhibit 5);

Thence Southward to the point that is at Lat. 32° 13′ 07″—Long. 91° 03′ 40″ (C–3 Smith Exhibit 5).

Thence running Westwardly along the dead thalweg of the abandoned channel of the Mississippi River (lower Oak Bend) to the point that is at Lat. 32° 13′ 23″—Long. 91° 04′;

Thence Westwardly to a point, Lat. 32° 13′ 37″—Long. 91° 04′ 30″;

Thence Westwardly to a point, Lat. 32° 13′ 35″—Long. 91° 05′;

Thence Westwardly to a point, Lat. 32° 13′ 26″—Long. 91° 05′ 30″;

Thence Westwardly to a point, Lat. 32° 13′ 04″—Long. 91° 06′;

Thence Westwardly to a point, Lat. 32° 12′ 30″—Long. 91° 06′ 28″;

Thence Westwardly to a point at the head of Palmyra Lake and Kellogg Lake (where the Northern and Western boundary of Diamond Point ends and which is point of beginning of the Southern boundary of Diamond Point), Lat. 32° 12′ 24″—Long. 91° 06′ 44″;

Thence Westwardly along the thalweg of Palmyra Lake to a point, Lat. 32° 12′ 26″—Long. 91° 07′.

That portion of the Southern boundary of Diamond Point that also forms the Mississippi-Louisiana state boundary is described as follows:

Beginning at the thalweg of the Mississippi River at the lower end of Diamond Point Cut-off at a point, being at Lat. 32° 09′ 46″—Long. 91° 00′ (Smith Exhibit 5);

Thence Westwardly along the dead thalweg of the abandoned channel of the Mississippi River and so-called Kellogg Lake to a point, Lat. 32° 09′ 43″—Long. 91° 00′ 30″;

Thence Westwardly to a point, Lat. 32° 09′ 40″—Long. 91° 01′;

Thence Westwardly to a point, Lat. 32° 09′ 45″—Long. 91° 01′ 30″;

Thence Westwardly to a point, Lat. 32° 10′—Long. 91° 01′ 52″;

Thence Westwardly to a point, Lat. 32° 10′ 07″—Long. 91° 02′;

Thence Westwardly to a point, Lat. 32° 10′ 27″—Long. 91° 02′ 29″;

Thence Westwardly to a point, Lat. 32° 10′ 41″—Long. 91° 03′;

Thence Westwardly to a point, Lat. 32° 10′ 50″—Long. 91° 03′ 30″.

The following portion of this description is inserted here to complete the Southern boundary of Diamond Point and to join the two portions of the Mississippi-Louisiana state boundary:

Thence continuing Westwardly along the dead thalweg in the abandoned channel of the Mississippi River and so-called Kellogg Lake to a point, Lat. 32° 10′ 54″—Long. 91° 04′;

Thence Westwardly to a point, Lat. 32° 11′—Long. 91° 04′ 18″;

Thence Westwardly to a point, Lat. 32° 11′ 03″—Long. 91° 04′ 30″;

Thence Westwardly to a point, Lat. 32° 11′ 11″—Long. 91° 05′;

Thence Westwardly to a point, Lat. 32° 11′ 25″—Long. 91° 05′ 30″;

Thence Westwardly to a point, Lat. 32° 11′ 44″—Long. 91° 06′;

Thence Westwardly to a point, Lat. 32° 12′—Long. 91° 06′ 10″;

Thence Westwardly to a point, Lat. 32° 12′ 07″—Long. 91° 06′ 15″;

Thence Westwardly to a point, Lat. 32° 12′ 20″—Long. 91° 06′ 30″;

Thence Westwardly to a point, Lat. 32° 12′ 24″—Long. 91° 06′ 44″ (being the point at the head of Palmyra Lake and Kellogg Lake where the Northern and Western boundary of Diamond Point ends and joins with the Southern boundary of Diamond Point).

The costs of this suit are equally divided between the two States, plaintiff and defendant.

Syllabus.

UNITED STATES EX REL. TOTH *v.* QUARLES, SECRETARY OF THE AIR FORCE.

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

No. 3. Argued February 8–9, 1955.—Restored to docket for reargument June 6, 1955.—Reargued October 13, 1955.—Decided November 7, 1955.

Five months after he had been honorably discharged from the United States Air Force and had returned to his home and was privately employed, an ex-serviceman was arrested by military authorities on charges of murder and conspiracy to commit murder while he was an airman in Korea. When arrested he had no relationship of any kind with the military. Under authority of Art. 3 (a) of the Uniform Code of Military Justice, he was taken to Korea to stand trial before a court-martial. *Held:* He could not constitutionally be subjected to trial by court-martial. Pp. 13–23.

1. The Act cannot be sustained as an appropriate exercise of the constitutional power of Congress "To raise and support Armies," "To declare War," or to punish "Offences against the Law of Nations." Pp. 13–14.

2. This assertion of military authority over civilians cannot rest on the President's power as Commander-in-Chief, nor on any theory of martial law. P. 14.

3. The Fifth Amendment does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces. P. 14, n. 5.

4. The Act is not a valid exercise of the power granted Congress in Article I of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces," as supplemented by the Necessary and Proper Clause. Pp. 14–23.

(a) The power granted Congress "To make Rules" to regulate "the land and naval Forces" is to be construed as restricting court-martial jurisdiction to persons who have a relationship with the armed forces. P. 15.

(b) This construction is required by the fact that any such expansion of court-martial jurisdiction as the Act provides neces-

sarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution, where persons on trial are surrounded with more constitutional safeguards than in military tribunals. Pp. 15–20.

(c) It is within the constitutional power of Congress to provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services. Pp. 20–21.

(d) The constitutional grant of power to Congress to regulate the armed forces does not empower Congress to deprive civilians of trials under Bill of Rights safeguards; and power to circumvent those safeguards is not to be inferred from the Necessary and Proper Clause. Pp. 21–22.

(e) A different result than that here reached is not required by the fact that some other countries which do not have our Bill of Rights subject civilians who were once soldiers to trials by court-martial rather than to trials by civilian courts. P. 22.

(f) Considerations of discipline in the armed forces do not warrant expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury. Pp. 22–23.

(g) Ex-servicemen, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution. P. 23.

94 U. S. App. D. C. 28, 215 F. 2d 22, reversed.

William A. Kehoe, Jr. argued the cause for petitioner. With him on the briefs were *Al. Philip Kane, Charles V. Koons, John J. McGrath, Peter F. Flaherty, Joseph H. Ridge, James F. Smith* and *L. Pat McGrath.*

Solicitor General Sobeloff argued the cause for respondent on the reargument, and *Marvin E. Frankel* on the original argument. With them on the brief on the original argument were *Assistant Attorney General Olney, Beatrice Rosenberg, Carl H. Imlay* and *Chester W. Wilson.* With them on the brief on the reargument was *Mr. Olney.*

Ralph B. Gregg filed a brief for the American Legion, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

After serving with the United States Air Force in Korea, Robert W. Toth was honorably discharged. He returned to his home in Pittsburgh and went to work in a steel plant. Five months later he was arrested by military authorities on charges of murder and conspiracy to commit murder while an airman in Korea.[1] At the time of arrest he had no relationship of any kind with the military. He was taken to Korea to stand trial before a court-martial under authority of a 1950 Act of Congress.[2] The Court of Appeals sustained the Act, rejecting the contention that civilian ex-servicemen like Toth could not constitutionally be subjected to trial by court-martial. 94 U. S. App. D. C. 28, 215 F. 2d 22. We granted certiorari to pass upon this important constitutional question. 348 U. S. 809.[3]

The 1950 Act cannot be sustained on the constitutional power of Congress "To raise and support Armies," "To declare War," or to punish "Offences against the Law of

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[1] The charges were violations of Articles 118 and 81 of the Uniform Code of Military Justice, 64 Stat. 140, 134, 50 U. S. C. §§ 712 and 675.

[2] Art. 3 (a), Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. § 553, provides: "Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

[3] This habeas corpus proceeding was brought in the District Court for the District of Columbia by Toth's sister while he was held in Korea. Without passing on any constitutional question the District Court ordered Toth discharged on the ground that he should not have been carried to Korea for trial without a hearing. 113 F. Supp. 330, 114 F. Supp. 468.

Nations." [4] And this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law. See *Ex parte Milligan,* 4 Wall. 2, 124–127. The Government's contention is that the Act is a valid exercise of the power granted Congress in Article I of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces," as supplemented by the Necessary and Proper Clause.[5]

This Court has held that the Article I clause just quoted authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses.[6] Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial.[7] It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions.[8] To allow this extension of military

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[4] See *Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* 327 U. S. 1.

[5] The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." This provision does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces.

[6] *Dynes* v. *Hoover,* 20 How. 65.

[7] *Kahn* v. *Anderson,* 255 U. S. 1.

[8] In 1863 Congress passed a statute authorizing trial of ex-soldiers for commission of fraud against the Government while in the service; this law also authorized court-martial trial of contractors not part of the military forces. 12 Stat. 696. The latter provision of the 1863 law appears never to have been sustained by any court. Lower

authority would require an extremely broad construction of the language used in the constitutional provision relied on. For given its natural meaning, the power granted Congress "To make Rules" to regulate "the land and naval Forces" would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.

Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases.

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courts have disagreed as to the constitutional validity of the provision authorizing ex-soldiers to be tried. See, *e. g., In re Bogart,* 3 Fed. Cas. 796. Compare *Ex parte Henderson,* 11 Fed. Cas. 1067; *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661, reversed by stipulation in unreported order of the Second Circuit, No. 20235, April 18, 1946. See *United States ex rel. Hirshberg* v. *Cooke,* 336 U. S. 210. A statute authorizing court-martial trial of inmates of the Soldiers' Home has been ruled unconstitutional by the Judge Advocate General of the Army. Dig. Op. J. A. G. (1912), pp. 1010, 1012. It was declared that "such inmates are not a part of the Army of the United States, but are civilians." *Id.,* at 1012. Col. Winthrop, concededly a leading authority on military law, expressed the view that "this class of statutes, which in terms or inferentially subject persons formerly in the army, but become finally and legally separated from it, to trial by court-martial, are all necessarily and alike unconstitutional . . . ." 1 Winthrop, Military Law and Precedents (2d ed. 1896), 146. The War Department reprinted this classic volume for the guidance of the Army in 1920. Winthrop, Military Law and Precedents (2d ed., Reprint 1920).

These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government. But the Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, even though wholly independent. They further provided that no person should be held to answer in those courts for capital or other infamous crimes unless on the presentment or indictment of a grand jury drawn from the body of the people. Other safeguards designed to protect defendants against oppressive governmental practices were included. One of these was considered so important to liberty of the individual that it appears in two parts of the Constitution. Article III, § 2, commands that the "Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." And the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." This right of trial by jury ranks very high in our catalogue of constitutional safeguards.[9]

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[9] A declaration of rights adopted by nine colonies in 1765 contained this statement: "That trial by jury, is the inherent and invaluable right of every British subject in these colonies." Harvard Classics, Volume 43, p. 148. The Declaration of Independence stated as one of the grievances of the colonies that the King of Great Britain had

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

Moreover, there is a great difference between trial by jury and trial by selected members of the military forces.

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deprived the colonists of the benefits of trial by jury in many cases and that he had "affected to render the Military independent of and superior to the Civil power." Another charge was that he had transported colonials "beyond Seas to be tried for pretended offences."

It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.

Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits.[10] Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field.[11] On many occasions, fully known to the Founders of this country, jurors—plain people—have manfully stood up in defense of liberty

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[10] Chief Justice Cooley said: "The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." *People* v. *Garbutt*, 17 Mich. 9, 27.

[11] "Juries undoubtedly may make mistakes: they may commit errors: they may commit gross ones. But changed as they constantly are, their errors and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and authority. The esprit du corps will not be introduced among them; nor will society experience from them those mischiefs, of which the esprit du corps, unchecked, is sometimes productive." II Wilson's Works (Andrews ed. 1896) 222.

against the importunities of judges and despite prevailing hysteria and prejudices.[12] The acquittal of William Penn is an illustrious example.[13] Unfortunately, instances could also be cited where jurors have themselves betrayed the cause of justice by verdicts based on prejudice or pressures. In such circumstances independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have power to set aside convictions.[14]

The 1950 Act here considered deprives of jury trial and sweeps under military jurisdiction over 3,000,000 persons who have become veterans since the Act became effective. That number is bound to grow from year to year; there are now more than 3,000,000 men and women in uniform.[15] These figures point up what would be the enormous scope of a holding that Congress could subject every ex-serviceman and woman in the land to trial by court-martial for any alleged offense committed while he or she had been a member of the armed forces. Every veteran discharged since passage of the 1950 Act is subject to military trial for any offense punishable by as much as five years' imprisonment unless the offense is now punishable in a civilian court. And one need only glance at the Military Code to see what a vast number and variety of offenses are thus brought under

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[12] An outstanding instance is the *Dean of St. Asaph's Case,* 21 How. St. Tr. 847, discussed in Stryker, For the Defense, 119–136.

[13] *Penn and Mead's Case,* 6 How. St. Tr. 951. After trial the jurors were fined for acquitting Penn contrary to the court's instructions. One was imprisoned for not paying the fine, but the Court of Common Pleas released him in a habeas corpus proceeding, upholding the freedom of the jury to decide the case. *Bushell's Case,* 6 How. St. Tr. 999.

[14] See II Wilson's Works (Andrews ed. 1896) 222.

[15] Bureau of the Census, Current Population Reports, Series P–25, No. 101 (U. S. Dept. Commerce 1954).

military jurisdiction.[16] Included within these are crimes such as murder, conspiracy, absence without leave, contempt toward officials, disrespect toward superior officers, willful or neglectful loss, damage, or destruction of government property, making false official statements, dueling, breach of the peace, forgery, fraud, assault, and many others.[17] It is true that with reference to some of these offenses, very minor ones, veterans cannot now be tried because of a presidential order fixing the punishment for such offenses at less than five years.[18] But that amelioration of the Military Code may be temporary, since punishment can be raised or lowered at the will of the President. It is also true that under the present law courts-martial have jurisdiction only if no civilian court does. But that might also be changed by Congress. Thus there is no justification for treating the Act as a mere minor increase of congressional power to expand military jurisdiction. It is a great change, both actually and potentially.

Fear has been expressed that if this law is not sustained discharged soldiers may escape punishment altogether for crimes they commit while in the service. But that fear

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[16] Arts. 77–134, Uniform Code of Military Justice, 64 Stat. 133–143, 50 U. S. C. §§ 671–728.

[17] A particularly sweeping offense, punishable by death and not subject to any statute of limitations, is found in Article 94, which provides in part that anyone "(2) who with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition; (3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or *fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny or sedition which he* knows or *has reason to believe is taking place,* is guilty of a failure to suppress or report a mutiny or sedition." (Emphasis supplied.)

[18] See Table of Maximum Punishments, 127*c*, MCM, 1951, 16 Fed. Reg. 1364–1368.

is not warranted and was not shared by the Judge Advocate General of the Army who made a strong statement against passage of the law.[19] He asked Congress to "confer jurisdiction upon Federal courts to try any person for an offense denounced by the [military] code if he is no longer subject thereto. This would be consistent with the fifth amendment of the Constitution." The Judge Advocate General went on to tell Congress that "If you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief, and you provide for a clean, constitutional method for disposing of such cases." It is conceded that it was wholly within the constitutional power of Congress to follow this suggestion and provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services. This concession is justified. U. S. Const., Art. III, § 2; and see, *e. g., Jones* v. *United States,* 137 U. S. 202, 211–212; *United States* v. *Bowman,* 260 U. S. 94, 97–98; *Skiriotes* v. *Florida,* 313 U. S. 69, 73–74. There can be no valid argument, therefore, that civilian ex-servicemen must be tried by court-martial or not tried at all. If that is so it is only because Congress has not seen fit to subject them to trial in federal district courts.

None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress

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[19] Hearings before Subcommittee of Senate Committee on Armed Services on S. 857 and H. R. 4080, 81st Cong., 1st Sess. 256–257. The Assistant General Counsel of the Office of Secretary of Defense, who was chairman of a committee that helped draft the Uniform Code of Military Justice, expressed doubts as to the constitutionality of Article 3 (a). Hearings before Subcommittee of House Committee on Armed Services on H. R. 2498, 81st Cong., 1st Sess. 881.

to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause. It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians. And we are not impressed by the fact that some other countries which do not have our Bill of Rights indulge in the practice of subjecting civilians who were once soldiers to trials by courts-martial instead of trials by civilian courts.[20]

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. Even as late as the Seventeenth Century standing armies and courts-martial were not established institutions in England.[21] Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the nor-

[20] The historical background of this country's preference for civilian over military trials was impressively presented in the arguments of counsel and opinion of this Court in *Ex parte Milligan,* 4 Wall. 2, 121. And see *Duncan* v. *Kahanamoku,* 327 U. S. 304.

[21] 3 Macaulay, History of England from the Accession of James the Second (London, 1855), 45.

mal and constitutionally preferable system of trial by jury.[22]

Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to *"the least possible power adequate to the end proposed."* [23] We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.

Reversed.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

This case presents the question whether or not an honorably discharged ex-serviceman may be apprehended by military authorities to stand trial by court-martial for a crime alleged to have been committed by him while he was a member of the armed forces of the United States. The answer turns upon the constitutionality and construction of the applicable provisions of the Uniform Code of Mili-

[22] Mr. Justice Sutherland writing for the Court in *Dimick* v. *Schiedt*, 293 U. S. 474, 485–486, said, "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), '. . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States*, 281 U. S. 276, 312."

[23] *Anderson* v. *Dunn*, 6 Wheat. 204, 230–231.

tary Justice, 64 Stat. 108, 50 U. S. C. § 551 *et seq.*, under which the United States Air Force acted in this case.

Whenever an enactment of Congress to cure weaknesses in criminal procedure is declared unconstitutional by this Court on the ground of lack of legislative power, the door is closed for all practical purposes forever on the method that Congress deems effective for correcting crime. Only an overruling of this case can change today's constitutional determination.

The judgment just announced turns loose, without trial or possibility of trial, a man accused of murder. In future similar cases among the military, if Congress enacts the substitute law as the Court suggests, *ante*, p. 21, the accused must face a jury far removed from the scene of the alleged crime and before jurors without the understanding of the quality and character of a military crime possessed by those accustomed to administer the Uniform Code of Military Justice. Or perhaps those accused will be extradited and tried by foreign law.

A dissent is justified, I think, if its argument may limit, in some degree, further interpreting limitations by the judiciary on the power granted by the Constitution to Congress: "To make Rules for the Government and Regulation of the land and naval Forces" without the jury and venue requirements of the Fifth and Sixth Amendments. These requirements are appropriate for civil trials but, by custom, our precedents and express language are inapplicable to "cases arising in the land or naval forces."

Robert W. Toth, after service in the United States Air Force, was honorably discharged on December 8, 1952. On April 8, 1953, formal charges were signed under the procedures required by the Uniform Code of Military Justice charging Toth with premeditated murder and conspiracy to commit murder.[1] The specifications under the

[1] The charges were violations of Articles 118 and 81 respectively of the Uniform Code of Military Justice, 50 U. S. C. §§ 712, 675.

charges alleged that the offenses were committed by Toth while an Airman First Class, United States Air Force, on September 27, 1952, at an air base in Korea, and the victim was a named Korean national. It was further alleged that Toth was a civilian subject to the Uniform Code of Military Justice under Article 3 (a) thereof which provides:

> "Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." 64 Stat. 109, 50 U. S. C. § 553 (a).[2]

On May 13, 1953, pursuant to orders originally issued by the Acting Secretary of the Air Force on April 30, 1953, and further supplemental orders through appropriate Air Force command channels, Toth was apprehended by Air Force police at his place of employment in Pittsburgh, Pennsylvania. On May 15, 1953, he was flown to Korea where he arrived on May 18, 1953.

This was the situation when the petition for habeas corpus was filed by the relator. The Government did not question jurisdiction in the District Court and after argument that court ordered the writ to issue.[3] Toth was returned to the United States and produced in court, whereupon the District Court ordered his discharge on the ground that even if the Air Force police had authority to apprehend Toth, they had no legal power to transport him to a distant point for trial or at least to do so without

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[2] Article 43 is the statute of limitations applicable to offenses punishable under the Code, 50 U. S. C. § 618.

[3] 113 F. Supp. 330.

a hearing. The court therefore found it unnecessary to pass on the constitutional objections raised by the petitioner as to the invalidity of Article 3 (a). 114 F. Supp. 468.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the District Court, discharged the writ and ordered Toth returned to the military authorities. 94 U. S. App. D. C. 28, 215 F. 2d 22. The Court of Appeals held that Article 3 (a) of the Code was constitutionally valid and that the Code provided the necessary authorization and machinery to apprehend and transport for trial, in the manner here followed, persons in civilian status who were amenable to courts-martial by reason of the provisions of Article 3 (a).

The Code was enacted May 5, 1950, after careful military and congressional study to assure that the military justice of the unified services would be in accordance with the present-day standards of fairness.[4] Article 3 (a) was adopted in view of the decision of this Court in *Hirshberg* v. *Cooke,* 336 U. S. 210 (1949), holding the Articles for the Government of the Navy, then in force, did not allow trial on charges filed subsequent to honorable discharge "without a grant of congressional authority," *id.*, at 215, although the charges arose from acts committed while the defendant was in military service. The near escape from military justice of Army personnel accused of the theft in Germany of the Hesse crown jewels was also in mind.[5] It was thought that a serviceman's discharge should not bar his prosecution in a military court for crimes committed when subject to military discipline.[6]

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[4] S. Rep. No. 486, 81st Cong., 1st Sess., p. 3; H. R. Rep. No. 491, 81st Cong., 1st Sess., p. 2.

[5] Hearings before a Subcommittee of the House Committee on Armed Services on H. R. 2498, 81st Cong., 1st Sess., pp. 879–885. See *Durant* v. *Hiatt,* 81 F. Supp. 948.

[6] Both the House and Senate Committee Reports stated that the need for Article 3 (a) was to remedy the undesirable situation pointed

The enactment of Article 3 (a) was chosen instead of the alternative of federal district court jurisdiction, although thorough presentations of objections not only on constitutional but also on policy grounds appear in the committee report and the Congressional Record.[7] The military were well aware, as was Congress, of possible unfavorable public reaction to extension of the jurisdiction of military courts to discharged veterans for alleged misdeeds during service. The language of Article 3 (a) was drawn to cover only the most serious offenses and restricted to those instances in which the guilty would otherwise escape trial or punishment in any American courts. Although Congress, under Art. I, § 8, cl. 14,[8] and the Necessary and Proper Clause, doubtless might have authorized the civil courts to try charges arising from violations of the Military Code during former service, even

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out by the *Hirshberg* decision. Both reports contain the following sentence: "In the opinion of the committee, the present provisions [Article 3 (a)] of this subdivision provide a desirable degree of continuing jurisdiction and at the same time place sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities." H. R. Rep. No. 491, 81st Cong., 1st Sess. 11; S. Rep. No. 486, 81st Cong., 1st Sess. 8. The same view was expressed by the managers of the bill in the House and Senate. Representative Brooks at 95 Cong. Rec. 5721 and Senator Kefauver at 96 Cong. Rec. 1358. Views against the adoption of Article 3 (a) were urged in committee and on the floor but did not prevail. Hearings before a Subcommittee of the Senate Committee on Armed Services on S. 857 and H. R. 4080, 81st Cong., 1st Sess. 256–257; 96 Cong. Rec. 1294, 1366, 1412–1417.

[7] 96 Cong. Rec. 1294 *et seq.* The proposed substitute for Article 3 (a) was: "Subject to the provisions of article 43, jurisdiction is hereby conferred upon the several district courts of the United States to try and punish according to the applicable provisions and limitations of this code and the regulations made thereunder—

"(1) any person charged with having committed an offense against this code while in a status in which he was subject to this code which status has been terminated; . . . ."

[8] "To make Rules for the Government and Regulation of the land and naval Forces; . . . ."

though committed on foreign soil,[9] it chose the method of Article 3 (a).

No question of accommodating the liberty of the citizen to requirements of the military through the interpretation of an ambiguous Act arises. Compare *Ex parte Endo*, 323 U. S. 283, 300. It is not for courts to question the wisdom of the legislation. Its obvious purpose was to assure, insofar as discipline may do so, the proper conduct of our far-flung and numerous military personnel in foreign lands. One need not stress the necessity of orderly conduct by the military on foreign posts for the maintenance of good relations in friendly or vanquished countries. It also seems a reasonable choice that uniform treatment by courts-martial trial of all accused of crimes punishable by the Military Code is preferred for morale and disciplinary purposes to courts-martial trial only for those who remain in the service. This case itself would make a good example of the difficulty of a federal district court trial. We address ourselves to the constitutionality of Article 3 (a).

(a) The congressional power under Article I of the Constitution to regulate the armed forces is conceded by the Court to embrace the power to provide for trial by court-martial and military punishment for violations of the Military Code. But the Court holds that that power ceases when the serviceman becomes a civilian. Nothing, we think, in the words of Article I or in the history of that congressional power justifies limiting trial and

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[9] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." Art. III, § 2, cl. 3.

Skiriotes v. *Florida*, 313 U. S. 69, 73, and cases cited; *Chandler* v. *United States*, 171 F. 2d 921.

punishment by the military, for crimes committed by members of the armed services, to the period of service. Certainly the power of Congress to provide for a military trial and punishment for a breach of the Military Code on charges brought before the end of enlistment or discharge may continue thereafter.[10] The crime charged against Toth was one covered by the Code. The circumstance that he was discharged from the service prior to the detection of the alleged crime and prior to being charged with its commission should make no constitutional difference.

Courts-martial are deeply rooted in history. War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline. The power to regulate the armed forces must have been granted to Congress so that it would have the authority over its armed forces that other nations have long exercised, subject only to limitations of the Constitution. *Dynes* v. *Hoover,* 20 How. 65, 78–79; *Ex parte Reed,* 100 U. S. 13, 21. The Government calls our attention to the current provisions for military trial after discharge of other nations with legal background similar to ours. Each of them allows such trials under varying conditions.[11]

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[10] *Carter* v. *McClaughry,* 183 U. S. 365, 382; *Mosher* v. *Hunter,* 143 F. 2d 745. Cf. *Kahn* v. *Anderson,* 255 U. S. 1, 7; *Walker* v. *Morris,* 3 American Jurist and Law Magazine 281.

[11] Section 158 of the British Army Act (Gt. Brit., Stats. Rev., 3d ed., Vol. X, 457, 563–564; War Office, Manual of Military Law, Pt. I, 1951, 376–377) provides:

"(1) Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he, or the corps or battalion to which he belongs, has ceased to be subject to military law in like manner as he might have been

Whether English courts-martial before 1789 exercised jurisdiction over charges preferred after separation from service cannot be categorically asserted in view of the paucity of cases. It would seem, however, that the language of Article I itself properly should be interpreted

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taken into and kept in military custody, tried or punished, if he or such corps or battalion had continued so subject:

"Provided that where a person has since the commission of an offence ceased to be subject to military law, he shall not be tried for such offence, except in the case of the offence of mutiny, desertion, or fraudulent enlistment, unless his trial commences within three months after he had ceased to be subject to military law, or unless the offence was committed outside the United Kingdom and is an offence which when committed in England is punishable by the law of England, and the Attorney-General consents to the trial . . . ."

The British Army Act, including the provision in § 158 for court-martial after termination of military service, dates from 1881. 17 Law Reports (Statutes) 44 and 45 Vict. 260, 331.

See also the Defence Act of Australia, § 103 (3), Commonwealth Acts, Vol. II (1901–1950), 1560, 1596; National Defence Act of Canada, 1950, §§ 56 (2) and (3), and 68 (f), Revised Statutes of Canada, 1952, Vol. III, 3814 and 3821. New Zealand has a similar statute (Army Act, § 127 (1), New Zealand Statutes, 1950, 283, 370–371).

At the time of our Constitutional Convention, there had already been held the well-known court-martial of Lord George Sackville for disobedience of orders of his Chief, Prince Ferdinand of Brunswick, at the battle of Minden. The trial took place after his dismissal from his command and the service. The King, George II, submitted the question of jurisdiction of the court-martial to the twelve judges composing the Courts of King's Bench, Common Pleas and Exchequer, headed by Lord Mansfield, and received the following advisory answer:

"In obedience to your Majesty's commands, signified to us by a letter . . . , referring to us the following question, 'Whether an officer of the army having been dismissed from his Majesty's service, and having no military employment, is triable by a Court Martial for a military offence lately committed by him while in actual service and pay as an officer?'

"We have taken the same into consideration, and see no ground

to empower Congress to authorize courts-martial after separation from the services. The crime charged was committed during service and violated the Military Code. Surely when read with the Necessary and Proper Clause, the conclusion must follow. Article 3 (a) bears a reasonable relation to the "Government and Regulation" of the armed forces; it is appropriate and plainly adapted to that end. *McCulloch* v. *Maryland,* 4 Wheat. 316, 419 *et seq.* That has been the test of congressional power.

This is not an effort to make a civilian subject to military law, in distinction to martial law, as in *Ex parte Milligan,* 4 Wall. 2, 121, 123, 127. Such an effort would meet condemnation as an invasion of the liberty of the citizen. See *Duncan* v. *Kahanamoku,* 327 U. S. 304; *Ex parte Endo,* 323 U. S. 283. Congress was granted authority to regulate the armed forces in order to enforce obedience by members of the military establishment to military regulation during their service to the end that order may be ensured. Disobedience may occur in nationally critical times. What reason can there be for

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to doubt of the legality of the jurisdiction of a Court Martial in the case put by the above question."

The judges ended with a reservation of the privilege of changing their minds if the matter were judicially presented, apparently in accordance with the practice in such advisory opinions. See note, 28 Eng. Rep. 941. II Eden's Chancery Reports, App., p. 371. See Trials, Courts Martial—Sackville, 1760. On conviction the King directed the sentence be recorded in the order book of every regiment, British and American. In view of the prominence of the parties and the subsequent distinguished career of Lord George Sackville, who died in 1785 after having been advanced in 1782 to the peerage as Viscount Sackville for his services in Parliament, the Irish administration, and as Secretary of State for the Colonies, the case could hardly have escaped the notice of the members of the Constitutional Convention. See VII Dictionary of Nat. Biography 1110; 4 Smollett, History of England, 337; Tytler, Military Law (2d ed.), 113. 8 Op. Atty. Gen. 328. But see, 31 Op. Atty. Gen. 521; Clode, Martial and Military Law, 92.

refusing courts-martial jurisdiction over crimes so committed by a serviceman merely because they passed undiscovered during the service period? [12] Could there now be doubt as to the power of Congress under Art. I to make a draftee subject to courts-martial before actual induction into the armed forces? This Court had none in 1944. Then we said, when considering a habeas corpus for release from military imprisonment after trial by court-martial of a person claiming civilian status:

> "We have no doubt of the power of Congress to enlist the manpower of the nation for prosecution of the war and to subject to military jurisdiction those who are unwilling, as well as those who are eager, to come to the defense of their nation in its hour of peril. *Arver* v. *United States,* 245 U. S. 366 [Selective Draft Law Cases]." *Billings* v. *Truesdell,* 321 U. S. 542, 556.

Toth may be a civilian but his crime was a violation of military regulations.

Judicial history lends its weight to the conclusion that congressional power to institute criminal proceedings against a military person continues after the accused's discharge. In 1863, the Congress enacted an Act to prevent and punish frauds upon the Government of the United States. It provided that any person in the mili-

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[12] It must be noted, however, that a leading military authority is against that view. See Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 105, although he admits the weight of the precedents is against him.

See, however, a comparable authority, Edmund M. Morgan, Court-Martial Jurisdiction, 4 Minn. Law Rev. 79, 83 (1920). For further discussion of the problem, see Myers and Kaplan, Crime Without Punishment, 35 Geo. L. J. 303 (1947); Note, Military Jurisdiction over Discharged Servicemen: Constitutionality and Judicial Protection, 67 Harv. L. Rev. 479 (1954); Note, The Amenability of the Veteran to Military Law, 46 Col. L. Rev. 977 (1946).

tary forces shall be punished for fraud under military regulation "as the court-martial may adjudge, save the punishment of death." 12 Stat. 696–697, § 1. Under § 2, jurisdiction of the court-martial was extended to dischargees.[13] The provision for charge and court-martial after discharge was ruled constitutional in 1866 by Attorney General Stanbery.[14] The section was held constitutional in 1873. *In re Bogart,* 3 Fed. Cas. 796. See other cases, note 22, *infra.* It was apparently held unconstitutional in 1946 under Article I in the District Court for the Southern District of New York, although the problem under the Fifth Amendment was also considered. *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661, 664.[15]

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[13] "That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed."

This was carried into the Articles of War. Rev. Stat. (1878), Art. 60, p. 235; 10 U. S. C. (1946 ed.) § 1566, Art. 94, amended 62 Stat. 641, and in the Articles for the Government of the Navy, 34 U. S. C. (1946 ed.) § 1200, Art. 14 (Eleventh), until the enactment of the present Uniform Code, Art. 3.

[14] 12 Op. Atty. Gen. 4, 5: "It is simply a regulation which is to follow a dismissal, providing, in certain contingencies, for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen."

In 1848 Attorney General Toucey, in the absence of any applicable rule for the government of the Army, had ruled that a charge of murder could not be brought against an officer already mustered out. 5 Op. Atty. Gen. 55, 58. A similar conclusion was stated by Attorney General Palmer (1919), 31 Op. Atty. Gen. 521, 529. See 8 Op. Atty. Gen. 328, 332.

[15] We are advised by the Government that this case was reversed by stipulation. See *Kronberg* v. *Hale,* 180 F. 2d 128, 130.

It is also to be noted that the present Uniform Code, Art. 4, 50 U. S. C. § 554, provides that an officer dismissed by the President may request trial by court-martial after such dismissal. A similar provision was first enacted by Congress in 1865, § 12, 13 Stat. 487, 489; see Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 64, 65.

The Court finds a "compelling reason" for construing the clause for Army regulation more narrowly than has been done by the Congress and the Executive for many years. This is that trial by Article III judges and juries offers safeguards to military offenders superior to those offered by courts-martial. Under our judicial system the use of juries has been found satisfactory in civil life. The argument for the adoption of civil trials for the military might appeal to Congress, if presented there. But, with due respect to the premise of the majority, the assumed superiority of the civil courts in the trial of service crimes should have no force in the construction of the constitutional power of Congress to enact Article 3 (a) of the Code. Belief that an accused has better opportunities to escape conviction in a civil court should not influence a conclusion as to constitutional power. As later appears in this opinion, the Fifth and Sixth Amendments except the land and naval forces from their commands. The advantages and disadvantages of indictment, venue and jury trial for the military have been weighed and determined adversely to the Court's conclusion by the Constitution and the Congress. Certainly the number of former members of the armed services now living is immaterial to the constitutional issue, as are the "dangers" suggested to be "lurking in military trials." The military is in position to give its personnel a fair trial. The only logical ground for declaring Article 3 (a) unconstitutional is that military crimes cannot be so punished because such procedure is beyond the reach of the con-

gressional authority to make rules for government of military personnel. Subsequent punishment by military procedures will help discipline during service. Such a conclusion by Congress is not strained or unreasonable but a natural use of its power to make regulations for the armed services. The choice is for Congress, not the Court.

(b) Another constitutional problem arises, *i. e.*, that Article 3 (a) is unlawful by reason of the limitations on prosecutions of the Fifth and Sixth Amendments to the Constitution.[16]

The argument upon the Sixth Amendment requires only summary treatment. The rights to a speedy and public trial, impartiality of the triers, information as to the charge, confrontation, compulsory process for witnesses and assistance of counsel are not in issue. This accused will not have for his trial a jury of the State and district of the crime, previously ascertained by our law. That is an impossibility in the circumstances of this case. Nor can it be that the Sixth Amendment requirements as

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[16] Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

to jury and place were intended to apply to the "cases arising in the land or naval forces" which were excepted from the protection of the grand jury by the Fifth. That would abrogate the authority of Congress to govern the military by courts-martial. It was so announced by this Court, unanimously, in *Ex parte Milligan*, 4 Wall. 2, 122.[17]

[17] "Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, '*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;' and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."

The four who concurred agreed with the majority on this point:

"The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

"What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States.

"It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

"Nor, in our judgment, does the fifth, or any other amendment,

Defendants in cases arising in the armed forces, we think, are not entitled to demand trial by jury, whether the crime was committed on foreign soil or at a place within a State or previously ascertained district.

Turning to the Fifth Amendment, the critical words are obviously "cases arising in the land or naval forces." The events leading to the taking of Toth into custody occurred while he was enlisted. They constituted then and now a violation of the Uniform Code. Relator would limit the quoted words to cases where charges had been filed during service. She stresses the phrase "when in actual service," but this Court has held and all the history of our courts-martial shows that such phrase has reference only to "cases arising . . . in the Militia." *Johnson* v. *Sayre,* 158 U. S. 109, 114.

The Fifth, like the other early amendments, arose from the determination to protect the rights of citizens. As the Articles of Confederation, Article 9, granted authority to the central government to make rules for the government and regulation of the armed forces, the Nation was

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abridge that power. 'Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger,' are expressly excepted from the fifth amendment, 'that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' and it is admitted that the exception applies to the other amendments as well as to the fifth.

. . . . . .

"We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment." 4 Wall., at 137–138.

It was so held as to Haupt, treated as an American citizen in *Ex parte Quirin,* 317 U. S. 1, 20, 24, 40, 44.

"We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury." *Id.,* at 45.

conversant with the problem. In the state conventions for ratification of the Constitution, Massachusetts, New Hampshire, New York and Rhode Island suggested words for regulation of the armed forces quite similar to the ones adopted by Congress.[18] It will be observed that two employ "arise." Three speak of "cases." Since the state suggestions were made as the result of consideration of the proposed Constitution, it is quite natural that the language of Article III concerning the judicial power would find an echo in the suggestions. Article III, § 2, reads, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." When the Congress considered the Act against military fraud in 1863, note 13, *supra,* no one suggested that a "case," the prosecution for which under the Act did not

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[18] Massachusetts: "That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."

New Hampshire: "That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."

New York: "That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; . . . ."

Rhode Island: "That, in all capital and criminal prosecutions, a man hath the right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury in his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces,) nor can he be compelled to give evidence against himself." I Elliot's Debates (2d ed.), 323, 326, 328, 334.

begin until after discharge of a serviceman, would not be a "case arising in the land or naval forces." The concern of Congress was with the liability of contractors, as part of military personnel, under § 1 of the Act, when they had no true military service status.[19] Because not service-connected, the contractors' clause has been held unconstitutional. *Ex parte Henderson,* 11 Fed. Cas. 1067, 1071.

The word "case," of course, might refer to litigation—a charge or complaint brought in court, here a prosecution. But it seems to us that its meaning, as used in the constitutional clauses under consideration, is a state of facts for judicial action, *i. e.,* the series of events that creates an enforceable right or obligation. The context in which it is used bears on the final definition. Here "cases arising" is more specific than the word "case" alone. The Government gives us several citations to cases applying the meaning for which it contends.[20]

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[19] As to that, Senator Howard, in charge of the bill, said:

"The question arises, what is a 'case arising in the land or naval forces of the United States?' There is not any doubt that a soldier or officer who has enlisted in the service of the United States is or may be made subject to martial law. Why is he made subject to martial law? Because, being in the service of the United States, the act committed by him is a case arising in that service. . . . An officer or soldier enters the Army under contract, under an agreement to render this service; and how, I beg to inquire, does the case of a contractor who engages to furnish arms, equipments, or munitions of war to the United States for the same purpose, differ from the case of an officer or soldier who is simply to bear arms and use the materials which the contractor is to furnish?" Cong. Globe, 37th Cong., 3d Sess. 953 (1863).

[20] *United States* v. *Bevans,* 3 Wheat. 336, 388, "the waters on which . . . cases may arise"; *Waring* v. *Clarke,* 5 How. 441, 466, "case of collision taking place on the Mississippi river"; and "cause of action arisen on the ocean." *Id.,* at 467. *De Lovio* v. *Boit,* 7 Fed. Cas. 418, 432, 434–435.

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Relator does the same.[21] Article III uses "cases arising" under federal law to indicate the extent of possible federal jurisdiction over legal rights or duties created by the laws of the United States. The meaning of "cases arising" in Article III and the Fifth Amendment must be determined by their purpose. That purpose is similar—to mark the source of the cause of action that ripens into a civil complaint or criminal charge. However restricted the word "case" may be, its use with "arising" points to the source of the litigation. If a case is claimed to exist only after institution of legal proceedings, nevertheless that case has its roots, it arises, in the events that give life to the cause of action. When a case so arises was stated thus in *Gully* v. *First Nat. Bank,* 299 U. S. 109, 112, in an opinion concerning the removal statute, where

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[21] "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States." *Osborn* v. *Bank of The United States,* 9 Wheat. 738, at 819.

"By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." *In re Pacific R. Commission,* 32 F. 241, 255.

"These definitions have been adhered to by this Court in *Muskrat* v. *United States,* 219 U. S. 346, 356 and *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227."

removal was asked because the state suit was alleged to have arisen under federal law:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . ."

One of the purposes of the Fifth Amendment by this exception was to preserve the separation of military law from the requirements of civil law. The regulation of the armed forces by Congress under cl. 14 of § 8, Art. I, was to be left for legislative judgment that discipline might be maintained by speedy trial and punishment in accordance with military law. The reasons, set out in our discussion of Article I power to regulate the armed forces, need not be repeated here. We ask ourselves, "What law is the basis of this prosecution?" The answer is the Military Code. If so, the case arises "in the land or naval forces."

That conclusion has the support of the weight of the precedents dealing with this phase of the Fifth Amendment. To meet the argument of defendant that jurisdiction must attach before discharge, it was said in the *Bogart* case, 3 Fed. Cas. 796, 799:

> "Among the ordinary and most common definitions of the word 'arise,' are 'to proceed, to issue, to spring,' and a case arising in the land or naval forces upon a fair and reasonable construction of the whole article, appears to us to be a case proceeding, issuing or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service."

This statement has been strengthened by the accord given the argument by other courts.[22]

(c) The Court, of course, does not gainsay the constitutional authority of Congress to adopt a military code for regulation of members of the armed forces without regard to the generally applicable requirements of the Fifth and Sixth Amendments. It holds that where the constitutional safeguards of the Fifth and Sixth Amendments for a citizen's freedom from tyranny are at stake, they should not be withdrawn except through absolute necessity. There is no such necessity here for it would have been possible to have provided a proper civil trial with the full protection of the applicable clauses of the Amendments. But here we are considering an exception to the safeguards offered by the Fifth and Sixth Amendments. That exception has been written into the Constitution from the experience of history to protect the discipline of the armed forces. Of course, that exception from the protections of these Amendments should be strictly construed to hold those excluded to the minimum as was done in *Ex parte Henderson, supra,* p. 39. Construction of the Constitution, however, should not be allowed to emasculate the natural meaning of language designed to protect the Nation in the regulation of its armed forces.

What we have argued in the foregoing pages of this opinion supports our conclusion on this tendered rule of construction. Granting that there are possible means of affording civil trials to persons discharged from the Army for military crimes committed during their service, we think that Congress has power to provide for punishment of these military crimes under the constitutional exceptions discussed. Such punishment, if our analysis of

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[22] *Ex parte Joly,* 290 F. 858; *Terry* v. *United States,* 2 F. Supp. 962; *Kronberg* v. *Hale,* 180 F. 2d 128.

Article I and the Fifth and Sixth Amendments is correct, will be for military crimes of servicemen, not of civilians, and for the maintenance of discipline in the armed forces.

The relator phrases strongly her argument against Toth's prosecution by courts-martial. To her the issue is "military dictatorship." Though she concedes that Congress may have merely desired to bar absolution from crime by discharge from service, such purpose, she argues, should not override the Constitution or be allowed to foreshadow a "military dictatorship." She forebodes that every petty crime may be included and limitation of prosecution be extended until all discharged servicemen shall live their lives under fear of the Military. The law still has degrees of harshness and courts and legislatures must act in reason. The possibility of individual abuse of power is ever present even under our Constitution but the probability of obliteration of any such tendency through judicial, executive or legislative action is the citizen's protection under the Constitution. A fear that punishment by courts-martial of servicemen after discharge may bear a threat to the rights and security of citizens is extravagant. It is true today, as it was in the time of the Founding Fathers, that the methods for maintenance of Army discipline should be subject to public opinion as expressed through Congress. If trial of discharged servicemen by courts-martial under the carefully defined provisions of Article 3 (a) seems harsh or hurtful to liberty, the door of Congress remains open for amelioration. This decision that a veteran, let out of the military forces before charges, must, by the Constitution, be tried by the civil courts for his military crimes impairs congressional power. Now only another Constitutional Amendment or a reversal of today's judgment will enable Congress to deal consistently with those violating the Uniform Code of Military Justice. We cannot agree that those who adopted the constitutional provisions for the

protection of military discipline intended such a result. Toth's alleged accomplices have been convicted by military courts and we see no reason why he should not be tried as proposed.

The decision below should be affirmed.

MR. JUSTICE MINTON, whom MR. JUSTICE BURTON joins, dissenting.

I agree with the opinion of MR. JUSTICE REED, and I would add another reason why I think the judgment should be affirmed.

A civilian not under the jurisdiction of the Military Code has a right to be tried in a civil court for an alleged crime as a civilian. My trouble is that I don't think Toth was a full-fledged civilian. By 50 U. S. C. § 553, Congress had retained jurisdiction to try Toth for a crime he had committed while a soldier and for which admittedly he could have been tried by court-martial if the United States had discovered his crime one minute before discharge.

He was not a full-fledged civilian under his discharge. He was still a soldier to answer in court-martial for the crime he had committed while a soldier. He had a conditional discharge only. The United States clearly reserved the right to charge and try him by court-martial for a crime committed while in the status of a soldier. This is the way Congress had provided for his trial. No other way was provided. That it may have provided another way is not to say the way provided is invalid.

I know of no reason why Congress could not pass this statute, 50 U. S. C. § 553, retaining court-martial jurisdiction over Toth to answer for a crime he allegedly committed when he was clearly subject to court-martial. *Kahn* v. *Anderson,* 255 U. S. 1, holds that, even though discharged from service, one convicted and serving sentence for a military offense could still be tried by court-

martial for murder and conspiracy to commit murder, even though the crime was alleged to have been committed within the limits of a state. Congress had made no provision for retention of status in that case as it had in this case, yet the Court implied the continuing military status to warrant the jurisdiction. No implied status is necessary here. It is expressly reserved by statute. Toth remained in that status by virtue of the statute.

CORN PRODUCTS REFINING CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 20. Argued October 18, 1955.—Decided November 7, 1955.

Petitioner's purchases and sales of corn futures in 1940 and 1942, which, though not "true hedges," were an integral part of its manufacturing business, *held* not capital-asset transactions under § 117 (a) of the Internal Revenue Code of 1939, and gains and losses therefrom gave rise to ordinary income and ordinary deductions. Pp. 47–54.

(a) The finding by both the Tax Court and the Court of Appeals that petitioner's purchases constitute "an integral part of its manufacturing business" is here sustained. Pp. 50–51.

(b) Through its purchases of commodity futures, petitioner obtained partial insurance against its principal risk—the possibility of a price rise. P. 51.

(c) The capital-asset provision of § 117 is to be narrowly construed. P. 52.

(d) Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. P. 52.

(e) The Treasury ruling, G. C. M. 17322, that hedging transactions were essentially to be regarded as insurance rather than dealings in capital assets and that gains and losses therefrom were ordinary business gains and losses, has been consistently followed by the courts as well as by the Commissioner and has had the tacit approval of Congress. Pp. 52–53.

(f) The conclusion here reached is supported by practical considerations as well as by the statute. Pp. 53–54.

215 F. 2d 513, affirmed.

Jay O. Kramer and *Samuel A. McCain* argued the cause and filed a brief for petitioner.

Charles K. Rice argued the cause for respondent. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Charles F. Barber, Ellis N. Slack, Hilbert P. Zarky* and *Harry Marselli.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This case concerns the tax treatment to be accorded certain transactions in commodity futures.[1] In the Tax Court, petitioner Corn Products Refining Company contended that its purchases and sales of corn futures in 1940 and 1942 were capital-asset transactions under § 117 (a) of the Internal Revenue Code of 1939. It further contended that its futures transactions came within the "wash sales" provisions of § 118. The 1940 claim was disposed of on the ground that § 118 did not apply, but for the year 1942 both the Tax Court and the Court of Appeals for the Second Circuit, 215 F. 2d 513, held that the futures were not capital assets under § 117. We granted certiorari, 348 U. S. 911,[2] because of an asserted conflict with holdings in the Courts of Appeal for the Third, Fifth, and Sixth Circuits.[3] Since we hold that these futures do not constitute capital assets in petitioner's hands, we do not reach the issue of whether the transactions were "wash sales."

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[1] A commodity future is a contract to purchase some fixed amount of a commodity at a future date for a fixed price. Corn futures, involved in the present case, are in terms of some multiple of five thousand bushels to be delivered eleven months or less after the contract. Cf. Hoffman, Future Trading (1932), 118.

[2] The grant was limited to the following two questions:

"1. Are transactions in commodity futures which are not 'true hedges' capital asset transactions and thus subject to the limitations of Section 117 of the Internal Revenue Code of 1939, or do the resulting gains and losses from such transactions give rise to ordinary income and ordinary deductions?

"2. Are commodity futures contracts 'securities' and thus subject to the 'wash sales' provisions of Section 118 of the Internal Revenue Code of 1939?"

[3] *Makransky's Estate* v. *Commissioner,* 154 F. 2d 59 (C. A. 3d Cir.); *Commissioner* v. *Farmers & Ginners Cotton Oil Co.,* 120 F. 2d 772 (C. A. 5th Cir.); *Trenton Cotton Oil Co.* v. *Commissioner,* 147 F. 2d 33 (C. A. 6th Cir.).

Petitioner is a nationally known manufacturer of products made from grain corn. It manufactures starch, syrup, sugar, and their byproducts, feeds and oil. Its average yearly grind of raw corn during the period 1937 through 1942 varied from thirty-five to sixty million bushels. Most of its products were sold under contracts requiring shipment in thirty days at a set price or at market price on the date of delivery, whichever was lower. It permitted cancellation of such contracts, but from experience it could calculate with some accuracy future orders that would remain firm. While it also sold to a few customers on long-term contracts involving substantial orders, these had little effect on the transactions here involved.[4]

In 1934 and again in 1936 droughts in the corn belt caused a sharp increase in the price of spot corn. With a storage capacity of only 2,300,000 bushels of corn, a bare three weeks' supply, Corn Products found itself unable to buy at a price which would permit its refined corn sugar, cerelose, to compete successfully with cane and beet sugar. To avoid a recurrence of this situation, petitioner, in 1937, began to establish a long position in corn futures "as a part of its corn buying program" and "as the most economical method of obtaining an adequate supply of raw corn" without entailing the expenditure of large sums for additional storage facilities. At harvest time each year it would buy futures when the price appeared favorable. It would take delivery on such contracts as it found necessary to its manufacturing operations and sell the remainder in early summer if no shortage was imminent.

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[4] Petitioner had contracts with three consumers to furnish, for a period of ten years or more, large quantities of starch or feed. In January 1940, petitioner had sold 2,000,000 bags of corn sugar, delivery to be made several months in the future. Also, members of the canning industry on the Pacific Coast had contracts to purchase corn sugar for delivery in more than thirty days.

If shortages appeared, however, it sold futures only as it bought spot corn for grinding.[5] In this manner it reached a balanced position with reference to any increase in spot corn prices. It made no effort to protect itself against a decline in prices.

In 1940 it netted a profit of $680,587.39 in corn futures, but in 1942 it suffered a loss of $109,969.38. In computing its tax liability Corn Products reported these figures as ordinary profit and loss from its manufacturing operations for the respective years. It now contends that its futures were "capital assets" under § 117 and that gains and losses therefrom should have been treated as arising from the sale of a capital asset.[6] In support of this position it claims that its futures trading was separate and apart from its manufacturing operations and that in its futures transactions it was acting as a "legitimate capitalist." *United States* v. *New York Coffee & Sugar Exchange,* 263 U. S. 611, 619. It denies that its futures transactions were "hedges" or "speculative" dealings as

[5] The dispositions of the corn futures during the period in dispute were as follows:

	Sales of futures thousand bushels	*Delivery under futures thousand bushels*
1938	17,400	4,975
1939	14,180	2,865
1940	14,595	250
1941	2,545	2,175
1942	5,695	4,460

[6] "(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 (1); . . . ."

covered by the ruling of General Counsel's Memorandum 17322, XV–2 Cum. Bull. 151, and claims that it is in truth "the forgotten man" of that administrative interpretation.

Both the Tax Court and the Court of Appeals found petitioner's futures transactions to be an integral part of its business designed to protect its manufacturing operations against a price increase in its principal raw material and to assure a ready supply for future manufacturing requirements. Corn Products does not level a direct attack on these two-court findings but insists that its futures were "property" entitled to capital-asset treatment under § 117 and as such were distinct from its manufacturing business. We cannot agree.

We find nothing in this record to support the contention that Corn Products' futures activity was separate and apart from its manufacturing operation. On the contrary, it appears that the transactions were vitally important to the company's business as a form of insurance against increases in the price of raw corn. Not only were the purchases initiated for just this reason, but the petitioner's sales policy, selling in the future at a fixed price or less, continued to leave it exceedingly vulnerable to rises in the price of corn. Further, the purchase of corn futures assured the company a source of supply which was admittedly cheaper than constructing additional storage facilities for raw corn. Under these facts it is difficult to imagine a program more closely geared to a company's manufacturing enterprise or more important to its successful operation.

Likewise the claim of Corn Products that it was dealing in the market as a "legitimate capitalist" lacks support in the record. There can be no quarrel with a manufacturer's desire to protect itself against increasing costs of raw materials. Transactions which provide such protection are considered a legitimate form of insurance. *United States* v. *New York Coffee & Sugar Exchange,* 263

U. S., at 619; *Browne* v. *Thorn,* 260 U. S. 137, 139–140. However, in labeling its activity as that of a "legitimate capitalist" exercising "good judgment" in the futures market, petitioner ignores the testimony of its own officers that in entering that market the company was "trying to protect a part of [its] manufacturing costs"; that its entry was not for the purpose of "speculating and buying and selling corn futures" but to fill an actual "need for the quantity of corn [bought] . . . in order to cover . . . what [products] we expected to market over a period of fifteen or eighteen months." It matters not whether the label be that of "legitimate capitalist" or "speculator"; this is not the talk of the capital investor but of the far-sighted manufacturer. For tax purposes petitioner's purchases have been found to "constitute an integral part of its manufacturing business" by both the Tax Court and the Court of Appeals, and on essentially factual questions the findings of two courts should not ordinarily be disturbed. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214.

Petitioner also makes much of the conclusion by both the Tax Court and the Court of Appeals that its transactions did not constitute "true hedging." It is true that Corn Products did not secure complete protection from its market operations. Under its sales policy petitioner could not guard against a fall in prices. It is clear, however, that petitioner feared the possibility of a price rise more than that of a price decline. It therefore purchased partial insurance against its principal risk, and hoped to retain sufficient flexibility to avoid serious losses on a declining market.

Nor can we find support for petitioner's contention that hedging is not within the exclusions of § 117 (a). Admittedly, petitioner's corn futures do not come within the literal language of the exclusions set out in that section. They were not stock in trade, actual inventory,

property held for sale to customers or depreciable property used in a trade or business. But the capital-asset provision of § 117 must not be so broadly applied as to defeat rather than further the purpose of Congress. *Burnet* v. *Harmel,* 287 U. S. 103, 108. Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income. It was intended "to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." *Burnet* v. *Harmel,* 287 U. S., at 106. Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term "capital assets" in § 117. See *Hort* v. *Commissioner,* 313 U. S. 28, 31; *Kieselbach* v. *Commissioner,* 317 U. S. 399, 403.

The problem of the appropriate tax treatment of hedging transactions first arose under the 1934 Tax Code revision.[7] Thereafter the Treasury issued G. C. M. 17322, *supra,* distinguishing speculative transactions in commodity futures from hedging transactions. It held that hedging transactions were essentially to be regarded as insurance rather than a dealing in capital assets and that

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[7] Section 208 (8) of the Revenue Act of 1924 limited "capital assets" to property held more than two years. This definition was retained until the Act of 1934. Since the rules of the various commodity exchanges required that futures contracts be closed out in periods shorter than two years, these contracts could not qualify as capital assets.

gains and losses therefrom were ordinary business gains and losses. The interpretation outlined in this memorandum has been consistently followed by the courts as well as by the Commissioner.[8] While it is true that this Court has not passed on its validity, it has been well recognized for 20 years; and Congress has made no change in it though the Code has been re-enacted on three subsequent occasions. This bespeaks congressional approval. *Helvering* v. *Winmill,* 305 U. S. 79, 83. Furthermore, Congress has since specifically recognized the hedging exception here under consideration in the short-sale rule of § 1233 (a) of the 1954 Code.[9]

We believe that the statute clearly refutes the contention of Corn Products. Moreover, it is significant to note that practical considerations lead to the same conclusion. To hold otherwise would permit those engaged in hedging transactions to transmute ordinary income into capital

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[8] *Stewart Silk Corp.* v. *Commissioner,* 9 T. C. 174; *Battelle* v. *Commissioner,* 47 B. T. A. 117; *Grote* v. *Commissioner,* 41 B. T. A. 247. See *Estate of Makransky* v. *Commissioner,* 5 T. C. 397, 412, aff'd *per curiam,* 154 F. 2d 59; *Trenton Cotton Oil Co.* v. *Commissioner,* 147 F. 2d 33, 35; *Commissioner* v. *Farmers & Ginners Cotton Oil Co.,* 120 F. 2d 772, 774; *Tennessee Egg Co.* v. *Commissioner,* 47 B. T. A. 558, 560; G. C. M. 18383, 1937–2 Cum. Bull. 244, 245; I. T. 3137, 1937–2 Cum. Bull. 164, 166. Cf. *Commissioner* v. *Banfield,* 122 F. 2d 1017, 1019–1020; G. C. M. 18658, 1937–2 Cum. Bull. 77.

[9] Section 1233 (a) provides that gain or loss from "the short sale of property, other than a hedging transaction in commodity futures," shall be treated as gain or loss from the sale of a capital asset to the extent "that the property, including a commodity future, used to close the short sale constitutes a capital asset in the hands of a taxpayer." The legislative history recognizes explicitly the hedging exception. H. R. Rep. No. 1337, 83d Cong., 2d Sess., p. A278; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 437: "Under existing law bona fide hedging transactions do not result in capital gains or losses. This result is based upon case law and regulations. To continue this result hedging transactions in commodity futures have been specifically excepted from the operation of this subsection."

gain at will. The hedger may either sell the future and purchase in the spot market or take delivery under the future contract itself. But if a sale of the future created a capital transaction while delivery of the commodity under the same future did not, a loophole in the statute would be created and the purpose of Congress frustrated.

The judgment is

Affirmed.

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

UNITED STATES *v.* ANDERSON, CLAYTON & CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 26. Argued October 20, 1955.—Decided November 7, 1955.

Pursuant to a contract entered into without any shown purpose of advantageous investment but solely for the purpose of maintaining the distribution of its common stock among responsible and active members of its organization in a manner designed to reflect their worth to it, a corporation purchased the shares of a deceased officer. These shares were not retired, but were retained as treasury stock. While in the treasury, they could not be voted nor counted for the purpose of establishing a quorum, nor were dividends paid on them. Subsequently, they were resold at a profit to other officers of the corporation, pursuant to the contract. *Held:* In the circumstances of this case, Treasury Regulations 111, § 29.22 (a)–15, does not make the sale of this treasury stock of the corporation a taxable transaction under § 22 (a) of the Internal Revenue Code of 1939. Pp. 55–60.

(a) On the record in this case, the corporation was not dealing in its shares as it might in the shares of another corporation, within the meaning of the Regulation. Pp. 59–60.

(b) A different result is not required by the fact that the shares were not retired and new shares issued. P. 60.

129 Ct. Cl. 295, 122 F. Supp. 837, affirmed.

Assistant Attorney General Holland argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, John F. Davis, Ellis N. Slack, Lee A. Jackson* and *Harry Baum.*

John C. White argued the cause and filed a brief for respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

Anderson, Clayton & Co., a Delaware corporation, was organized in 1929. Its capital structure consisted of preferred stock and 100,000 shares of common stock, the

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capital value of which was fixed at one dollar per share. By April 21, 1930, all of the common stock had been issued, in varying amounts, to the corporation's managing officials, in consideration of their worth and responsibility to the company, which is engaged in the highly technical and skilled business of cotton merchandising.

In 1931 a written agreement was entered into between the corporation and the common stockholders, the purpose of which was to restrict the ownership of the common stock to the management group and to adjust the respective interests in the common stock among that group as responsibility changed. Accordingly, the agreement provided that the stock could not be disposed of except by written consent of the owners of 75% of the common stock. Upon the death of any party to the agreement, the corporation agreed to purchase the common stock of the deceased at its book value as of July 31 preceding the stockholder's death.

One M. D. Anderson, one of the chief officers of the company, was originally issued 31,000 shares. During the development of the corporation, Mr. Anderson had transferred shares of his stock, pursuant to the agreement, to junior officials as they assumed more duties and responsibilities, until at the time of his death in 1939 he owned 18,574 shares. These shares the corporation purchased at their book value of $50.79 per share. This stock was not retired, but was retained as treasury stock. While in the treasury, it could not be voted nor were dividends paid on it.

The company in 1944 sold 6,500 of these shares to junior officials at the then book value of $112.68 per share. The difference between the price paid Anderson's estate and that received from the sale of the shares to the junior officials was $402,285, on which the United States imposed a long-term capital-gains tax of $100,571.25. Respondent paid the tax and sued in the

Court of Claims to recover the amount. The respondent took the position that no long-term capital gain resulted because it was not dealing in its stock "as it might in the shares of another corporation," as contemplated in Treasury Regulations 111, § 29.22 (a)–15.[1] The Court of Claims agreed with respondent and entered judgment for recovery of the tax paid, with interest. 129 Ct. Cl. 295, 122 F. Supp. 837. We granted certiorari, 348 U. S. 936, because of the claim of conflict with decisions of the Courts of Appeals.[2]

The sole question therefore is whether, in the circumstances of this case, Treasury Regulations 111, § 29.22 (a)–15 makes the sale of this treasury stock of the corpora-

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[1] "SEC. 29.22 (a)–15. *Acquisition or Disposition by a Corporation of its Own Capital Stock.* (a) Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

"(b) But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stocks as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Internal Revenue Code."

[2] *Commissioner* v. *Landers Corp.*, 210 F. 2d 188; *Commissioner* v. *H. W. Porter & Co.*, 187 F. 2d 939; *Commissioner* v. *Rollins Burdick Hunter Co.*, 174 F. 2d 698; *Commissioner* v. *Batten, Barton, Durstine & Osborn, Inc.*, 171 F. 2d 474.

tion a taxable transaction under § 22 (a) of the Internal Revenue Code of 1939.[3]

Article 66 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, provided that a corporation which purchases its own stock, holds it as treasury stock, and later sells it "realizes no gain or loss" from such transactions. This Court upheld that regulation as a proper one interpretive of the general terms of § 22 (a) of the Internal Revenue Code. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114. The present regulation was promulgated in 1934. Its effect was to remove the categorical exclusion of taxable gains or losses arising out of the purchase and sale by a corporation of its own stock accorded such transactions by Article 66 of Treasury Regulations 74. The amended regulation specifically excludes from tax consequences a corporation's sale of its stock upon original issue whether sold for more or less than par or stated value. On the other hand, the regulation specifically provides that tax consequences flow from the receipt by the

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[3] "SEC. 22. Gross Income.

"(a) *General Definition.* 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."

For tax years after 1953, transactions such as the one here involved carry no tax consequences by virtue of congressional enactment of § 1032 of the Internal Revenue Code of 1954, which provides: "No gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation."

corporation of its own stock as consideration for sales of its property or in satisfaction of indebtedness to it. With regard to all other dealings by a corporation in its own stock, whether or not tax consequences result depends generally upon the "real nature of the transaction, which is to be ascertained from all its facts and circumstances." The regulation provides further that "if a corporation deals in its own shares as it might in the shares of another corporation," such dealings are considered, for tax purposes, as though the corporation were in fact dealing in the other corporation's stock. Thus, whether the transaction here in question is taxable depends, in the final analysis, on whether respondent corporation dealt with its shares of treasury stock "as it might" have dealt with another corporation's stock.

The Court of Claims ruled, after a thorough examination of all of the facts and circumstances surrounding the transaction, that the corporation was not dealing in its shares as it might in the shares of another corporation. This conclusion is abundantly supported by the subsidiary findings, which are all supported by the evidence in this case.

We agree with the Court of Claims. Here the purchase and sale were made pursuant to a contract entered into without any shown purpose of advantageous investment. Instead the purpose of the agreement was found to be to maintain the distribution of the stock among responsible and active members of the organization in a manner designed to reflect their worth to the corporation. Indicative of this singleness of purpose is the fact that some of the stock purchased from Mr. Anderson's estate was sold to the corporation's other executives at a price below that for which it was acquired. No consideration was given to the opportune time for purchase or sale. The purchase of Mr. Anderson's stock by the corporation was dictated by the terms of the contract upon the fortuitous

circumstance of his death. Moreover, when purchased, the stock was lodged in the treasury. It could not be taken into account in any payment of dividends, nor voted in shareholder meetings, nor counted for the purpose of establishing a quorum. These unrecognized rights are all incident to the ownership of common stock of other corporations. It is thus clear that respondent was not dealing in its shares as it might in the shares of others.

The Government urges that the crucial inquiry as to whether the transaction is taxable under the regulation depends for its answer upon whether the reacquired shares are resold or retired and new shares issued; since the shares were not retired, the resale at a price greater than cost results in a taxable gain under § 22 (a) of the Code and the applicable regulation. The Government receives comfort for its position in the language of *Commissioner* v. *Batten, Barton, Durstine & Osborn, Inc.*, 171 F. 2d 474, 476, and *Commissioner* v. *Landers Corp.*, 210 F. 2d 188, 191. But we do not think formalities should be raised to such an important position. Moreover, the applicable regulation provides that tax consequences depend upon "the real nature of the transaction, which is to be ascertained from all its facts and circumstances," and not upon the sole circumstance that the stock is not retired. When viewed in its entirety, the instant transaction, limited to a wholly intracorporate purpose with no element of speculation or gain envisioned from dealing in its shares, does not constitute dealing by the corporation in its own shares as it might deal in the shares of another corporation within the meaning of the regulation.

The judgment is

Affirmed.

Mr. Justice Douglas and Mr. Justice Burton dissent.

INDIAN TOWING CO., INC., ET AL. *v.* UNITED STATES.

ON REHEARING.

No. 8. Argued February 10, 1955; affirmed by an equally divided Court April 11, 1955; rehearing granted May 16, 1955; reargued October 13, 1955.—Decided November 21, 1955.

If the Coast Guard is negligent in the operation of a lighthouse and damage is caused thereby, the United States is liable under the Tort Claims Act. Pp. 61–70.

(a) The language of 28 U. S. C. § 2674, imposing liability "in the same manner and to the same extent as a private individual under like circumstances," is not to be read as excluding liability for negligent conduct in the operation of an enterprise in which private persons are not engaged. Pp. 64–65.

(b) The Tort Claims Act does not impliedly incorporate the distinction between "governmental" and "non-governmental" functions which has caused confusion in the law of municipal liability for torts. Pp. 65–69.

(c) Once the Coast Guard has exercised its discretion to operate a lighthouse at a certain place, it is obligated to use due care to make certain that the light is kept in good working order; and, if the light becomes extinguished, the Coast Guard is further obligated to use due care to discover this fact and to repair the light or give warning that it is not functioning. P. 69.

(d) *Feres* v. *United States*, 340 U. S. 135, and *Dalehite* v. *United States*, 346 U. S. 15, distinguished. P. 69.

211 F. 2d 886, reversed and remanded.

Richard B. Montgomery argued the cause for petitioners. With him on the brief was *Cicero C. Sessions*.

Lester S. Jayson argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Burger* and *Paul A. Sweeney*.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioners brought suit in the United States District Court for the Southern District of Mississippi, seeking

recovery under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse light. They alleged that on October 1, 1951, the tug *Navajo,* owned by petitioner Indian Towing Company, was towing *Barge AS–16,* chartered by petitioner Upper Mississippi Towing Corporation; that the barge was loaded with a cargo of triple super phosphate, consigned to petitioner Minnesota Farm Bureau Service Company and insured by petitioner United Firemen's Insurance Company; that the tug *Navajo* went aground on Chandeleur Island and as a result thereof sea water wetted and damaged the cargo to the extent of $62,659.70; that the consignee refused to accept the cargo; that petitioners Indian Towing Company and Upper Mississippi Towing Corporation therefore became responsible for the loss of the cargo; and that the loss was paid by petitioner United Firemen's Insurance Company under loan receipts. The complaint further stated that the grounding of the *Navajo* was due solely to the failure of the light on Chandeleur Island which in turn was caused by the negligence of the Coast Guard. The specific acts of negligence relied on were the failure of the responsible Coast Guard personnel to check the battery and sun relay system which operated the light; the failure of the Chief Petty Officer who checked the lighthouse on September 7, 1951, to make a proper examination of the connections which were "out in the weather"; the failure to check the light between September 7 and October 1, 1951; and the failure to repair the light or give warning that the light was not operating. Petitioners also alleged that there was a loose connection which could have been discovered upon proper inspection.

On motion of the respondent the case was transferred to the United States District Court for the Eastern District of Louisiana, New Orleans Division. Respondent

then moved to dismiss on the ground that it had not consented to be sued "in the manner in which this suit is brought" in that petitioners' only relief was under the Suits in Admiralty Act, 41 Stat. 525, or the Public Vessels Act, 43 Stat. 1112. This motion was granted and the Court of Appeals for the Fifth Circuit affirmed *per curiam*. 211 F. 2d 886. Because the case presented an important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act, we granted certiorari, 348 U. S. 810. The judgment of the Court of Appeals was affirmed by an equally divided Court, 349 U. S. 902, but a petition for rehearing was granted, the earlier judgment in this Court vacated, and the case restored to the docket for reargument before the full Bench. 349 U. S. 926.

The relevant provisions of the Federal Tort Claims Act are 28 U. S. C. §§ 1346 (b), 2674, and 2680 (a):

> § 1346 (b). ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
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> § 2674. "The United States shall be liable . . . 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."
>
> . . . . .

§ 2680. "The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The question is one of liability for negligence at what this Court has characterized the "operational level" of governmental activity. *Dalehite* v. *United States,* 346 U. S. 15, 42. The Government concedes that the exception of § 2680 relieving from liability for negligent "exercise of judgment" (which is the way the Government paraphrases a "discretionary function" in § 2680 (a)) is not involved here, and it does not deny that the Federal Tort Claims Act does provide for liability in some situations on the "operational level" of its activity. But the Government contends that the language of § 2674 (and the implications of § 2680) imposing liability "in the same manner and to the same extent as a private individual under like circumstances . . ." must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of "uniquely governmental functions." The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby

induces reliance must perform his "good Samaritan" task in a careful manner.

Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "non-governmental"-"governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.[1]

[1] A good illustration of the effort of a conscientious court to reconcile the irreconcilable is *Haley* v. *City of Boston,* 191 Mass. 291, 77 N. E. 888. For an example of the confusion prevailing in one jurisdiction, compare *District of Columbia* v. *Woodbury,* 136 U. S. 450 (municipal corporation liable for injuries caused by negligent failure to keep sidewalk in repair) with *Harris* v. *District of Columbia,* 256 U. S. 650 (municipal corporation not liable for injuries caused by negligent sprinkling of streets). But even in the law of municipal corporation and state liability, one State at least has sought to emerge from the quagmire. See the more recent New York cases: *Foley* v. *State of New York,* 294 N. Y. 275, 62 N. E. 2d 69 (State liable when negligent failure to replaced burned-out bulb in traffic light caused accident); *Bernardine* v. *City of New York,* 294 N. Y. 361, 62 N. E. 2d 604 (city liable in negligence action for damages caused by runaway police horse). When the confused law of municipal corporations is applied to the Tort Claims Act, the same unsatisfactory results occur. Compare the holding of the Court of

While the Government disavows a blanket exemption from liability for all official conduct furthering the "uniquely governmental" activity in any way, it does claim that there can be no recovery based on the negligent performance of the activity itself, the so-called "end-objective" of the particular governmental activity. Let us suppose that the Chief Petty Officer going in a Coast Guard car to inspect the light on Chandeleur Island first negligently ran over a pedestrian; later, while he was inspecting the light, he negligently tripped over a wire and injured someone else; he then forgot to inspect an outside connection and that night the patently defective connection broke and the light failed, causing a ship to go aground and its cargo of triple super phosphate to get wet; finally the Chief Petty Officer on his way out of the lighthouse touched a key to an uninsulated wire to see that it was carrying current, and the spark he produced caused a fire which sank a nearby barge carrying triple super phosphate. Under the Government's theory, some of these acts of negligence would be actionable, and some would not. But is there a rational ground, one that would carry conviction to minds not in the grip of technical obscurities, why there should be any difference in result? The acts were different in time and place but all were done in furtherance of the officer's task of inspecting the lighthouse and in furtherance of the Coast Guard's task in operating a light on Chandeleur Island. Moreover, if the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the

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Appeals for the Fifth Circuit in the instant case, 211 F. 2d 886, with its holding in *United States* v. *Lawter*, 219 F. 2d 559 (United States liable under Tort Claims Act for negligence of Coast Guard during helicopter rescue operation).

Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity.[2]

While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 U. S. C. § 2680, all Government activity is inescapably "uniquely governmental" in that it is performed by the Government. In a case in which the Federal Crop Insurance Corporation, a wholly Government-owned enterprise, was sought to be held liable on a crop-insurance policy on the theory that a private insurance company would be liable in the same situation, this Court stated: "Government is not partly public or partly private, depending upon the gov-

[2] Although the argument is more elaborately presented here, this is not the first statute which the Government has attempted to construe in this manner. The Suits in Admiralty Act, 41 Stat. 525, provided that a libel *in personam* could be brought against the United States for damage caused by a Government-owned merchant vessel or tug in cases "where if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained . . ." and stated that "such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." In *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, an action was brought under the Act to recover damages for the loss of a ship and cargo by collision with an unmarked wreck of a sunken Government-owned merchant vessel. The Government moved to dismiss the action on the ground, *inter alia,* that "The said alleged cause of action set out in the said libel relates to an alleged failure on the part of the officers and/or agents of the United States to perform a purely governmental function or to alleged negligence of such officers and/or agents in the performance of a purely governmental function; and gives rise to no liability on the part of the United States of America for which they are suable in the United States Court or elsewhere." The motion to dismiss was granted on another ground but on appeal the Supreme Court rejected all arguments that the district court lacked jurisdiction and reversed the judgment of the district court.

ernmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 383–384. On the other hand, it is hard to think of any governmental activity on the "operational level," our present concern, which is "uniquely governmental," in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.

There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards. (For substantive limitations, see § 2680 (a)–(m).[3] For administrative safeguards, see § 2401 (b) (statute of limitations); § 2402 (denial of trial by jury); § 2672 (administrative adjustment of claims of $1,000 or less); § 2673 (reports to Congress); § 2674 (no liability for punitive damages or for interest prior to judgment); § 2675 (disposition by federal agency as prerequisite to suit when claim is filed); § 2677 (compromise); § 2679 (exclusiveness of remedy).) The language of the statute does not support the Government's argument. Loose general statements in the legislative history to which the Government points seem directed mainly toward the "discretionary function" exemption of § 2680 and are not persuasive. The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not

[3] Congress significantly withheld liability for claims relating, *inter alia,* to the postal service, tax collection, quarantine establishment, fiscal operations, combatant activities of the Coast Guard during time of war, and the activities of the TVA.

to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

The Court of Appeals for the Fifth Circuit considered *Feres* v. *United States,* 340 U. S. 135, and *Dalehite* v. *United States,* 346 U. S. 15, controlling. Neither case is applicable. *Feres* held only that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U. S., at 146. And see *Brooks* v. *United States,* 337 U. S. 49. The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case.[4]

[4] The Court in *Dalehite* disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability . . ." in the law of torts. 346 U. S., at 44. But see *Workman* v. *New York City,* 179 U. S. 552.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings.

Reversed and remanded.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON join, dissenting.

The Court reverses the judgment on the ground that the United States is liable under the Federal Tort Claims Act for damages caused by the negligence of the Coast Guard in maintaining a lighthouse light near the mouth of the Mississippi. The alleged negligence was the failure of the Coast Guard personnel to check the electrical system which operated the light, the failure to make a proper examination of the connections and other apparatus connected with the light, and the failure to repair the light or give notice to vessels that the light was not functioning. Although navigators were warned this was an "unwatched light," [1] it is assumed at this point in the litigation that this negligence occurred and that it was the proximate cause of the loss. Government operation of the lighthouse was authorized by 14 U. S. C. § 81. It is forbidden to others except by authority of the Coast Guard.[2]

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[1] United States Coast Guard, Light List, *Atlantic and Gulf Coasts of the United States,* corrected to January 1, 1951 (C. G. 158), pp. 5, 498.

[2] 14 U. S. C. § 83:

"No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined not more than $100 for each offense. Each day during which such violation continues shall be considered as a new offense."

The Government advises that as of June 30, 1953, government aids

The question of the liability of the United States for this negligence depends on the scope and meaning of the Federal Tort Claims Act. The history of the adoption of that Act has heretofore been thoroughly explained.[3] Before its enactment, the immunity of the Government from such tort actions was absolute. The Act authorized suits against the Government under certain conditions. The Government was made liable for injury to persons or property

> "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private

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to navigation numbered 38,169; authorized private aids 3,301. U. S. Coast Guard, Aids to Navigation Operated and Maintained by the United States Coast Guard (June 30, 1953) pp. 1, 4.

We are further advised:

"The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids [U. S. Coast Guard, *Aids to Navigation* (C. G. 127, 1945) p. 1201]:

"(1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.

"(2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which channels are used exclusively by the corporation's, or its contractor's, vessels.

"(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

"See also, U. S. Coast Guard, *Aids to Navigation Manual* (CG–222, Jan. 1953), pp. 4–1, 4–3.

"Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C. F. R. (1949 ed.) § 68.01–1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U. S. C. 409; 33 C. F. R. (1949 ed.) 64.01–1."

[3] *Feres* v. *United States,* 340 U. S. 135; *Dalehite* v. *United States,* 346 U. S. 15.

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> person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b).

There was a further condition, 28 U. S. C. § 2674, that the United States should be liable "in the same manner and to the same extent as a private individual under like circumstances." [4]

In *Feres* v. *United States,* 340 U. S. 135, we passed upon the applicability of the Act to claims by members of the armed services injured through the negligence of other military personnel.[5] We said:

> "One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command. . . . In the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a

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[4] There were further limitations and certain specific exceptions not pertinent here.

[5] *E. g.,* the negligence of an Army surgeon during an operation in sewing up a towel in the abdomen of a soldier; and negligence in quartering a soldier in barracks known to be unsafe because of a defective heating plant.

> few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Id.*, at 141–142.

Thus, in *Feres* the Court was of the view that the Act does not create new causes of action theretofore beyond the applicable law of torts. So, in determining whether an action for negligence in maintaining public lights is permissible, we must consider whether similar actions were allowed by the law of the place where the negligence occurred, prior to the Tort Claims Act, against public bodies otherwise subject to suit.

Dalehite v. *United States,* 346 U. S. 15, 42, followed the reasoning of *Feres.* That case involved, among other issues, the liability of the United States for negligence of the Coast Guard in fighting fire. The Coast Guard had been found negligent in its fire-fighting duties by the trial court. These duties were outside the discretionary function exception of § 2680 (a) of the Act. Resting our decision on the Act itself, we said the Tort Claims Act

> "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." *Id.*, at 43–44.

These two interpretive decisions have not caused Congress to amend the Federal Tort Claims Act. As a matter of fact, the catastrophe that gave rise to the *Dalehite* case was subsequently presented to Congress for legislative relief by way of compensation for the losses which resulted, as found by the trial court, partly from the negligence of the Coast Guard. Throughout the reports, discussion and enactment of the relief act, there was no effort to modify the Tort Claims Act so as to change the law, in any respect, as interpreted by this Court in *Feres* and *Dalehite*.[6] Although its discussion was restricted solely to the discretionary function exception to the Act, Congress must have accepted the rulings relating to the issues here involved as in accord with its understanding of the Tort Claims Act. One cannot say that when a statute is interpreted by this Court we must follow that interpretation in subsequent cases unless Congress has amended the statute. On this our cases conflict.[7] However, we should continue to hold, as a matter of *stare decisis* and as the normal rule, that inaction of Congress, after a well-known and important decision of common knowledge, is "an aid in statutory construction . . . useful at times in resolving statutory ambiguities." *Helvering* v. *Reynolds*, 313 U. S. 428, 432. The nonaction of Congress should decide this controversy in the light of the previous rulings. The reasons which led to the conclusions against creating new and novel liabilities in the *Feres* and *Dalehite* cases retain their persuasiveness.

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[6] 69 Stat. 707; H. R. Rep. No. 2024, 83d Cong., 2d Sess.; S. Rep. No. 2363, 83d Cong., 2d Sess.; H. R. Rep. No. 1305, 84th Cong., 1st Sess.; H. R. Rep. No. 1623, 84th Cong., 1st Sess.; S. Rep. No. 684, 84th Cong., 1st Sess.

[7] Compare *United States* v. *Elgin, J. & E. R. Co.*, 298 U. S. 492, 500; *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, 775; *Toolson* v. *New York Yankees*, 346 U. S. 356, with *Helvering* v. *Hallock*, 309 U. S. 106; *Commissioner* v. *Church*, 335 U. S. 632.

This enactment, like any other, should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress. It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain. The courts are not the legislative branch of the Government.

The Act made the Government liable in instances where it would be suable "if a private person." The meaning of "private person" is not discussed in the legislative history. In *Feres* we talked of private liability and came to a conclusion which is contrary to that reached by the Court today. See pp. 72–73, *supra*. We held that because surgeons in private practice or private landlords were liable for negligence did not mean the United States was. Liability of governments for the failure of lighthouse warning lights is as unknown to tort law as, for example, liability for negligence in fire fighting excluded by the *Dalehite* ruling. Lighthouse keeping is as uniquely a governmental function as fire fighting. There is at least some uncertainty and ambiguity as to what Congress meant by making the United States liable in circumstances where it would be liable "if a private person." That uncertainty should not lead us to accept liability for the United States in this case. In dealing with this enlarged concept of federal liability for torts, wisdom should dictate a cautious approach along the lines of *Feres* and *Dalehite*.

The Act says that the United States shall be liable in accordance with the law of the place where the act or omission occurred. § 1346 (b). This alleged tort occurred in Louisiana. Under the Louisiana law a municipal corporation is not responsible for injury sustained as

a result of negligence on the part of the employees of a city in the maintenance of traffic lights.[8] Street traffic lights are a close analogy to navigation lights. We can see no reason to doubt that under Louisiana law the maintenance of navigation lights, if permissible, by municipalities would likewise be free of liability. The Court warns us against the morass of decisions that involve municipal tort liability. It calls that law a "quagmire" and avoids it by a complete surrender of sovereign immunity without regard to the law of municipal liability of the respective States.

The over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of "any governmental activity on the 'operational level.'" It seems broad enough to cover all so-called "uniquely governmental activities." Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled.[9] Perhaps liability arises even for injuries from negligence in pursuing criminals.

The Court's literal interpretation of this Act brings about an application of the Federal Tort Claims Act analogous to that condemned by Congress in the Portal-to-Portal Act of 1947 after *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, see 61 Stat. 84, § 1 (a), and in the Fair Labor Standards Amendments of 1949, 63 Stat. 910, after *Bay Ridge Co.* v. *Aaron*, 334 U. S. 446, see 2 U. S. Code Cong. Serv. (1949) 1617. Compare *United States* v. *American Trucking Assns.*, 310 U. S. 534. The judgment should be affirmed.

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[8] *Edwards* v. *City of Shreveport*, 66 So. 2d 373; cf. *Howard* v. *City of New Orleans*, 159 La. 443, 105 So. 443.

[9] But see footnote 4 of the majority opinion, in which *Workman* v. *New York City* is cited.

NEESE, ADMINISTRATOR, *v.* SOUTHERN RAILWAY CO.

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

No. 28. Argued November 7, 1955.—Decided November 21, 1955.

1. The District Court's denial of a new trial, upon remittitur of part of the verdict in this case, was not without support in the record, and its action should not have been disturbed by the Court of Appeals. P. 77.
2. This Court refuses to decide constitutional questions when the record discloses other grounds of decision, whether or not properly raised here by the parties. P. 78.

216 F. 2d 772, reversed.

Henry Hammer argued the cause and filed a brief for petitioner.

Sidney S. Alderman argued the cause for respondent. With him on the brief were *Henry L. Walker* and *Frank G. Tompkins, Jr.*

PER CURIAM.

We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals.

We need not consider respondent's contention that only the jurisdictional question was presented by the petition for certiorari, for in reversing on the above ground we follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties. See *Peters* v. *Hobby,* 349 U. S. 331, 338; *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129, 132, 136, 142.

AFFRONTI *v.* UNITED STATES.

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

No. 71. Argued November 15, 1955.—Decided December 5, 1955.

Under 18 U. S. C. § 3651, after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, a federal district court may not suspend sentence and grant probation as to the remaining term or terms. *United States* v. *Murray*, 275 U. S. 347. Pp. 79–84.

(a) The legislative history of this section does not require a different result. Pp. 81–82, 84.

(b) The probationary power ceases with respect to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence. Pp. 82–83.

(c) The provisions for probation should be interpreted to avoid, so far as possible, duplicating other existing provisions for the mitigating of criminal sentences. P. 84.

221 F. 2d 150, affirmed.

Harry F. Murphy argued the cause and filed a brief for petitioner.

John V. Lindsay argued the cause for the United States. On the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Charles F. Barber, Beatrice Rosenberg* and *Isabelle R. Cappello.*

MR. JUSTICE REED delivered the opinion of the Court.

Affronti was tried in the United States District Court for the Western District of Missouri on a ten-count indictment charging him with illegal sales of narcotics. A jury found him guilty on counts two through ten, and a five-year sentence was imposed on each count to be served consecutively. At the time of sentencing, execution of the sentences on counts six through ten was suspended and probation granted, the probation to commence at the

expiration of the sentences on counts two through five. While serving his sentence on count two, petitioner filed a motion in the District Court seeking suspension of sentence and probation on counts three, four and five. The motion was denied upon the controlling authority of *Phillips* v. *United States,* 212 F. 2d 327 (C. A. 8th Cir. 1954), which held that the district courts have no power to suspend sentence after a prisoner has begun to serve a cumulative sentence composed of two or more consecutive sentences. The Court of Appeals affirmed,[1] and we granted certiorari [2] because of the existence of a conflict between the decision below and the decision of the Ninth Circuit in *Kirk* v. *United States,* 185 F. 2d 185.[3]

Prior to 1925 the district courts had no power at all to suspend sentences and release a convict on probation. *Ex parte United States,* 242 U. S. 27. This situation was remedied by Congress when it passed the Probation Act in 1925.[4] That Act gave power to the federal courts, "after conviction or after a plea of guilty or nolo contendere," to suspend sentence and place the defendant on probation.[5] The purpose of the Act, as revealed by its legislative history, was discussed by this Court in *United States* v. *Murray,* 275 U. S. 347. That case also presented a question concerning the time within which a district court can suspend a sentence and grant probation.

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[1] 221 F. 2d 150.

[2] 349 U. S. 951.

[3] The Fourth Circuit appears to be in accord with the Eighth Circuit on this question. *Mann* v. *United States,* 218 F. 2d 936. The Tenth Circuit, *obiter dictum,* in *White* v. *Steigleder,* 37 F. 2d 858, 859, is in accord with the Ninth Circuit. See also *Kelley* v. *United States,* 209 F. 2d 638.

[4] 43 Stat. 1259.

[5] The power extended to sentences for convictions of any offense not punishable by death or life imprisonment, and the exercise of the power was discretionary and conditioned upon the ends of justice and the best interests of the public and the defendant.

In *Murray* this Court observed that, in view of the existence of provisions for parole and executive clemency, it would seem unlikely that Congress would have intended to make the probation provisions applicable during the same period of time. *Id.*, at 356. It was concluded that it would be more reasonable to construe the Probation Act so as to reconcile the three methods of mitigation of criminal sentences, thereby "making them as little of a repetition as we can." *Id.*, at 357. This and other considerations led the Court to hold that a district judge had no power under the Act to place a convict on probation after he had begun the execution of his sentence.

The decision in the *Murray* case does not, however, completely dispose of the question now before the Court. Since the *Murray* decision there has been a language change in the statutory provisions for probation. In *Murray* the Court was considering the question of power of the district courts to place a convict on probation after he had commenced to serve a single general sentence.[6] Here we are concerned with the power to grant suspension of sentences which are, technically, wholly unexecuted because they constitute the unserved terms of a series of consecutive sentences.

In 1948, in connection with the revision and codification of Title 18 of the United States Code, the language of the

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[6] The *Murray* decision embraced two cases consolidated for argument. In one of the cases the District Court had suspended a three-month prison sentence and placed the convict (Murray) on probation one day after he had commenced serving the sentence. In the other case the prisoner (Cook) had been sentenced to "a total of fourteen years and nine months" imprisonment, and the District Court suspended the remainder of his sentence and placed him on probation after he had served approximately two years of the sentence.

Whether Cook's sentence was in fact a cumulative sentence of a number of consecutive sentences (see *Phillips* v. *United States*, 212 F. 2d 327, 332) is unimportant at this time. His sentence was treated as if it had been a single general sentence.

Probation Act with which we are concerned was changed. The statute now provides for suspension of sentence and probation "Upon entering a judgment of conviction." [7] The substitution of the quoted words for "after conviction or after a plea of guilty or nolo contendere," the phrase which appeared in the Probation Act prior to the 1948 codification of Title 18, does not appear to have resulted in any substantive change in the law. The Reviser's Notes which accompanied the 1948 codification merely stated the following with respect to this amendment: "Words 'after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment' were omitted from first sentence as unnecessary." [8] The Reviser's Notes were used by Congress as a full explanation of all changes made in the text of the existing law.[9] It is unlikely, therefore, that Congress intended the phrase as it appears in the present section to have a different meaning than the phrase had prior to the revision.[10]

The more significant difference between the *Murray* case and the present one is the fact that here we are dealing with a cumulative sentence composed of a number of distinct sentences which are to run consecutively.[11] Petitioner notes that while he has begun the execution of the first of the series of sentences, he has not commenced the execution of the sentences which he is now seeking to have suspended. He reasons from this fact that the District Court still has probationary power over the latter sentences. Of course the words of the statute do not themselves require adoption of petitioner's argument. In fact the language of the present probation provision, and

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[7] 62 Stat. 842, 18 U. S. C. § 3651.

[8] H. R. Rep. No. 304, 80th Cong., 1st Sess., App. A173.

[9] *Id.*, at 9.

[10] See *Kirk* v. *United States*, 185 F. 2d 185, 188.

[11] See note 6, *supra*.

of the original provision as interpreted by *Murray*, suggests a contrary result.

In the final analysis, this case must be governed by the meaning of the statute. Are we to read the statute to mean that the courts should be able to suspend the uncommenced terms of a cumulative sentence after the prisoner has been imprisoned and entered upon the execution of a prior term? We think not. The *Murray* opinion points out that it is unlikely that Congress would have found it wise to make probation apply in such a way as to unnecessarily overlap the parole and executive-clemency provisions of the law. Federal judicial power to permit probation springs solely from legislative action. *Ex parte United States, supra.* The authority to put a convict on probation for an uncommenced term, after service of an earlier term has begun, has not been clearly given. Therefore, in construing the provisions for probation, we adhere to the *Murray* interpretation to avoid interference with the parole and clemency powers vested in the Executive Branch.[12] We conclude that the probationary power ceases with respect to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence.[13]

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[12] That a contrary construction would result in an unnecessary overlap between probation and parole provisions is made clear by a reference to 18 U. S. C. § 4202. That section provides that a federal prisoner may be paroled after he has served one-third of the "term or terms" for which he is confined. Thus, if serving a cumulative sentence composed of two or more consecutive sentences, a prisoner is eligible for parole when he has served one-third of the total sentence. See also 18 U. S. C. § 4161, which provides that "When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis" for computing time off for good behavior.

[13] This conclusion as to the meaning of the statute is further supported by a recognition of some of the practicalities of sentencing. At the time of entering a judgment of conviction, the district judge

We note the argument that since Congress has authorized the sentencing court to limit probation to less than all of the terms of a cumulative sentence,[14] it should follow that the probation powers for each term exist until that term is begun. But the power to limit a grant of probation to less than an entire cumulative sentence does not compel a conclusion that the power to grant probation as to each of the separate sentences exists until the convict begins to serve each. We think, moreover, this argument is met by our conclusion that the provisions for probation should be interpreted to avoid, so far as possible, duplicating other existing provisions for the mitigation of criminal sentences. See note 12, *supra*.

Congress has done nothing since this Court's decision in *United States* v. *Murray, supra,* to indicate that probation power should be applied after the beginning of any term of a sentence.

Affirmed.

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is in the best position to fix the terms of a convict's sentence. Thereafter, however, the judge becomes progressively less familiar with the considerations material to the adjustment of the punishment to fit the criminal. At the same time, the officials of the Executive Branch responsible for these matters become progressively better qualified to make the proper adjustments. Cf. *United States* v. *Soeder,* 120 F. Supp. 594, 597; *United States* v. *Bernett,* 123 F. Supp. 841, 846. These considerations apply as much to a series of consecutive sentences as to a simple general sentence.

But see Note, Application of Federal Probation to Convicts Serving Consecutive Sentences, 64 Yale L. J. 260, 265–268 (1954).

[14] 18 U. S. C. § 3651. The provision for probation "limited to one or more counts or indictments" was added by the 1948 codification of Title 18. The Reviser's Notes indicate that this provision was added because it "reflects exactly the practice followed by the Federal courts." H. R. Rep. No. 304, 80th Cong., 1st Sess., App. A173. Thus, this addition did not result in a substantive change in the Probation Act and does not of itself reveal any extension thereof.

REECE *v.* GEORGIA.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 112. Argued November 9, 1955.—Decided December 5, 1955.

1. Georgia law requires that objections of a defendant to the composition of a grand jury be raised before indictment. Petitioner, a Negro of low mentality, was indicted and convicted of a capital offense, but was not provided with counsel until the day after he was indicted. Before his arraignment, petitioner moved to quash the indictment on the ground that Negroes had been systematically excluded from service on the grand jury. This motion was denied on the ground that it was made too late. *Held:* Failure to consider the motion to quash on its merits was a denial of due process of law and violated the Fourteenth Amendment. Pp. 87–90.

   (a) The indictment of a defendant by a grand jury from which members of his race have been systematically excluded is a denial of his right to equal protection of the laws. P. 87.

   (b) Where no opportunity to challenge the grand-jury selection has been afforded a defendant, his right may be asserted by a plea in abatement or a motion to quash before arraignment. P. 87.

   (c) Assignment of counsel in a state prosecution at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case is a denial of due process of law. Pp. 89–90.

2. This case being properly here upon review of the second judgment of the Georgia Supreme Court therein, this Court has jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, and re-examination of such questions here is unaffected by a ruling of the state court that its first decision became the law of the case. P. 87.

211 Ga. 339, 85 S. E. 2d 773, reversed and remanded.

Daniel Duke argued the cause and filed a brief for petitioner.

Eugene Cook, Attorney General of Georgia, and *Robert H. Hall* and *E. Freeman Leverett,* Assistant Attorneys General, submitted on brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, Amos Reece, a Negro, was convicted of the rape of a white woman in Cobb County, Georgia. He contends here that Georgia's rule of practice requiring him to challenge the composition of the grand jury before indictment violates the Due Process Clause of the Fourteenth Amendment. The Georgia Supreme Court affirmed his conviction, 211 Ga. 339, 85 S. E. 2d 773, and we granted certiorari because of the important issues involved, 349 U. S. 944.

Reece was arrested on October 20, 1953, and was held in the county jail until his indictment three days later. On October 24, the day after his indictment, two local attorneys were appointed by the trial court to defend him. On October 30, before his arraignment, Reece moved to quash the indictment on the ground that Negroes had been systematically excluded from service on the grand jury. This motion was overruled after a hearing. On the same day, petitioner was tried, convicted and sentenced to be electrocuted. The Supreme Court of Georgia held that the motion to quash was properly denied because, by Georgia practice, objections to a grand jury must be made before the indictment is returned, 210 Ga. 578, 82 S. E. 2d 10, but reversed the case on another ground, not pertinent here, and remanded it for a new trial.

Before his second trial Reece filed a special plea in abatement which alleged systematic exclusion of Negroes from the jury commission, the grand jury which indicted him and the petit jury about to be put upon him. This plea also stated that petitioner had neither knowledge of the grand jury nor the benefit of counsel before his indictment. The State's demurrer to this plea was sustained, and petitioner was again tried, convicted and sentenced to be electrocuted. It is this judgment which is here for review.

At the outset the State contends that the case is not properly before us because petitioner did not apply for a writ of certiorari within 90 days after the first judgment of the Supreme Court of Georgia. This contention is clearly without substance. A timely application for certiorari to review the second judgment was made, and the case is properly here. 28 U. S. C. § 1257. We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, *Urie* v. *Thompson,* 337 U. S. 163, 172–173, and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case, *Davis* v. *O'Hara,* 266 U. S. 314.

This Court over the past 50 years has adhered to the view that valid grand-jury selection is a constitutionally protected right. The indictment of a defendant by a grand jury from which members of his race have been systematically excluded is a denial of his right to equal protection of the laws. *Patton* v. *Mississippi,* 332 U. S. 463; *Norris* v. *Alabama,* 294 U. S. 587; *Rogers* v. *Alabama,* 192 U. S. 226; *Carter* v. *Texas,* 177 U. S. 442. Where no opportunity to challenge the grand-jury selection has been afforded a defendant, his right may be asserted by a plea in abatement or a motion to quash before arraignment, *United States* v. *Gale,* 109 U. S. 65, 72. Of course, if such a motion is controverted it must be supported by evidence, *Patton* v. *Mississippi, supra; Martin* v. *Texas,* 200 U. S. 316.

We mention these principles since the State contests the merits of Reece's claim of systematic exclusion. In the hearing on his motion to quash before the first trial, he presented uncontradicted evidence to support the following facts: no Negro had served on the grand jury in Cobb County for the previous 18 years; the 1950 census showed that the county had a white population of 55,606 and a Negro population of 6,224; the same census showed

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a population of 16,201 male white citizens over 21 years of age, and 1,710 male Negro citizens over 21 years of age. Petitioner's motion alleged, and this was not contradicted, that there were 534 names on the grand-jury list and of this number only six were Negroes. Of the six Negroes, one did not reside in the county and the other five testified in this proceeding. Two were over 80 years of age: one was partially deaf and the other in poor health. The remaining three were 62 years of age. Each of the witnesses had lived in the county for at least 30 years. None had ever served on a grand jury nor heard of any other Negro serving on a grand jury in the county. The Clerk and Deputy Clerk of the court testified that the jury boxes had been revised in 1952, that there was no discrimination or systematic exclusion of Negroes from the grand-jury list, that six Negroes were on the list, and that neither had ever known a Negro to serve on a grand jury in Cobb County.

This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizable Negro population in the county, the fact that all-white juries had been serving for as long as witnesses could remember, and the selection on the jury list of a relatively few Negroes who would probably be disqualified for actual jury service all point to a discrimination "ingenious or ingenuous," *Smith* v. *Texas,* 311 U. S. 128, 132. This evidence placed the burden on the State to refute it, *Patton* v. *Mississippi, supra,* and mere assertions of public officials that there has not been discrimination will not suffice. See *Hernandez* v. *Texas,* 347 U. S. 475. However, we do not decide this issue. It is sufficient to say that petitioner's motion stated and his evidence supported a prima facie constitutional claim.

Georgia's rule of practice provides that when an "accused has been arrested for the commission of a penal offense and is committed to jail, he is apprised of the fact

that his case or the charge against him will undergo grand-jury investigation, and it is incumbent upon him to raise objections to the competency of the grand jurors before they find an indictment against him." *Reece* v. *State,* 210 Ga. 578, 82 S. E. 2d 10. This rule goes back to 1882, *Williams* v. *State,* 69 Ga. 11, and has been consistently followed in that State. A similar requirement was considered by this Court in *Carter* v. *Texas,* 177 U. S. 442. In that case the Texas Code of Criminal Procedure provided that a challenge to the array must be made before the grand jury was impaneled and that anyone confined in the jail at the time would, at his request, be brought into court to make such challenge. The defendant in *Carter* moved to quash the indictment after the grand jury had been impaneled but before his arraignment. Since the grand jury had been impaneled before the commission of the offense for which the defendant was indicted, this Court held that he "never had any opportunity to challenge the array of the grand jury, and was entitled to present the objection on which he relied by motion to quash." 177 U. S., at 447. In the present case, as in *Carter,* the right to object to a grand jury presupposes an opportunity to exercise that right. *Gale* v. *United States,* 109 U. S. 65, 72. *Michel* v. *Louisiana, post,* p. 91.

We may now turn to the present case to see if Reece was afforded such opportunity. He was indicted by a grand jury that was impaneled and sworn eight days before his arrest. It adjourned the day before his arrest and was reconvened two days later by an order which did not list him as one against whom a case would be presented. Reece is a semi-illiterate Negro of low mentality. We need not decide whether, with the assistance of counsel, he would have had an opportunity to raise his objection during the two days he was in jail before indictment. But it is utterly unrealistic to say that he had such opportunity when counsel was not provided for him

until the day after he was indicted. In *Powell* v. *Alabama,* 287 U. S. 45, this Court held that the assignment of counsel in a state prosecution at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case is a denial of due process of law. The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard. Georgia should have considered Reece's motion to quash on its merits.

In view of this disposition, it is not necessary that we consider other issues first raised by Reece in his plea in abatement at the second trial.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Syllabus.

MICHEL *v.* LOUISIANA.

NO. 32. CERTIORARI TO THE SUPREME COURT OF LOUISIANA.*

Argued November 8–9, 1955.—Decided December 5, 1955.

1. Louisiana law requires that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier. After expiration of the time allowed, these three Negro petitioners moved to quash their indictments on the ground that there was systematic exclusion of Negroes from the grand juries which indicted them. Their motions were denied and each was convicted of a capital offense. *Held:* In the circumstances of these cases, application of the rule to these petitioners did not violate the Fourteenth Amendment. Pp. 92–102.
2. Michel was indicted on February 19 and presented for arraignment on February 23. He appeared without counsel, and arraignment was continued for one week. The record shows that counsel was appointed for him on March 2, the date the grand-jury term expired. Counsel contended that he did not consider himself appointed until March 5, when he received written notice from the court. The motion to quash, not filed until March 9, was denied as being out of time. *Held:* The finding of the lower courts that counsel was appointed March 2 is sustained. Since the appointed counsel, a lawyer experienced in state criminal practice, had adequate time to file the motion after his appointment, application of the rule was not unreasonable. Pp. 95–96.
3. Poret fled from the State shortly after the crime was committed and remained outside the State until long after the time for filing a motion to quash his indictment had expired. After returning to the State on October 3 and retaining counsel on October 26, he did not file his motion to quash until November 7—after he had been arraigned and had filed other motions which implied a waiver of his objections to the grand jury. *Held:* Louisiana's rule requiring timely objections to the composition of a grand jury need not be suspended for the benefit of one who, by his own action, fails to avail himself of the state remedy; and there was no violation of due process in denying the motion as out of time. Pp. 96–100.

*Together with No. 36, *Poret et al.* v. *Louisiana,* also on certiorari to the same court, argued November 9, 1955.

4. Labat was indicted December 11, 1950, and arraigned on January 3, 1951. On January 5, 1951, the court appointed competent counsel for him and the term of the grand jury that had indicted him did not expire until March 1951. In January 1952, court-appointed counsel withdrew from the case and another counsel was appointed; but motion to quash the indictment was not made until November 7, 1952. *Held:* Inadequacy of counsel will not be presumed from failure to file a pretrial motion where the matter was within counsel's discretion and there were valid reasons for not filing. In the circumstances of this case, there was no violation of due process in denying the motion as out of time. Pp. 100–101.

225 La. 1040, 74 So. 2d 207, and 226 La. 201, 75 So. 2d 333, affirmed.

Gerard H. Schreiber and *George H. Fust* argued the cause and filed a brief for petitioner in No. 32.

Felicien Y. Lozes and *Rudolph F. Becker, Jr.* argued the cause and filed a brief for petitioners in No. 36.

Leon D. Hubert, Jr. argued the cause for respondent in No. 32. *Adrian G. Duplantier* argued the cause for respondent in No. 36. With them on the briefs were *Fred S. LeBlanc,* Attorney General of Louisiana, and *Michael E. Culligan,* Assistant Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

Louisiana requires that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier.[1] In these cases we are asked to

[1] Section 202 of the Louisiana Code of Criminal Procedure, R. S. § 15:202, provides that:

"All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

In *State* v. *Wilson,* 204 La. 24, 14 So. 2d 873, appeal dismissed, 320

decide whether this statute as applied violates the Fourteenth Amendment. The three petitioners, all Negroes sentenced to death for aggravated rape, make no attack on the composition of the petit jury nor on the fairness of their trials but challenge the composition of the grand juries which indicted them on the ground that there was a systematic exclusion of Negroes from the panels. No hearing was held on these allegations because the lower courts found that the question had been waived. In each case the Supreme Court of Louisiana affirmed, 225 La. 1040, 74 So. 2d 207, and 226 La. 201, 75 So. 2d 333, and we granted certiorari, 348 U. S. 936 and 950, because of the importance of the issues involved.

Grand juries in Orleans Parish are impaneled in September and March to serve for six months. Since § 202 of the Louisiana Criminal Code, as interpreted, requires a defendant to object to the grand jury before three judicial days after its term, the time to raise such objections may vary from a minimum of three days—if the defendant is indicted on the last day of the term—to a much longer period if he is indicted during the term. Section 284 of the Louisiana Code of Criminal Procedure provides that in any case such objections must be made before arraignment.

We do not find that this requirement on its face raises an insuperable barrier to one making claim to federal rights. The test is whether the defendant has had "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court." *Parker* v. *Illinois,* 333 U. S. 571, 574; *Davis* v. *Wechsler,* 263 U. S. 22; *Central Union Co.* v. *Edwardsville,* 269 U. S. 190; *Paterno* v. *Lyons,* 334 U. S. 314. See *Carter* v.

U. S. 714, the Supreme Court of Louisiana interpreted the phrase "the third judicial day of the term" to mean "the third judicial day following the term." Such a construction has been adhered to, *State* v. *Chianelli,* 226 La. 552, 76 So. 2d 727, and is not open to attack here.

Texas, 177 U. S. 442. In *Avery* v. *Alabama,* 308 U. S. 444, this Court held that a lapse of three days between the appointment of counsel and the date of trial was not of itself a denial of due process. In Louisiana a motion to quash is a short, simple document, easily prepared in a single afternoon.[2] In the light of *Avery,* a three-day minimum for such a motion is not unreasonable. *Wilson*

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[2] The motion to quash filed in Michel's case is as follows:

"Motion to Quash

"Now into this Honorable Court comes John Michel, defendant herein, and having heard the Indictment read and protesting that he is not guilty of the offense set out therein, moves to quash the said Indictment in its entirety, and to quash and set aside the general venire involved herein and to quash and set aside the Grand Jury Panel herein for the reason that in the proceedings prior to and attending the presentment of said Indictment, mover was deprived of due process of law and equal protection of law as guaranteed by the Constitution of the United States and the State of Louisiana as follows:

"1. Defendant is a member of the colored race.

"2. That considering the negro population of the Parish of Orleans and the number of negroes qualified for jury service, there has been systematic, unlawful and unconstitutional exclusion of negroes from the general venire and Grand Jury Panel and Grand Jury involved in the returning of the Indictment herein; that said systematic, unlawful and unconstitutional exclusion of negroes from said units has existed continuously prior hereto for a number of years in the Parish of Orleans; that said exclusion has existed because of race or color; that a negro has never served on a Grand Jury in the Parish of Orleans; that in those instances where negroes have been included in the general venire and Grand Jury Panels referred to herein, negroes have been discriminated against by an arbitrary and inapportionate [*sic*] limiting of their number by State officials who have not sufficiently acquainted themselves with the qualifications of all potential jurors.

"WHEREFORE, the said John Michel prays that this Motion to Quash be maintained and that the said Indictment, general venire and Grand Jury Panel be declared null and void and that he be discharged from said Indictment."

v. *Louisiana,* 320 U. S. 714.[3] But in the circumstances of a particular case, the application of such a rule may not give a reasonable opportunity to raise the federal question. See *Reece* v. *Georgia, ante,* p. 85, decided this day. Accordingly we pass to a consideration of the facts in each of these cases.

No. 32. John Michel.—Michel was indicted by the grand jury on February 19, 1953, and was presented to the court for arraignment on February 23. He appeared without counsel and the arraignment was continued for one week. During that week, the trial judge talked with Mr. Schreiber, a former assistant district attorney with wide experience in local criminal practice. He asked Mr. Schreiber whether he would take the case if private counsel was not retained. The judge indicated that if Mr. Schreiber accepted, additional counsel would be appointed.

The term of the grand jury which indicted Michel expired March 2, 1953. On that same date Michel appeared again for arraignment without counsel. Mr. Schreiber was also present in court on other business and the trial judge then appointed him counsel for Michel. Whereupon Mr. Schreiber asked the court to give him an opportunity to look it over and continue the matter for one week. No mention of co-counsel was made, and the continuance was granted.

Thereafter, on March 5, Mr. Schreiber received a formal notice of his appointment which, though not required by Louisiana law, appears at times to have been served in appointment cases. On March 6, Mr. Fust was appointed co-counsel. The motion to quash the indictment was filed on March 9—four days after Mr. Schreiber received the formal notice of appointment, and five judicial days

[3] In dismissing the appeal from *State* v. *Wilson, supra,* n. 1, the Court stated: "The motion to dismiss is granted and the appeal is dismissed, it appearing that the decision is based upon a nonfederal ground adequate to support it." 320 U. S. 714.

(7 calendar days) after the expiration of the term of the grand jury. The State demurred on the ground that it came too late.

The determination of a single question of fact is decisive in this case: the precise date of appointment of counsel for Michel. It is contended that Mr. Schreiber was not appointed as counsel until March 5, the date of his formal notice; that he was not aware that he was to be chief counsel until after Mr. Fust told him on the 7th of his appointment to "assist" Mr. Schreiber; and that even if he assumed that he was appointed on March 2, he was unfamiliar with the case and thought the week's continuance held open for that period all of petitioner's rights. The record, however, shows without contradiction that Mr. Schreiber was appointed in open court, in the presence of petitioner, on March 2. The trial judge so found and the Supreme Court of Louisiana explicitly upheld this finding. While such findings are not conclusive on this Court, *Rogers* v. *Alabama,* 192 U. S. 226, they are entitled to great weight, *Fay* v. *New York,* 332 U. S. 261, 272. On a question of state practice with which we are unfamiliar, we will not ordinarily overturn the findings of two courts on the mere assertion of counsel that he did not consider himself appointed on the date of record. Since we find that counsel, a lawyer experienced in state criminal practice, had adequate time to file the motion after his appointment, we hold that the application of § 202 in this case was not unreasonable.

No. 36. Poret and Labat.—These codefendants were also convicted of rape and sentenced to death. Neither made any attack on the composition of the petit jury, but both filed motions to quash their indictments claiming discrimination in the selection of the grand-jury panel. The facts in each case will be considered separately.

Poret.—Shortly after the crime was committed, Poret eluded police officers and fled the State of Louisiana. He

was indicted on December 11, 1950, but he was not arrested and nothing was known of his whereabouts until late 1951 when Louisiana authorities discovered that he was in prison in Tennessee. That State refused to release him until he had served his term. Louisiana filed a detainer against him, and he was returned to New Orleans on October 3, 1952. At his arraignment on October 27, 1952, he was assisted by counsel of his own selection. He pleaded not guilty to the indictment and was granted additional time to file a motion for severance. On November 7, after denial of his motion for severance, he moved—for the first time—to quash the indictment because of systematic exclusion of Negroes from the grand jury. After a hearing at which it was determined that Poret was a fugitive from justice, this motion was denied by the trial court on the ground that it was filed more than a year and a half too late. Under § 202, the time for filing had expired in March 1951, and the trial court held that the provisions of § 202 would not be "suspended or nullified for the benefit of a fugitive from justice who, by his own conduct" was unable to assert his right. The holding was affirmed on this ground by the Supreme Court of Louisiana.

It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights.[4] More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury. The problem here is whether such a limitation may be

[4] "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough." *Williams* v. *Georgia*, 349 U. S. 375, 382–383, and cases cited at n. 6. See also *Brown* v. *Allen*, 344 U. S. 443, 486.

avoided by Poret simply on the showing that he was a fugitive from prosecution throughout the entire period provided him.

Petitioner argues that he has had no opportunity to make his challenge to the grand jury, since the time allowed him by § 202 had expired before he was returned to Louisiana. But the record shows that he was not sentenced in Tennessee until five months after that period had expired, and nothing appears to have intervened during this period except his own voluntary flight. Thus Poret's claim is, in effect, that a flight which itself is a violation of federal law, 18 U. S. C. § 1073, is converted into a federal immunity from the operation of a valid state rule. We do not believe that the mere fugitive status existing here excuses a failure to resort to Louisiana's established statutory procedure available to all who wish to assert claimed constitutional rights. This is not to say that the act of fleeing and becoming a fugitive deprives one of federal rights. We hold only that due regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquisitorial process [5] and that the present case is not one in which this interest must bow to essential considerations of fairness to individual defendants.

But it is said that Poret had no lawyer, either before he fled the State or during the 87-day period from his indict-

[5] Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may affect other convictions based on indictments returned by the same grand jury.

ment to the expiration of his time to file under § 202. However, during all of this time he remained a fugitive, and there is no showing that he could not have filed in time had he not elected to flee. In fact, in each of the other cases before us, the court appointed counsel in ample time for those petitioners to raise their claims. We cannot assume that Poret would not have received like treatment if he had been unable to select counsel of his own choice. We, therefore, conclude that Poret, by his own action, failed to avail himself of Louisiana's adequate remedies. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ." *Yakus* v. *United States,* 321 U. S. 414, 444. Even in federal felony cases where, unlike state prosecutions, indictment by a grand jury is a matter of right, this Court has strictly circumscribed the time within which motions addressed to the composition of the grand jury may be made. Fed. Rules Crim. Proc., 12 (b)(3). Likewise the Congress has denied the benefit of such important federal procedural rules as the Statute of Limitations to "any person fleeing from justice." 18 U. S. C. § 3290.

Poret's case affords a perfect illustration of the necessity for prompt determination of claims such as he raises here. Five years have now elapsed since the crime was committed, and the delay has been largely caused by Poret's own actions. Even if available, and memory permitted, the victim and chief witness would be reluctant to retell the sordid story of her unfortunate experience. Poret's conviction by a petit jury whose composition he did not attack has been affirmed by Louisiana's highest court and no constitutional challenge is made here to the fairness of that trial.

Furthermore, it may be added that after being returned to Louisiana on October 3, and employing his personal

lawyer on October 26, Poret still did not file his motion to quash until November 7. At this time he had already been arraigned and had filed other motions which implied a waiver of his objections to the grand jury. Rather than asserting his federal claim at the first opportunity,[6] he delayed the filing of his motion until 12 days after his selection of counsel. This is four times the period we upheld in *Michel*. We, therefore, find no violation of due process in denying this motion as out of time.

Labat.—Edgar Labat was Poret's codefendant. He was apprehended the evening of the crime, and implicated Poret. Labat was indicted December 11, 1950, and arraigned on January 3, 1951, and he pleaded not guilty. On January 5 the court appointed Mr. E. I. Mahoney as counsel for petitioner. Thereafter the status of the case remained unchanged for more than a year. The next entry is dated January 29, 1952, when Mr. Mahoney asked leave to withdraw. Mr. Gill was thereafter employed, and on June 12, 1952, moved for a continuance. After a hearing, the motion was granted and the case was again continued. In October the codefendant Poret was returned to the State. Labat filed his motion to quash the indictment on November 7. The term of the grand jury that indicted Labat had expired in March 1951.

Petitioner now contends that he was denied effective representation of counsel. *Powell* v. *Alabama*, 287 U. S. 45. Mr. Mahoney had a reasonable time in which to file his motion to quash, but did not do so. It was stated on oral argument that he was 76 or 77 years old when he took the case, and was ill in bed during several months of the year. The trial court and the Supreme Court of Louisiana held that the facts did not show a lack of effective counsel. As in No. 32, Michel's case, we accept these

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[6] Cf. *Agnew* v. *United States*, 165 U. S. 36.

findings. There is little support for the opposite conclusion in the record. Mr. Mahoney was a well-known criminal lawyer with nearly fifty years' experience at the bar. There is no evidence of incompetence.[7] The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness. *Feeley* v. *Ragen,* 166 F. 2d 976. The delay might be considered sound trial strategy, particularly since the codefendant could not be found. We cannot infer lack of effective counsel from this circumstance alone. Such an inference would vitiate state rules of procedure designed to require preliminary objections to be disposed of before trial.

At argument, petitioners for the first time raised the contention that the requirements of § 202 had been applied by the district attorney only when Negro defendants attempted to attack the composition of the grand jury. They cited two cases in which the district attorney had failed to file demurrers to such motions and the indictments were quashed after the time set out in the statute. The present district attorney, who had been in office some eighteen months but was not serving at the time of these prosecutions, stated that it was his policy to apply § 202 whenever possible. Petitioners' contention was not raised below, and we do not believe it has been properly put in issue, *Pennsylvania R. Co.* v. *Illinois Buick Co.,* 297 U. S. 447, 463. If such an allegation had been presented and preserved, and found support in the record,

[7] On the contrary, Mr. Mahoney, since deceased, was recognized as an exceptionally qualified counsel. On June 1, 1955, the legal profession in New Orleans honored him with a plaque which cited him as "an astute and honored criminal lawyer who has ever been mindful of the oath administered him 52 years ago to uphold the law and to guarantee to each accused his day in court." As pointed out in the State's brief, whether or not to make an immediate attack on the grand jury was entirely within the discretion of Mr. Mahoney and there were valid reasons for not doing so at the time.

we might have a very different case here. See *Rogers* v. *Alabama,* 192 U. S. 226.

For the reasons stated the judgments of the Supreme Court of Louisiana are

Affirmed.

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

Petitioners, who are colored, were indicted, convicted and sentenced to death in a Louisiana state court. The grand jury indicting the petitioners was drawn from the parish of Orleans where 32% of the population is colored. Only once within the memory of people living in that parish had a colored person been selected as a grand juror. That juror, who happened to look like a white man, was selected under the mistaken idea that he was one. The foregoing facts are not disputed here.

Each of the petitioners challenges the validity of the indictment against him on the ground that the failure to have colored people on the grand jury was the result of systematic and deliberate exclusion on account of race. In 1875 Congress made it a crime for state or federal officers to disqualify citizens from grand or petit jury service on account of race or color. 18 Stat. 336, as amended, 18 U. S. C. § 243. And since the adoption of the Fourteenth Amendment this Court has consistently held that systematic exclusion of Negroes from grand-jury service violates the Federal Constitution. See *Patton* v. *Mississippi,* 332 U. S. 463, 465–466, and cases there cited. The Court holds, however, that these petitioners had a reasonable opportunity to challenge the composition of the grand jury indicting them but failed to do so, thereby waiving their constitutional and statutory rights to have the charges against them considered by a fair and legal grand jury. Without going into the facts of each particular case, I think that the record shows that

there was no such reasonable opportunity afforded to petitioners Michel and Poret or their counsel. I shall add a few words, however, about the supposed opportunity of petitioner Poret to challenge the validity of the indicting grand jury.

The state courts have found that Poret fled from Louisiana after allegedly committing the crime for which he was indicted. But the time allowed Poret by state law to challenge the validity of his grand jury expired long before he was arrested and brought back to Louisiana. It is apparent therefore that after his arrest Poret never had any opportunity at all to challenge the grand jury. It is true that if Poret had not fled and had been arrested and had the benefit of counsel early enough he could have challenged the grand jury's composition. For this reason the Court holds that he forfeited his federally guaranteed right to have his case considered by an unpacked grand jury. I cannot agree that the right to the kind of fair trial guaranteed by the Federal Constitution and congressional enactment can be thus denied by a State. If Poret can be denied this constitutional right, why not others? Could a state statute of limitations like this one declare that anyone under indictment who flees the State has thereby waived his right to counsel or his right to be tried by an unbiased judge? Cf. *In re Murchison,* 349 U. S. 133.

Poret could have been charged with a federal crime under 62 Stat. 755, 18 U. S. C. § 1073, for fleeing from one State to another to avoid prosecution. But he could not have been convicted until after adequate notice and a fair trial on an indictment returned by a fair grand jury selected without regard to race or color. And certainly Congress did not by this statute authorize state courts to forfeit the federally protected rights of an accused because he had violated the federal law against fleeing. I suppose Congress would have no power to do such a

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thing. Under our system even a bad man is entitled to have his case considered at every stage by a fair tribunal.

No sound reasons have been advanced supporting the power of a State to use the device here contrived to justify trial of defendants on indictments returned by grand juries in flagrant violation of the Federal Constitution. The arguments advanced by the Court find no substantial support in any of our prior decisions. On the contrary, this Court has strongly asserted the right of defendants to raise defenses permitted others despite their guilt or innocence of charges that are separate and distinct from those upon which they are tried. See *Hovey* v. *Elliott,* 167 U. S. 409. Cf. majority and dissenting opinions in *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U. S. 37. The Court's opinion here appears to me to give far too little weight to the constitutional and statutory rights of an accused to be indicted and tried by juries selected without racial discrimination.

I would reverse the convictions of Poret and Michel. Since Labat and Poret were jointly indicted by the same unconstitutionally selected grand jury, I would vacate the conviction of Poret's codefendant Labat. See *Ashcraft* v. *Tennessee,* 322 U. S. 143, 155–156, and 327 U. S. 274, 279. Cf. *Malinski* v. *New York,* 324 U. S. 401.

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

I do not think that petitioners were accorded the opportunity, guaranteed by due process of law, to challenge the constitutionality of the composition of the grand juries that indicted them.

As to Michel, the trial judge found that counsel was appointed on March 2, 1953, three days before the deadline for filing a motion to quash. From the record it is clear that the trial judge believed that he appointed counsel on March 2. But the record contains a sworn statement

by Michel's counsel that he did not consider himself appointed until he received official notice from the court on March 5; and that is what he tells us with great seriousness on oral argument.

The crucial question in this case is not what the trial judge thought, but what the effect of the misunderstanding between him and counsel had upon the constitutional rights of Michel. If counsel on March 2 believed that he was not yet appointed and rendered no service to the petitioner during this critical three-day period, the appointment was not an effective appointment. On this record and on the representations made to us on oral argument, it is clear that Michel had no real opportunity to raise the important constitutional question that might well have saved him from execution. Without counsel, of course, he had no effective opportunity to raise the constitutional question. See *Reece* v. *Georgia, ante,* p. 85. I would not allow any man to go to his death because a misunderstanding between the judge and his lawyer prevented him from getting a hearing on a constitutional question.

Petitioner Poret apparently fled Louisiana shortly after the crime was committed. He was apprehended in Tennessee, but long after the indictment had been returned and the statutory period for filing a motion to quash had expired. The opportunity to raise the constitutional objection, therefore, was foreclosed before he was arraigned and, as far as the record shows, before he had any knowledge that the indictment was pending against him. It's as if the grand jury had been impaneled before the commission of the offense, and the time for raising objections to it expired with the impaneling, as was the case of *Carter* v. *Texas,* 177 U. S. 442, 447. Under these circumstances, Poret had no real opportunity to challenge the constitutionality of the composition of the grand jury. His flight was a wrong that could be punished. But it is dangerous

doctrine to deprive a man of his constitutional rights in one case for his wrongful conduct in another. That is a doctrine that currently is gaining momentum. I disavow it. I would give every accused, regardless of his record, conduct, reputation or beliefs, the full benefit of the constitutional guarantees of due process. Every accused should have the right on his arrest and arraignment to invoke them. Poret goes to his death without ever having had an opportunity to show that the grand jury which indicted him was not drawn in accordance with the mandate of the Fourteenth Amendment.

I would reverse both convictions* and give the defendants an opportunity to come forward with their evidence that the grand juries which indicted them were unconstitutional because of the systematic exclusion of Negroes from the panels.

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*The conviction of Labat should be vacated because he was jointly indicted with Poret by the same grand jury whose composition is challenged on constitutional grounds. Cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* WARREN COMPANY, INC.

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

No. 27. Argued October 20, 1955.—Decided December 12, 1955.

The National Labor Relations Board ordered an employer to cease and desist from certain unfair labor practices, to reinstate certain discharged employees with back pay, to bargain collectively with the union, and to post notices stating that it would do so. The employer complied with all of these orders except the order to bargain collectively, claiming that the union no longer represented a majority of its employees. In an enforcement proceeding, the Court of Appeals decreed enforcement, overruling the employer's contention that the union's loss of majority representation of the employees relieved the employer from compliance with the order to bargain collectively. Subsequently, the Board petitioned the Court of Appeals to find the employer in contempt for continued refusal to bargain collectively; but the Court declined to do so on the ground that the union no longer represented a majority of the employees. *Held:* It was the statutory duty of the Court of Appeals to adjudge the employer in contempt of its enforcement decree, and the Court exceeded the allowable limits of its discretion in declining to do so. Pp. 108–113.

(a) In the circumstances of this case, it was the lawful duty of the employer to bargain collectively with the union for a reasonable time. P. 112.

(b) For failure to so bargain, it was the statutory duty of the Court of Appeals, on petition of the Board, to adjudge the employer in contempt of its enforcement decree. P. 112.

(c) The National Labor Relations Act contemplates cooperation between the Board and the Courts of Appeals, both at the enforcement and the contempt stages in order to effectuate its purposes. P. 112.

(d) The granting or withholding of such remedial action is not wholly discretionary with the Court, and the Court of Appeals exceeded the allowable limits of its discretion in denying relief to the Board. P. 113.

214 F. 2d 481, reversed and remanded.

David P. Findling argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Theophil C. Kammholz* and *Dominick L. Manoli.*

John Wesley Weekes argued the cause and filed a brief for respondent.

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

On August 7, 1952, the United States Court of Appeals for the Fifth Circuit entered its decree enforcing in full an order of the National Labor Relations Board issued on June 30, 1950, against respondent herein directing it (1) to cease and desist from refusing to bargain collectively with District Lodge No. 46, International Association of Machinists, a labor union, as the exclusive bargaining agent of all its tool and die makers, machinists, etc., and from discouraging membership in the union; (2) to take affirmative action upon request to bargain collectively with the union as the exclusive representative of respondent's said employees and, if an understanding should be reached, to embody such understanding in a signed agreement; and (3) to post at its plant a notice to be furnished by the Regional Director of the National Labor Relations Board and signed by the officers of respondent agreeing to desist from certain unfair labor practices, and to bargain collectively with the union upon request as required in the order. 197 F. 2d 814.

Respondent had posted the notice and restored certain employees to their jobs as required by the order, but declined to bargain collectively with the union, although requested by the latter to do so on numerous occasions over a period of seven months, basing its refusal to do so on the ground that the union had lost its alleged majority status by reason of a turnover in personnel. It demanded proof from the union that it represented a majority of the employees then employed in the bargaining unit. The

union replied that its majority status had been determined by the Board and by the Court of Appeals in its decree of enforcement. Respondent never bargained collectively with the union, either before or after the decree, contending at all times that the latter did not have majority status, although in 1948 the employees had designated the union as their bargaining agent and the Board had found that respondent had avoided collective bargaining through its lack of good faith and because of its own unfair labor practices. This finding was not challenged by respondent and was adopted by the Court of Appeals in its enforcement decree of August 7, 1952. Respondent then filed a petition with the Board on January 27, 1953, requesting an election in the bargaining unit. Because of respondent's failure to remedy its unfair labor practice by good-faith bargaining with the union for a reasonable period, the Board sustained its Regional Director's dismissal of the petition.

On September 22, 1953, the Board filed its petition in the Court of Appeals, specifically setting forth the conduct of respondent showing its failure and refusal to comply with the court's decree enforcing the Board's order, and asking that respondent be required to show cause why it should not be adjudged in civil contempt. The Board also asked the court to institute a prosecution for criminal contempt against respondent. Respondent answered, claiming compliance with the decree except that since the decree of the court it had refused to bargain collectively with the union as the bargaining agent of its employees because for a long time the union had not represented its employees as such bargaining agent.

The Court of Appeals concluded that no case for a civil contempt order had been made out and dismissed the proceeding. The court held that, notwithstanding the prior entry of a decree directing respondent to bargain collectively with the union, respondent's compliance with

other provisions of the decree entitled it to refuse to bargain collectively since it had ascertained that even before the decree, because of a turnover in personnel, the union had lost majority status. The court stated that to hold respondent liable in contempt under these circumstances would do violence to its decree and to the Act rather than to vindicate them.

Because of the importance of the question in the administration of the National Labor Relations Act, we granted certiorari, 348 U. S. 958. Petitioner does not press here its prayer in the court below for an adjudication of criminal contempt.

In arriving at its decision purging respondent of contempt, the Court of Appeals stated that respondent had "complied fully with all the provisions" of its enforcement order; that it had "made an offer to bargain with the union;" that the union's alleged loss of majority status was "without fault" on the respondent's part; and that the Board took the position that respondent was required "to bargain indefinitely" notwithstanding the union's loss of majority status.

If we had so understood the record, certiorari would not have been granted, but we do not so understand it. We believe the facts are to the contrary in each instance.

The original order of the Board found not only that respondent for a period of four years after notification by the union of its majority status had refused to bargain with it, but had also used deliberate and flagrant unfair labor practices to deprive the union of its majority status. In its opinion enforcing this cease and desist order, the Court of Appeals stated:

> "With commendable candor respondent's counsel has stated its position as follows:
>
> " 'We have controverted the findings of fact of the Board in our Response, but in all fairness to this

> Court we are constrained to admit that there is sufficient evidence, even though disputed, upon which to base the Board's order.' " 197 F. 2d 814.

The findings of both the Board and the Court of Appeals are, therefore, clear that there had been no willingness on respondent's part up to that date, August 7, 1952, to bargain with the union.

In its "Answer of the Respondent to the petition of the Board for adjudication in Civil Contempt and other Civil Relief," filed November 12, 1953, respondent alleged:

> "As shown hereinbefore and hereinafter Respondent has refused to bargain collectively with the Union because it did not represent a majority of the employees."

There is nothing in the record to indicate that this situation has ever changed in the slightest respect, and this in face of the fact that the union has at all times been willing to bargain.

Neither does the record indicate that the Board insisted upon respondent's bargaining with the union indefinitely; on the contrary, it demonstrates that the Board has urged here and in the court below that respondent should bargain in good faith only for a reasonable length of time after designation of the union as the bargaining agency.

It cannot be said that respondent is "without fault," because the record is clear that at no time has respondent bargained in good faith with the union. It has met with the union but twice since 1948 and on neither of those occasions did it bargain.[1] It has avoided other meetings

[1] There was only one meeting after entry of the enforcement decree. At this meeting, on January 19, 1953, respondent stated that it was in doubt as to the majority status of the union and for that reason "hesitated" to bargain with the union on the matter of a contract. This position was confirmed in a letter dated January 20, 1953, in which respondent advised the union of its intention to petition the Board for a decertification election.

by evasion and refusal or failure to respond to a request therefor.

The sole question necessary for determination here is whether an employer who has been found guilty by the Board of unfair labor practices in refusing to bargain with a union designated as the exclusive representative of its employees and who has been directed to so bargain, is, after a decree enforcing the order and without remedying its unfair labor practices, legally justified in refusing to bargain with the union because it contends the union does not in fact have majority status in its plant, or must such employer bargain fairly for a reasonable length of time in accordance with the order to avoid an adjudication in civil contempt.

We believe that an employer in such circumstances cannot lawfully refuse to bargain; that he must do so for a reasonable time; and that for a failure to so bargain it is the statutory duty of the Court of Appeals on petition of the Board to adjudge him in contempt of its enforcement decree. To conclude otherwise would greatly weaken the administration of the National Labor Relations Act.

That Act contemplates cooperation between the Board and the Courts of Appeals both at the enforcement and the contempt stages in order to effectuate its purposes. It consigns certain statutory functions to each,[2] and where the Board has acted properly within its designated sphere, the court is required to grant enforcement of the Board's order.[3] The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated. It is for this reason that Congress gave the judicial remedy of con-

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[2] *United States* v. *Morgan*, 307 U. S. 183.

[3] *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318.

tempt as the ultimate sanction to secure compliance with Board orders.[4] The granting or withholding of such remedial action is not wholly discretionary with the court.[5] This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence.[6]

It seems clear to us that in the light of these principles and the facts of this case, the court below exceeded the allowable limits of its discretion in denying relief to the Board and that its judgment must be reversed and remanded for proceedings in conformity with this opinion.

Reversed and remanded.

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[4] *Labor Board* v. *Mexia Textile Mills*, 339 U. S. 563.

[5] *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187.

[6] *International Salt Co.* v. *United States*, 332 U. S. 392; *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Penfield Co.* v. *Securities and Exchange Commission*, 330 U. S. 585.

ARIZONA *v.* CALIFORNIA ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER.

No. 10, Original. Argued December 8, 1955.—Decided December 12, 1955.

Ruling on motion of California to join other States as parties to this action. P. 115.

George I. Haight served as Special Master by appointment of the Court, 347 U. S. 986, and filed the report on which this ruling was made. After his death, *Simon H. Rifkind* was appointed Special Master, 350 U. S. 812.

John P. Frank and *Ernest W. McFarland* argued the cause for the State of Arizona, complainant. On the brief were *Robert Morrison,* Attorney General, *John H. Moeur, Mr. Frank, John Geoffrey Will, Burr Sutter, Perry Ling* and *Theodore Kiendl.*

Northcutt Ely, Assistant Attorney General of California, argued the cause for defendants. On the brief were *Edmund G. Brown,* Attorney General, *Mr. Ely, Robert L. McCarty, Prentiss Moore* and *Gilbert F. Nelson,* Assistant Attorneys General, and *Charles E. Corker, Howard I. Friedman, Burton J. Gindler, James B. McKenney, John R. Alexander* and *George Brody,* Deputy Attorneys General, for the State of California, *Francis E. Jenney* for the Palo Verde Irrigation District, *Harry W. Horton* and *R. L. Knox, Jr.* for the Imperial Irrigation District, *Earl Redwine* for the Coachella Valley County Water District, *James H. Howard, Charles C. Cooper, Jr., Donald M. Keith, Alan Patten* and *Frank P. Doherty* for the Metropolitan Water District of Southern California, *Roger Arnebergh* for the City of Los Angeles, and *T. B. Cosgrove* for the City of San Diego, defendants.

W. T. Mathews, Special Assistant Attorney General, argued the cause for the State of Nevada, Intervener. With him on the brief were *Harvey Dickerson,* Attorney General, and *Wm. J. Kane,* Special Assistant Attorney General.

Hatfield Chilson, Special Assistant Attorney General of Colorado, argued the cause for the States of Colorado, New Mexico, Utah and Wyoming. On the brief were *Duke W. Dunbar,* Attorney General, and *Mr. Chilson* for the State of Colorado, *Richard Robinson,* Attorney General, and *Fred E. Wilson* for the State of New Mexico, *E. R. Callister,* Attorney General, and *Dennis McCarthy,* Special Assistant Attorney General, for the State of Utah, and *George F. Guy,* Attorney General, for the State of Wyoming.

PER CURIAM.

The motion of California to join the States of Colorado and Wyoming as parties to this cause is denied. The motion to join Utah and New Mexico as parties is granted only to the extent of their interest in Lower Basin waters.

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN would grant the motion.

THE CHIEF JUSTICE did not participate in this proceeding.

PENNSYLVANIA ex rel. HERMAN *v.* CLAUDY, WARDEN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DIVISION.

No. 45. Argued November 14, 1955.—Decided January 9, 1956.

In a state court, petitioner pleaded guilty to numerous charges of burglary, larceny, forgery and false pretense, and he was sentenced to imprisonment for terms aggregating from 17½ to 35 years. Eight years later, he petitioned the same court for habeas corpus, claiming that his conviction was invalid under the Due Process Clause of the Fourteenth Amendment, because (1) his pleas of guilty resulted from coercion and threats by state officers, and (2) he was never advised of his right to counsel or given the benefit of counsel. The District Attorney filed an answer challenging the materiality of some of petitioner's allegations, denying others and urging that the writ be refused because of petitioner's tardiness in challenging the judgment. The petition was dismissed summarily without a hearing. *Held:* Petitioner was entitled to a hearing, and the judgment is reversed. Pp. 117–123.

(a) Petitioner's allegations as to his treatment prior to confession and his understanding of the nature and consequences of a guilty plea present the very kind of dispute that should be decided only after a hearing. Pp. 119–121.

(b) Neither petitioner's statement at his trial that he was guilty and threw himself upon the mercy of the court nor any other statements made by him at that time were in themselves sufficient to refute as frivolous or false the allegations in his petition for habeas corpus concerning matters not shown by the record. P. 121.

(c) The number and complexity of the charges against petitioner, as well as their seriousness, create a strong conviction that no layman could have understood the accusations and that petitioner should have been advised of his right to be represented by counsel. P. 122.

(d) The mere fact that petitioner had, without benefit of counsel, pleaded guilty to an offense two years before did not show that he had the capacity to defend himself against the numerous charges here. *Gibbs* v. *Burke,* 337 U. S. 773; *Uveges* v. *Pennsylvania,* 335 U. S. 437. Pp. 122–123.

(e) Petitioner was not barred from presenting his challenge to the conviction, although eight years had passed before his petition for habeas corpus was filed. *Uveges* v. *Pennsylvania, supra; Palmer* v. *Ashe,* 342 U. S. 134. P. 123.

(f) Petitioner's allegations were sufficient to entitle him to relief, if proven. Pp. 119–120, 123.

(g) Petitioner cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers, and he is entitled to relief if he can prove his charges. P. 123.

Reversed and remanded.

Herbert Monte Levy and *Marjorie Hanson Matson* argued the cause and filed a brief for petitioner.

Wray G. Zelt, Jr. argued the cause for respondent. With him on the brief were *Harold V. Fergus* and *John F. Roney.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1945 petitioner Stephen Herman pleaded guilty in a Pennsylvania state court to 8 charges of burglary, 12 of larceny, 8 of forgery, and 2 of false pretense.[1] He was sentenced to serve 17½ to 35 years in the penitentiary, 2½ to 5 years on each of the charges, some running consecutively, some concurrently. Eight years later, in 1953, he filed this petition for habeas corpus in the same Pennsylvania court, asking that his conviction be held invalid as in violation of the Due Process Clause of the Fourteenth Amendment. He alleged: (1) that his pleas of guilty were the result of coercion and threats by state officers and (2) that at no stage of the proceedings was he either advised of his right to or given the benefit of counsel. The District Attorney filed an answer challenging the materiality of some of petitioner's allegations,

[1] The courts below so computed the charges. Petitioner counts only 27 charges. The record casts doubt on the accuracy of both computations.

denying others, and urging that the writ be refused because of petitioner's tardiness in challenging the judgment. He asked that the petition be summarily dismissed on the ground that "it would be a waste of time and very expensive for Washington County to have this defendant go into a hearing to prove charges that he could have raised at the time he was sentenced by this Court." The petition was summarily dismissed without a hearing by the same trial judge who had sentenced petitioner.

On appeal, the Superior Court of the Commonwealth of Pennsylvania affirmed the dismissal. 176 Pa. Super. 387, 107 A. 2d 595. The Supreme Court of Pennsylvania denied leave to appeal without opinion. We granted certiorari, 349 U. S. 904, because summary dismissal in the face of the petitioner's serious allegations appeared to be out of line with decisions of this Court.

Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause; [2] (2) where a person convicted in a state court has not intelligently and understandingly waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel, the Due Process Clause invalidates his conviction; [3] (3) where a denial of these constitutional protections is alleged in an

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[2] *E. g., Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227; *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Harris* v. *South Carolina,* 338 U. S. 68; *Leyra* v. *Denno,* 347 U. S. 556.

[3] *E. g., Uveges* v. *Pennsylvania,* 335 U. S. 437; *Gibbs* v. *Burke,* 337 U. S. 773; *Rice* v. *Olson,* 324 U. S. 786; *Von Moltke* v. *Gillies,* 332 U. S. 708; *Palmer* v. *Ashe,* 342 U. S. 134; *Bute* v. *Illinois,* 333 U. S. 640; *Betts* v. *Brady,* 316 U. S. 455. It was pointed out in the *Uveges* case that a minority of the Court have contended that *all* persons charged with crimes are entitled to counsel under the Sixth and Fourteenth Amendments.

appropriate proceeding by factual allegations not patently frivolous or false on a consideration of the whole record, the proceeding should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations.[4]

In the light of our previous holdings we now consider the allegations of the petition for habeas corpus and the prosecuting officer's answer. The petition alleged:

Petitioner, who had been to school only 6 years, was 21 years old when arrested. His only prior experience with criminal procedure was 2 years earlier, when without the benefit of counsel he pleaded guilty to charges of burglary, larceny, and forgery, and was sentenced to 6 to 12 months in jail. After his arrest on the present charges he was held incommunicado for 3 days. During this period a state trooper grabbed him by the neck and threatened to choke him if he did not confess, and there were threats against the safety of his wife and daughter. Petitioner finally confessed after 72 hours of intermittent questioning and was taken to a justice of the peace. He waived indictment and agreed to plead guilty to 3 charges. More than a month later he was taken before the Court of Common Pleas and charged with some 30 offenses. The assistant prosecuting attorney demanded that petitioner sign a plea of guilty to all the charges. When petitioner asked what he was signing, the assistant prosecuting attorney said "Sign your name and forget it." Petitioner was not informed of the seriousness of the charges by the prosecutor or the judge; he did not know that his plea of guilty could result in a maximum sentence of some 315 years; he did not know nor was he informed that he could have counsel.

[4] *E. g., Smith* v. *O'Grady,* 312 U. S. 329; *Hawk* v. *Olson,* 326 U. S. 271; *Palmer* v. *Ashe,* 342 U. S. 134; *Chessman* v. *Teets,* 350 U. S. 3. Cf. *Moore* v. *Dempsey,* 261 U. S. 86, 92; *Walker* v. *Johnston,* 312 U. S. 275.

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Petitioner pleaded guilty to all of the charges against him. He now says he was innocent of all but one.

The District Attorney's answer alleged: It was immaterial that petitioner was only 21 years old and of limited educational background. Since petitioner had previous experience in criminal procedure from the former case in which he pleaded guilty, he understood his rights and was barred from alleging that his lack of criminal experience violated due process. It was not necessary that a defendant should have the advice, support, and assistance of relatives or friends even if it be assumed that there was anything in the record to show that such an opportunity was denied to petitioner. Petitioner had no constitutional right to be informed by the court or prosecuting attorney of his right to counsel or of the severity of the sentences which might be imposed upon him. There was no showing that petitioner had been injured by not having counsel. The District Attorney did not deny that petitioner had been told in the courtroom to "Sign your name and forget it," but denied only "that the statements were made by the Assistant District Attorney in order to obtain pleas to the charges involved." The District Attorney defended the State's right to confine petitioner for a period of 72 hours on the ground that this was not "an unreasonable length of time to hold a defendant." The charge that the officers threatened the safety of petitioner's wife and daughter was specifically denied as untrue, as was the charge that petitioner was grabbed by the neck. The answer alleged that petitioner's confession was wholly voluntary.

The foregoing narrative of the allegations in the petition and the answer reveals a sharp dispute as to the facts material to a determination of the constitutional questions involved. The allegations as to petitioner's treatment prior to confession and his understanding of the nature and consequences of a guilty plea present the very

kind of dispute which should be decided only after a hearing. It is true that the trial record shows that petitioner told the judge that he was guilty and said "I throw myself at the mercy of the court, Your Honor." But neither these nor any other statements made before the trial judge at that time [5] are in themselves sufficient to refute as frivolous or false the serious charges made by the petitioner concerning matters not shown by the record.

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[5] When petitioner was brought before the trial judge to plead guilty the prosecuting attorney talked at length about the charges against petitioner, but said nothing about sentences which could be imposed. Petitioner's part in these proceedings was very small. The following is the full record of his participation:

[Mr. Docktor (the prosecuting attorney):] ". . . How old are you now?

"By the Defendant: Twenty-one.

"By Mr. Docktor: Twenty-one years of age. Is there anything you wish to state to the Court about your case?

"By the Defendant: I throw myself—

"By the Court: You will have to speak louder.

"By the Defendant: I throw myself at the mercy of the court, Your Honor.

"By Mr. Docktor: I wish to state for the record that the informations and prosecutions were made by H. M. Jaynes of the Pennsylvania State Police.

"By the Court (addressing Defendant): Where have you worked since you were paroled?

"By the Defendant: I worked at the Hazel.

"By the Court (addressing Defendant): Have you been working all of the time since you were paroled in 1943?

"By the Defendant: No, sir.

"By the Court: 1944 I believe it was, wasn't it?

"By the Defendant: No, sir; I was working at the hospital, too.

"By the Court: Sir?

"By the Defendant: I was working at the hospital and Hazel.

"By the Court: At the hospital?

"By the Defendant: Yes.

"By the Court: How did you come to be working at the hospital?

"By the Defendant: I worked there. I was paroled for that.

"By the Court: You are the fellow who ran away from there while

See *Palmer* v. *Ashe,* 342 U. S. 134, 137. It is entirely possible that petitioner's prior confession caused him, in the absence of counsel, to enter the guilty plea. Moreover, the number and complexity of the charges against petitioner, as well as their seriousness, create a strong conviction that no layman could have understood the accusations and that petitioner should, therefore, have been advised of his right to be represented by counsel. We cannot agree with the Pennsylvania Superior Court that the mere fact that petitioner had, without the benefit of counsel, pleaded guilty to an offense 2 years before showed that he had the capacity to defend himself against the 30 charges here. We held in *Gibbs* v. *Burke,* 337 U. S.

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you were on parole.

"By the Defendant: That is right; yes, sir.

"By the Court: Will you explain to me why the Court should extend any leniency to you?

"By the Defendant: No, sir.

"By the Court: We have trusted you twice before and you have never complied with any of the conditions that you were paroled on.

"By the Defendant: I tried to.

"By the Court: You didn't even try to. You could have continued to work up there and you wouldn't do that. Where did you go to when you ran away from the job at the hospital?

"By the Defendant: I started to work down at Hazel.

"By the Court: You were working around this town—

"By the Defendant: Yes, sir.

"By the Court: —while the officers were searching for you?

"By the Defendant: No.

"By the Court: Where were you?

"By the Defendant: I was here in town but not working.

"By the Court: You secured your parole on promise of good behavior.

"By the Defendant: Yes, sir.

"By the Court: In the meantime, you have committed numerous burglaries and forgeries and various felonies?

"By the Defendant: Yes, sir.

"By the Court: Now you want the Court to have mercy. There is an end to being merciful. We did that in 1944. . . ."

773, that in spite of Gibbs' conviction in 6 prior criminal cases the circumstances showed he was entitled to the benefit of counsel. In *Uveges* v. *Pennsylvania,* 335 U. S. 437, where the facts were strikingly similar to those presented here, we held that representation by counsel was required by the Due Process Clause. Nor was petitioner barred from presenting his challenge to the conviction because 8 years had passed before this action was commenced. Uveges did not challenge his conviction for 7 years. 335 U. S. 437, 438–439. And in a later case we held that a prisoner could challenge the validity of his conviction 18 years after he had been convicted. *Palmer* v. *Ashe,* 342 U. S. 134. The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy.

The chief argument made by the State here in support of the court's summary dismissal of the petition is this: "Counsel for petitioner argues that since facts are alleged in the petition, a hearing must be held. Since our answer contradicted the allegations in the petition, the lower court was not required to grant a hearing. This contention was sustained by the Superior Court." We cannot accept this argument. Under the allegations here petitioner is entitled to relief if he can prove his charges. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers.

The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

RYAN STEVEDORING CO., INC. *v.* PAN-ATLANTIC STEAMSHIP CORP.

ON REHEARING.

No. 4. Argued March 3–4, 1955; affirmed by an equally divided Court, April 11, 1955; rehearing granted, May 16, 1955; reargued October 11–12, 1955.—Decided January 9, 1956.

Without signing a formal stevedoring contract or an express indemnity agreement, a stevedoring contractor agreed to perform all stevedoring operations required by a shipowner in the latter's coastwise service. Under this agreement, the contractor loaded a ship at Georgetown, S. C., with a mixed cargo, including rolls of pulpboard, and unloaded it in navigable water at a pier in Brooklyn, N. Y. During the unloading, a longshoreman employed by the contractor was injured by a roll of pulpboard which had been insufficiently secured when stored by the contractor in Georgetown. Under the Longshoremen's Act, the contractor's insurance carrier paid the longshoreman compensation and furnished him medical services, without any formal award by the Deputy Commissioner. Claiming that, because of unsafe stowage of the cargo, the ship was unseaworthy and that the shipowner had neglected to furnish him with a safe place to work, the longshoreman sued the shipowner and obtained a judgment for a much larger sum, from which the contractor's insurance carrier was to be reimbursed for the amount it had advanced to the longshoreman. *Held:* On the shipowner's third-party complaint against the contractor, the shipowner was entitled to reimbursement from the contractor for the amount of the judgment against the shipowner. Pp. 125–135.

1. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, which provides that the liability of an employer prescribed in § 4 "shall be exclusive and in place of all other liability of such employer to the employee," does not preclude assertion by the shipowner of the contractor's contractual liability to it, though the contractor was also the employer of the injured longshoreman. Pp. 128–132.

2. Even in the absence of an express agreement of indemnity, the contractor was obligated to reimburse the shipowner for damages caused it by the contractor's breach of its contract to stow the cargo properly and safely. Pp. 132–134.

3. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, distinguished. P. 133.

4. That the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage and did not do so does not bar the shipowner's right to recover from the contractor any damage caused by the contractor's failure to stow the rolls safely. Pp. 134–135.

211 F. 2d 277, affirmed.

Sidney A. Schwartz argued the cause for petitioner. With him on the brief was *Edward Ash.*

Edward J. Behrens argued the cause for respondent. With him on the brief was *Charles H. Lawson.*

By special leave of Court, 348 U. S. 948, *Leavenworth Colby* argued the cause for the United States, as *amicus curiae,* urging affirmance. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This case presents two questions as to the liability of a stevedoring contractor to reimburse a shipowner for damages paid by the latter to one of the contractor's longshoremen on account of injuries received by him in the course of his employment on shipboard. 1. The first question is whether the Longshoremen's and Harbor Workers' Compensation Act [1] precludes a shipowner from asserting such a liability. 2. The second is whether the liability exists where a contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operations and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo. For the reasons hereafter stated, we answer the first question in the negative and the second in the affirmative.

In 1949, respondent, Pan-Atlantic Steamship Corporation, a Delaware corporation, operated the SS. *Canton*

[1] 44 Stat. 1424 *et seq.*, as amended, 33 U. S. C. § 901 *et seq.*

Victory in the American coastwise trade under a bareboat charter. As evidenced by letters, but without a formal stevedoring contract or an express indemnity agreement, respondent secured, for that year, the agreement of petitioner, Ryan Stevedoring Co., Inc., an Alabama corporation, to perform all stevedoring operations required by respondent in its coastwise service. Pursuant to that contract, petitioner loaded the *Canton Victory* at Georgetown, South Carolina, with mixed cargo. This included pulpboard, such as is used in making corrugated paper and paper bags, shipped in rolls 4 feet wide and 3 to 5 feet long. Petitioner stowed some of these rolls side-by-side on the floor of Hatch No. 3 and "nested" others above them by placing the upper rolls in the troughs between the lower ones. To immobilize the rolls, it was necessary to secure or "chock" the bottom tier with wedges or with miscellaneous pieces of wood known as "dunnage." There is little evidence as to what took place when the rolls were stowed at Georgetown but it was the uniform practice of petitioner's longshoremen to stow such cargo under the immediate direction of their hatch foremen, while respondent's cargo officers supervised the loading of the entire ship and had authority to reject unsafe stowage.

A few days later, on July 20, 1949, in navigable water at a pier in Brooklyn, New York, petitioner engaged in unloading these rolls. While one of petitioner's Brooklyn longshoremen, Frank Palazzolo, was working in Hatch No. 3, one roll, weighing about 3,200 pounds, broke loose from the others, struck him violently and severely injured his left leg. There is no evidence that he was negligent. On the other hand, it appears that the rolls in Hatch No. 3 had been insufficiently secured when stowed by petitioner in Georgetown. This is established by the absence of proper wedges and dunnage holding the rolls in place at the time of the accident.

Petitioner's insurance carrier under the Longshoremen's Act paid Palazzolo $2,940 compensation and furnished him medical services costing $9,857.36, all without any formal award by the Deputy Commissioner. As permitted by § 33 of that Act, Palazzolo sued the respondent-shipowner in the Supreme Court of New York.[2] He claimed that the unsafe stowage of the cargo, which caused his injuries, established either the unseaworthiness of the ship, or the shipowner's negligence in failing to furnish him with a safe place to work, or both. The shipowner removed the case to the United States District Court for the Eastern District of New York and filed a third-party complaint against petitioner. By stipulation, Palazzolo's case against the shipowner was tried to a jury, which returned a verdict in his favor for $75,000.

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[2] "SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary [of Labor] may provide, to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

. . . . . .

"(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." 44 Stat. 1440, as amended, 33 U. S. C. § 933 (a) (b) and (i).

For procedure to secure an award of compensation, see § 19, 44 Stat. 1435–1436, as amended, 33 U. S. C. § 919.

A longshoreman, after accepting compensation payments from his employer without an award, may sue a third-party tortfeasor for his injuries. *American Stevedores* v. *Porello,* 330 U. S. 446, 454–456. If the facts permit, he may recover from the shipowner for unseaworthiness, or for negligence, or both. *Pope & Talbot* v. *Hawn,* 346 U. S. 406.

The District Court entered judgment on the jury verdict. From the above sum, petitioner's insurance carrier was to be reimbursed for the $12,797.36 it had advanced because of Palazzolo's injuries.

Also by stipulation, the shipowner's third-party complaint was submitted on the same record to the judge who had presided over Palazzolo's case. He dismissed the complaint. 111 F. Supp. 505. The Court of Appeals affirmed Palazzolo's judgment but reversed the dismissal of the third-party complaint and directed that judgment be entered for the shipowner. 211 F. 2d 277. Petitioner, the stevedoring contractor, contends that the order reversing the dismissal of the impleader suit is erroneous. Because of the wide application of the case and the conflicting views that have been expressed on the issues, we granted certiorari. 348 U. S. 813. The United States filed a brief as *amicus curiae* in support of the shipowner and took part in the oral argument. 348 U. S. 948. The judgment was affirmed by an equally divided Court, 349 U. S. 901, but the case was restored to the docket for reargument before a full Court, 349 U. S. 926.

1. *The first question is whether the Longshoremen's Compensation Act precludes the assertion by a shipowner of a stevedoring contractor's liability to it, where the contractor is also the employer of the injured longshoreman.*

Neither court below discussed this question, although petitioner presented it to them. Petitioner's argument is based upon the following provision in the Longshoremen's and Harbor Workers' Compensation Act:

> "SEC. 5. The *liability of an employer* prescribed in section 4 [for compensation] *shall be exclusive and in place of all other liability of such employer to the employee,* his legal representative, husband or wife,

> parents, dependents, next of kin, *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death,* except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. . . ." (Emphasis supplied.) 44 Stat. 1426, 33 U. S. C. § 905.

The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone* claiming under or through such employee, *on account of his injury or death arising out of that employment.* In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other hand, the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages.[3]

Section 5 of the Act expressly excludes the liability of the employer "to the employee," or others, entitled to recover "on account of such [employee's] injury or death." Therefore, in the instant case, it excludes the

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[3] In the instant case, the *stevedoring contractor,* however, has received a contractual *quid pro quo* from the shipowner for assuming responsibility for the proper performance of all of the latter's stevedoring requirements, including the discharge of foreseeable damages resulting to the shipowner from the contractor's improper performance of those requirements. See Restatement, Contracts, §§ 334, 330; *Bethlehem Shipbuilding Corp.* v. *Gutradt Co.,* 10 F. 2d 769; *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640 (C. A.).

liability of the stevedoring contractor to its longshoreman, and to his kin, for damages on account of the longshoreman's injuries. At the same time, however, § 5 expressly preserves to each employee a right to recover damages against third persons.[4] It thus preserves the right, which Palazzolo has exercised, to recover damages from the shipowner in the present case. The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless. Petitioner's agreement in the instant case amounts to the latter for, as will be shown, it is a contractual undertaking to stow the cargo "with reasonable safety" and thus to save the shipowner harmless from petitioner's failure to do so.

In the face of a formal bond of indemnity this statute clearly does not cut off a shipowner's right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages "on account of" an employee's "injury or death." It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship.

A like result occurs where a shipowner sues, for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard. And a like liability for breach of contract accrues to a shipowner against a stevedoring contractor in any instance when the

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[4] See § 33 (a) in note 2, *supra*.

latter's improper stowage of cargo causes an injury on shipboard to some one other than one of its employees. The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle. While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly. See *American Stevedores* v. *Porello,* 330 U. S. 446; *Crawford* v. *Pope & Talbot,* 206 F. 2d 784, 792–793; *Brown* v. *American-Hawaiian S. S. Co.,* 211 F. 2d 16; *Rich* v. *United States,* 177 F. 2d 688; *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329.[5]

The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obli-

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[5] There is nothing in the legislative history of the Compensation Act calling for a contrary interpretation. Our interpretation of that Act is supported also by that of the New York Workmen's Compensation Act upon which it is modeled. The latter Act provides that the—"liability of an employer [for compensation] prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death . . . ." McKinney's N. Y. Laws, Workmen's Compensation Law, § 11.

See *Westchester Lighting Co.* v. *Westchester County Corp.,* 278 N. Y. 175, 15 N. E. 2d 567. Other state courts have reached comparable results as to exclusive liability clauses in their respective Compensation Acts. 2 Larson, Workmen's Compensation Law, §§ 76.00–76.44 (a).

gation *owing to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act.[6]

2. *The other question is whether, in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused it by the contractor's improper stowage of cargo.*

The answer to this is found in the precise ground of the shipowner's action. By hypothesis, its action is not based on a bond of indemnity such as it may purchase by way of insurance, or may require of its stevedoring contractor, and which expressly undertakes to save the shipowner harmless. If the shipowner did hold such an express agreement of indemnity here, it is not disputed that it would be enforceable against the indemnitor. On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo. Such an action, brought without reliance

[6] We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor. See *Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16, 18; *States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253; *Slattery* v. *Marra Bros.*, 186 F. 2d 134 (N. J. statute); *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181; *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322; *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946; *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463. And see generally, Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. of Pa. L. Rev. 321 (1954).

upon contractual undertakings, would present the bald question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage, should bear the ultimate burden of the injured longshoreman's judgment. That question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active and passive tortious conduct.[7] Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right.

The shipowner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led to the decision in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, are not applicable. See *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322.

The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's

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[7] See *Brown* v. *American-Hawaiian S. S. Co.*, *supra*; *Crawford* v. *Pope & Talbot*, *supra*; *McFall* v. *Compagnie Maritime Belge*, *supra*; Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, *supra*.

warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.[8]

The Court of Appeals has stated that the liability of petitioner in this case is for the performance of its obligation to stow the rolls on board ship "in a reasonably safe manner." 211 F. 2d, at 279. That court also has affirmed the decision of the District Court which was based upon the verdict of the jury that petitioner's improper stowage of the rolls produced either the unseaworthiness of the ship, or the hazardous working condition which is the basis for the shipowner's liability to Palazzolo.

Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's uncorrected failure to stow the rolls "in a reasonably safe manner." Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach

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[8] See *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217; *Brown* v. *American-Hawaiian S. S. Co., supra; Crawford* v. *Pope & Talbot, supra,* at 792–793; *American Mutual Liability Ins. Co.* v. *Matthews, supra,* at 323–325; *Rich* v. *United States, supra; Bethlehem Shipbuilding Corp.* v. *Gutradt Co., supra; Mowbray* v. *Merryweather, supra; Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 67 N. E. 439.

of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach.[9]

The judgment of the Court of Appeals, accordingly, is

Affirmed.

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

The petitioner, Ryan Stevedoring Company, is an employer subject to the Longshoremen's and Harbor Workers' Compensation Act.[1] Section 5 of that Act completely abolished all rights of longshoremen to sue their employers for injuries resulting from negligence of the employer or his employees. The Act substituted for old tort remedies a prescribed schedule of compensation for employees' injuries or death which was declared to be "exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." I think the Court's holding today breaks promises the Act made both to employers and employees. My view requires a more detailed statement of the facts and circumstances of this case than appears in the Court's opinion.

Palazzolo, an employee of Ryan, the stevedore, was injured while unloading cargo on a ship owned by the respondent, Pan-Atlantic Steamship Corporation. As authorized by § 33 Palazzolo elected to sue the shipowner rather than accept a compensation award. In his com-

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[9] See *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397; *Hastorf Contracting Co.* v. *Ocean Transportation Corp.,* 4 F. 2d 583, aff'd, 4 F. 2d 584; *Mowbray* v. *Merryweather, supra; Boston Woven Hose Co.* v. *Kendall,* 178 Mass. 232, 59 N. E. 657.

[1] 44 Stat. 1424, as amended, 33 U. S. C. § 901.

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plaint he charged that his injury was solely due to the negligent manner in which a number of heavy rolls of paper pulp had been stowed, or to the resulting unseaworthiness of the vessel. One of these rolls weighing about 3,200 pounds had broken loose from its position and seriously injured Palazzolo. The shipowner answered denying the allegations of negligence and unseaworthiness. At the same time the shipowner filed a complaint of its own against Ryan, the stevedore, alleging that any injury Palazzolo had received was solely attributable to the negligent manner in which the stevedore's employees had stowed the rolls of pulp. On this basis the shipowner asked the court to compel the stevedore to reimburse the shipowner for any judgment Palazzolo might obtain against the shipowner. Palazzolo's case against the shipowner was submitted to a jury; the shipowner's claim for reimbursement by the stevedore was tried by the judge largely on the same evidence and issues submitted to the jury. The facts in summary were these:

The stevedore's employees loaded the rolls of pulp in Georgetown, South Carolina, and four or five days later different employees of the same stevedore unloaded them in New York. This was pursuant to a general contract under which Ryan had agreed to perform the shipowner's stevedoring services along the Atlantic and Gulf coasts. The terms of the contract were set out in written memorandums prepared by the shipowner and agreed to by the stevedore. These memorandums contained a simple agreement to do the stevedoring for an agreed compensation plus, in some circumstances, cost of the stevedore's insurance. There was nothing further from which it could possibly be inferred that Ryan would be under a duty to indemnify the shipowner for losses resulting from any negligent stowage by Ryan's employees. To prevent injuries to cargo, crew and longshoremen, it

is necessary and customary to put some kind of props or supports under or against the heavy pulp rolls to keep them stationary until such time as they are unloaded. Some witnesses testified that a thick, heavy, strong piece of lumber cut into a special wedge shape, called a "chock," is a satisfactory kind of support under the rolls. Failure to use "chocks" may, as testified by one of the ship's officers, permit the rolls to run "rampant." Other witnesses testified that in addition to chocking, safety required that wooden floors be placed between the layers of rolls. All agreed, however, that indiscriminate scraps of wood called "dunnage" are wholly inadequate supports. All but one witness who testified swore that the roll that broke loose and injured Palazzolo in New York had nothing but "dunnage" under or against it. The lone exception was the ship's officer who swore that he saw wedges under the rolls in New York. No one testified that wooden floors were used or that they were made available by the shipowner. There was testimony that this shipowner never used chocks *or* wooden flooring and that in New York the longshoremen had looked for chocks but none were to be found on the ship. An officer of the shipowner testified that he was on the ship in Georgetown, South Carolina, while it was being loaded; that it was his primary duty to watch and see that the rolls were properly stowed and chocked; that he did watch; that chocks were available as part of the ship's "gear"; that he saw chocks, not dunnage, put under the rolls; that had any attempt been made to stow the rolls without using chocks he would have tried to stop the stevedore; that "the stevedores and the chief officer and the mate on watch generally cooperate and work together in the stowage in the overall stowage of the cargo." Thus the uncontradicted testimony of the ship's officer was sufficient to support a finding that he as a representative of the ship actively joined in stowing the rolls in the way in

which they arrived at New York. And other evidence was sufficient to support a finding that the cargo arrived in New York unprotected by chocks.

These issues were properly submitted to the jury by the judge in his charge. He told the jury that it could not find the ship unseaworthy on account of the way in which the goods were unloaded in New York. The issue thus revolved around stowage in South Carolina which was actively supervised by the ship's officers. The court submitted to the jury the questions, among others, as to whether the ship had available for use proper equipment to stow these dangerous rolls and whether the ship's officers were guilty of negligent loading and stowage in South Carolina. The jury gave Palazzolo a verdict for $75,000. The trial judge found in deciding the shipowner's indemnity claim against the stevedore that the ship's officer present at the stowage "did not properly perform his admitted duty to supervise the safe and careful loading of the vessel," although he had "authority to remedy the condition or halt the work." 111 F. Supp. 505, 507. He concluded from this and other findings [2] that the ship and the stevedore were "joint-tortfeasors" and therefore declined to order the stevedore to reimburse the shipowner.

The Court of Appeals held that there was adequate evidence to support the jury's finding that the shipowner was negligent and that the ship was unseaworthy because of the defectively stowed rolls. That court nevertheless held that the stevedore had to reimburse the shipowner for its loss despite the findings of the jury and the trial court that the loss occurred because of the shipowner's

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[2] The trial court also found that the ship's officer "in the exercise of reasonable care should have discovered and corrected" the defective stowage conditions. Had this been the only ship's negligence found it might be material in considering the question of common-law indemnity. But this Court relies on contractual indemnity.

negligence.[3] The Court of Appeals justified imposing payment of the $75,000 verdict on the stevedore on the ground that Palazzolo's injury was due to the "sole," "primary," or "active" negligence of the stevedore's employees. But the court's suggestion that the injury could have been due to the "sole" negligence of the stevedore is answered by the part of the court's opinion holding that there was adequate evidence to support the jury and trial court findings that the shipowner itself was negligent. Use of the words "primary" and "active" seems to indicate that the Court of Appeals believed it should look at this cold record and find for itself whether the stevedore's employees or the ship's employees were guilty of this type of negligence. I do not agree that the Court of Appeals should make such findings. And if the Court of Appeals' cryptic statements about "sole," "active" and "primary" can be considered as upsetting any of the findings of the trial court, I think the Court of Appeals' action should be set aside as clearly erroneous. *McAllister* v. *United States,* 348 U. S. 19.

I have set out the evidence in some detail because I think it shows almost beyond doubt that this stevedoring company is being required to pay a $75,000 verdict "on account of" injuries to an employee received in the line of that employee's duties. This is at least $60,000 more than it would have to pay under the Longshoremen's

[3] Even though the question of unseaworthiness was also submitted to the jury, it depended wholly upon whether there was negligent stowage. Under the undisputed testimony of the ship's officer the jury and judge had to find that the shipowner was guilty of negligence if the stevedore was. Moreover, if the shipowner failed to provide the proper gear in the way of chocks or lumber, the shipowner was guilty of negligence whether the stevedore was or not. In this case, therefore, the shipowner's negligence and unseaworthiness were one and the same thing. And if the shipowner failed to supply needed gear in the way of chocks or lumber, it would have been permissible to find that this was the "sole" cause of Palazzolo's injuries.

Act. That Act was revolutionary in its field. It took away from longshoremen the right to sue their employers for negligence and substituted a fixed schedule of compensation for injuries regardless of fault. Many workers and employers opposed the compensation scheme. The workers deplored loss of their chance to get big tort verdicts. But Congress thought it best to give them a more certain and less expensive recovery, even though far less in amount than some tort recoveries might be. Many employers preferred to take their chance on defeating employees' damage suits under the old tort system. The idea of "liability without fault" was abhorrent to them. Congress weighed the conflicting interests of employers and employees and struck what was considered to be a fair and constitutional balance.[4] Injured employees thereby lost their chance to get large tort verdicts against their employers, but gained the right to get a sure though frequently a more modest recovery. However, § 33 did leave employees a chance to recover extra tort damages from third persons who negligently injured them. And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts. Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act. Thus employers were given every reason to believe they could buy their insurance and make other business arrangements on the basis of the limited Compensation Act liability. More than that, § 33 of the Act also provides that for compensation paid an employee an employer shall himself be reimbursed or indemnified out of any money collected as a result of an employee's claim for negligent injury by a

[4] See *Crowell* v. *Benson*, 285 U. S. 22, 37–42; *New York Central R. Co.* v. *White*, 243 U. S. 188, 201–202. Cf. *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431.

third person. But the end result here is that this employer is actually mulcted in damages because its employee successfully prosecuted a third-party action. Liability is thus imposed because of the negligence of the employer's other employees. This the Act forbids. Whether called "common-law indemnity," "contribution," "subrogation," or any other name, the result is precisely the same. The employer has to pay more "on account of" an injury to his employee than Congress said he should.

I agree, of course, that if the employer here had made a contract, oral or written, agreeing to hold this shipowner harmless or to indemnify the shipowner against liability for injuries to petitioner's employees caused by the shipowner's negligence in whole or in part, the contract would have been valid and indemnity could have been obtained. For the Longshoremen's Act does not forbid employers under it to make independent agreements to indemnify others. But I think there is not the slightest support in this record for a finding that any such contract was made. No such allegation was made in the shipowner's complaint. And the shipowner's counsel was careful to stipulate during the course of the trial that his action was not based on a contract but on common-law indemnity.[5] I recognize that common-law indemnity may

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[5] "Mr. Behrens [counsel for shipowner]: This right of indemnity alleged by Pan-Atlantic is a right of common-law indemnity rather than a contractual provision. My question is how to get such facts before your Honor.

"Your Honor, there was a motion for summary judgment in this case by Ryan, to which was annexed the exchange of correspondence between Ryan and Pan-Atlantic, which is a contract.

"Now, the question is whether those documents should now be put in evidence before your Honor, or whether your Honor will infer from the absence of any proof on the subject that there was no contractual indemnity.

"Mr. Schwartz [counsel for Ryan]: I think we can agree and stip-

sometimes arise where two people commit a tort or wrong which hurts the same person. As between wrongdoers the courts will under some circumstances impose the total liability on the "primary" or "active" wrongdoer, apparently meaning the wrongdoer the court deems to be the most negligent. But indemnity so imposed is plainly "on account of" the negligence of the wrongdoer or his employees. The Act expressly forbids such a recovery by "anyone" from a stevedoring company "on account" of an injury to one of its longshoremen. Plainly, common-law indemnity should not be used to fasten such a liability on a stevedoring company. I suppose it is for this reason that the Court purports to find an actual contract to indemnify and thus decides the case on an issue neither presented in the complaint nor considered by the trial court.

A genuine contract as distinguished from a liability imposed by law, sometimes called a "quasi-contract," requires mutual agreement of the parties. It is for this reason that the courts have frequently said that the cardinal rule in the interpretation of contracts is that the intention of the parties should be ascertained and enforced.[6] And courts do not ordinarily stretch language in order to

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ulate between us that whatever contractual arrangement was made between Pan-Atlantic and Ryan, did not contain any expressed provision for indemnity, and it is Mr. Behrens' position in this matter that his claim over is based solely upon an implied right of indemnity, as implied in law.

"Mr. Behrens: That is correct.

. . . . .

"Mr. Schwartz: I will stipulate that there is no contractual provision for indemnity.

"Mr. Behrens: And I will so stipulate, if that is satisfactory to your Honor.

"The Court: Very well."

[6] See, *e. g.*, *Mauran* v. *Bullus*, 16 Pet. 528, 534; *Canal Co.* v. *Hill*, 15 Wall. 94, 99–100.

find that one person has agreed to indemnify another when the latter negligently hurts someone.[7] Special caution should be used in construing contracts so as to impose indemnity liability on companies not engaged in the business of writing indemnity insurance.

I think there is not a shred of evidence to support the Court's inference that this stevedore voluntarily agreed to give up the limited liability which the Longshoremen's Act was deliberately designed to afford. The Court finds nothing to support such a conclusion except that the stevedore agreed to do a stevedoring job. From that the Court implies that it was to do a good workmanlike job. From there it takes the next step—which should be more difficult than it appears to be—and says that the stevedoring company also agreed to give up its immunity under the Act and pay any judgments that might be rendered in favor of the stevedore's employees against the shipowner for its negligence. The precise scope of the indemnity which the Court finds the stevedore intended to assume is left in doubt. Are we to assume that the stevedore agreed to an unlimited liability for indemnity without regard to the comparative or qualitative proportions of negligence as between its employees and the employees of the shipowner? Are we even to assume that the stevedore deliberately and intentionally agreed to indemnify the shipowner upon a court's finding that the stevedore's negligence was the "sole," "primary," or "active" cause of injury? Findings of fact based on these standards are never easy. And in efforts to formulate a common-law indemnity remedy courts themselves have groped considerably in trying to give meaning to the terms "primary" and "active." Is an understanding of the different nuances of "sole," "primary" and "active" to be attributed to stevedoring companies in judicial rewriting of

[7] See, *e. g.*, cases collected in Note, 175 A. L. R. 8, 29–32.

work contracts so as to make them indemnity contracts? Surely before this Court determines the existence of a contract and the scope of its coverage the case should be sent back to the trial court so that these issues could be determined after a full hearing on the facts. The issues were not tried in the District Court and not tried in the Court of Appeals. The issues have never been tried. In *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, we remanded a case to the trial court for a hearing on evidence as to the scope of a contract of indemnity even though it was written. Here there is not even an oral contract to indemnify. Before creating a contract it might be appropriate to follow the course we did in *Porello.* Or is the Court rejecting this phase of *Porello?* Cf. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282, 284.

Finally, the Court's action here not only deprives the employer of his limited liability, it makes the right of employees to recover damages from third parties a barren promise. Section 33 of the Act provides two ways for an injured employee to obtain damages from a negligent third person: (1) The employee may elect to waive statutory compensation from his employer and sue the negligent third person directly for damages. (2) If the employee accepts a compensation award the employer may sue the third person as statutory assignee of the employee's claim, but all the employer recovers in excess of the amount of the compensation award must be paid over to the employee. Palazzolo was able to make an election and bring his own suit because his employer was financially interested in the outcome of his case and therefore advanced money to Palazzolo to sustain him during his injury until his case against the third party could be tried. The Court takes away all incentive for employers to follow this course in the future. Hereafter stevedoring companies under circumstances like this will

know that it is decidedly to their advantage that no third-party actions be brought. An employer like Ryan will hereafter know that if he or his employee prosecutes a claim against a third party and obtains a judgment for the employee's benefit, every dime of the judgment will have to be paid by the employer himself. Human nature and habits being what they are, employers will not be eager to finance suits against themselves. Injured longshoremen are not ordinarily wealthy enough to support themselves without work pending the trial of lengthy lawsuits. Yet if an employee accepts a compensation award only his employer can bring suit against the third person, and the employer will not be overly anxious to sue himself. It has been suggested that we can expect the courts to protect employees under such circumstances. In other words, the employee who has accepted compensation must go into court to protect himself against his employer before he goes into court to protect his claim against a third party who has negligently injured him. I cannot believe Congress would have given employers such complete control over these suits if it had thought the employers could be held liable for everything recovered. The actual effect of the Court's holding is this: The employer as an assignee of an employee's claim will know that if he wins a lawsuit, he loses a lawsuit. This knowledge will not give him a yearning anxiety to file suit. Even though he yields to the call of duty and files the lawsuit, he might not be exceedingly anxious to write a good complaint. His other pleadings might not be all that a zealous lawyer would desire. Although the employer must pay the judgment, his will be the opening argument to the jury. And when the last word is said in the closing argument, it will be made by counsel who knows that if he persuades the jury to give his client a verdict his client will have to pay it. Counsel will also know that if he happens to lose the case his client will

be the winner. Such is the state of affairs brought about by the Court's holding that this employer intended to make a contract which would subject him to the very liability that Congress had abolished.

There has been considerable disagreement in this Court and among other courts about three of our recent holdings, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282; and *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406. In each of these cases a worker in the same position as Palazzolo sued a shipowner alleging negligence and unseaworthiness. Judgments were obtained against the shipowners. We held in the *Halcyon* case that the shipowner could not under the common-law doctrine of "contribution" force injured employees' employers to pay part of the judgment against the shipowner. The *Sieracki* and *Halcyon* cases were reaffirmed in *Pope & Talbot.* In that case we refused to permit a shipowner to shift part of his loss to the injured person's employer on his argument that the employer, who was under the Longshoremen's Act, negligently contributed to the injury. We rejected the contention on the ground that if accepted it "would frustrate this [Act's] purpose to protect employers who are subjected to absolute liability by the Act." 346 U. S., at 412. The Court's opinion today provides a way under which by simple change of words and remedial formulas the results reached in our three former cases can be undermined. Employees like Sieracki and Palazzolo will find it practically impossible to get their cases for injuries against third persons tried in a court. And a shipowner who wants to shift liability wholly to a stevedoring company can do so by a very simple method. He can allege that the stevedoring company intentionally made a contract agreeing to indemnify him under circumstances like those in this case; that allegation will be automatically proved by simply establishing the fact that

the stevedoring company contracted to do some work on the ship; the result will be that the employer is wholly deprived of the protection of limited liability which the Act was intended to provide. And while this will be accomplished under the name of "contract," it will really be achieved because the Court has announced as an absolute principle of law that without regard to whether a stevedoring company intends to agree to indemnify, it has so agreed if it agrees to do a job. Thus by indirection rights of longshoremen and their employers recognized by this Court in *Sieracki, Halcyon,* and *Pope & Talbot* are taken away. In effect the *Sieracki* case is rejected.

I would reverse this case.

REX TRAILER CO., INC. *v.* UNITED STATES.

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

No. 46. Argued December 5, 1955.—Decided January 9, 1956.

In an action based on § 26 (b)(1) of the Surplus Property Act of 1944, the United States recovered $2,000 on each of five counts of a complaint charging petitioner with fraudulent purchases of motor vehicles. Petitioner had previously pleaded nolo contendere to a 5-count indictment arising out of the same five transactions and paid fines aggregating $25,000. *Held:*

1. The recovery under § 26 (b)(1) is civil in nature and did not put petitioner twice in jeopardy in violation of the Fifth Amendment. Pp. 148–152.

2. The failure of the Government to allege specific damages did not preclude the recovery here. Pp. 152–153.

3. On the record in this case, it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed the civil remedy into a criminal penalty. Pp. 153–154.

218 F. 2d 880, affirmed.

Gustave H. Dongus argued the cause for petitioner. With him on the brief was *Bernard Stroyman.*

Melvin Richter argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff* and *Assistant Attorney General Burger.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner contends that this action brought by the Government to recover $2,000 on each of five counts of a complaint based on § 26 (b)(1) of the Surplus Property Act of 1944 [1] places it twice in jeopardy in violation

[1] Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.) § 1635, provided in pertinent part:

"(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person

of the Fifth Amendment. In an earlier proceeding it had pleaded nolo contendere to a five-count indictment bottomed on the same five transactions and paid fines in the aggregate amount of $25,000. In the present case the District Court granted the Government's motion for summary judgment, and the Court of Appeals affirmed, 218 F. 2d 880. We granted certiorari, 349 U. S. 937, to resolve an asserted conflict between the decisions of the Courts of Appeals.[2]

At the close of World War II the Government was faced with the problem of disposing of vast quantities of surplus war materials. A large part of this property, valued at many billions of dollars, was needed to satisfy the civilian demand caused by wartime shortages in consumer goods. To facilitate and regulate the orderly

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any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

"(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

. . . . . .

"(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."

[2] In considering whether the statute of limitations contained in 28 U. S. C. § 2462 applied to § 26 (b)(1) of the Surplus Property Act, the Fifth Circuit held § 26 (b)(1) to be a civil remedy in *United States* v. *Weaver*, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in *United States* v. *Witherspoon*, 211 F. 2d 858.

disposal of this property, Congress passed the Surplus Property Act of 1944, 58 Stat. 765. The stated purposes of this statute included the re-establishment of returning veterans in business, agricultural, or professional life, the discouragement of speculation in surplus property, and the elimination of unusual and excessive profits to speculators. The concern of Congress for returning veterans is emphasized by its 1946 Amendment to the Act, 60 Stat. 168, which gave veterans a priority for the purchase of surplus property, second only to that of the Federal Government, and authorized the Administrator to assign the highest priority to veterans for the purchase of certain items. This legislation thus afforded veterans an opportunity to purchase goods not available elsewhere at a fair price and on good credit terms. The benefits were of great value to the millions of men and women returning to civilian life just after the war.

With this background in mind we may turn to the facts of the present case. In June 1947 the Rex Trailer Company purchased five motor vehicles from the War Assets Administration at Tinker Field, Oklahoma. Rex had only a nonpriority right of purchase under the Surplus Property Act; but, by the fraudulent use of the names of five persons possessing veteran priority rights, it was able to purchase the vehicles. Admittedly, the terms of the statute were violated, but the record does not show petitioner's gain from the fraud. The United States limited itself to the recovery of the sum of $2,000 for each of the five overt acts alleged in its complaint.

Petitioner's sole contention is that § 26 (b)(1) provides a criminal penalty and, having once been convicted and fined for the transactions in question, it cannot again be subjected to punishment. The only question for our decision, then, is whether § 26 (b)(1) is civil or penal, for "Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double

jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell,* 303 U. S. 391, 399.

We conclude that the recovery here is civil in nature. The Government has the right to make contracts and hold and dispose of property, and, for the protection of its property rights, it may resort to the same remedies as a private person. *Cotton* v. *United States,* 11 How. 229. Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations. In all building contracts, for example, Congress has required the insertion of a liquidated-damage clause which "shall be conclusive and binding upon all parties" without proof of "actual or specific damages sustained . . . ." 32 Stat. 326, 40 U. S. C. § 269. Liquidated-damage provisions, when reasonable, are not to be regarded as penalties, *United States* v. *United Engineering & Contracting Co.,* 234 U. S. 236, 241, and are therefore civil in nature.

In § 26 of the Surplus Property Act, Congress has provided three alternative remedies. The first provides a recovery of $2,000 plus double the amount of the damage sustained; the second permits a recovery "as liquidated damages" of twice the consideration agreed upon; the third permits the Government to recover the property and retain "as liquidated damages" the consideration it received. These alternative remedies are set out in three consecutively numbered subsections of § 26 (b). All three were recognized as civil remedies by Congress before the bill was passed,[3] and the conclusion is inescapable

[3] In referring to these provisions, the Senate Committee on Military Affairs described them as providing for "the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States . . . . The United States is given the option of electing among three different measures of damages." S. Rep. No. 1057, 78th Cong., 2d Sess. 13–14.

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that each was of the same nature and designed to serve the same purpose. Further, Congress provided in § 26 (d) that: "[t]he civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."

The case of *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, involved a provision of the False Claims Act, R. S. §§ 5438, 3490, 31 U. S. C. § 231, essentially the equivalent of § 26 (b)(1).[4] In *Marcus,* as here, the defendant had pleaded nolo contendere in an earlier criminal prosecution based on the same transaction. This Court rejected the petitioner's contention of double jeopardy and held that the statute involved was remedial and not penal, since it was unable to say that the provision for $2,000 plus double damages would "do more than afford the government complete indemnity for the injuries done it." 317 U. S., at 549. In concluding, it recognized that "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress." 317 U. S., at 552.

It is insisted, however, that the failure of the Government to allege specific damages precludes recovery here. But there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by

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[4] The False Claims Act provides that the defrauder "shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." *United States ex rel. Marcus* v. *Hess,* holding this provision to provide a compensatory civil remedy, was decided on January 18, 1943. The Surplus Property Act, which employed virtually identical language in § 26 (b)(1), was enacted on October 3, 1944. Under these circumstances it would be very difficult to say that these words which provided a civil remedy in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act.

the Court in *Marcus*.[5] The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss. As this Court recognized in *Priebe & Sons* v. *United States*, 332 U. S. 407, 411–412, liquidated damages "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. . . ." And the fact that no damages are shown is not fatal. Section 26 (b)(1) merely accomplishes the intended result of Congress by authorizing a separate proceeding for the recovery of a lump sum in damages.

It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation.[6] The damages resulting from this injury may be difficult or impossible to ascertain, but it is the

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[5] On several of the projects involved in the *Marcus* case, fraud was discovered by the Government in time for payments to be withheld. At trial in the District Court defendants urged that there could be no recovery of a penalty or forfeiture in these instances where no actual damage could be shown. The District Court held that failure to show actual damage in these instances would not preclude recovery under the statute. *United States ex rel. Marcus* v. *Hess*, 41 F. Supp. 197, 218. The judgment of the District Court was affirmed here. See *United States* v. *Rohleder*, 157 F. 2d 126, 129.

[6] It seems quite probable that there is also an element of unjust enrichment to the Rex Trailer Company from its fraudulent purchases. The record is silent on this point and we have not considered it in arriving at our decision, but the fact that Rex was willing to resort to fraud to purchase the vehicles at the veteran's price strongly suggests an unfair gain from the purchases. The price for sales to priority purchasers was fixed by regulations published in 32 CFR (1946 Supp.) §§ 8302.8 (d), 8302.11, which provided: "Disposal agencies shall fix the fair value at which property shall be acquired by priority claimants. Such a fair value shall not be greater

function of liquidated damages to provide a measure of recovery in such circumstances. On this record it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty.

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the judgment substantially for the reasons given by him in his opinion in support of the *Marcus* decision. 317 U. S., at 553.

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than the lowest price which is offered to any trade level at the time of acquisition by the priority claimant, or where the fair value is fixed after examining competitive bids, it shall not be greater than the lowest acceptable bid."

Syllabus.

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS.

No. 33. Argued November 10, 1955.—Decided January 9, 1956.

An interstate railroad which engaged in hauling loaded truck-trailers "piggy-back" brought an action in a state court to enjoin a labor union from conduct which interfered with such operation and which allegedly violated the Labor Management Relations Act. Employees of motor carriers with which the union had collective bargaining agreements had been persuaded by agents of the union to refrain from delivering loaded trailers to the railroad for "piggy-backing." The union was not concerned in any way with the railroad's labor policy, nor was there any claim that the union interfered in any manner with the railroad's employees. *Held:* The case is within the exclusive jurisdiction of the National Labor Relations Board, the railroad may seek any remedy it may have before said Board under the Labor Management Relations Act, and the state court had no authority to enjoin the union's conduct. Pp. 156–161.

(a) A railroad subject to the Railway Labor Act is not precluded from seeking the aid of the National Labor Relations Board in circumstances unrelated to the railroad's relations with its own employees. Pp. 158–161.

(b) The question whether there was a violation of the Labor Management Relations Act is for the National Labor Relations Board to determine. P. 161.

(c) Even if the union's conduct is not prohibited by § 8 of the Labor Management Relations Act, it may come within the protection of § 7, in which case the State is not free to enjoin the conduct. P. 161.

(d) *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, followed. P. 161.

331 Mass. 720, 122 N. E. 2d 759, reversed.

Stephen J. D'Arcy, Jr. argued the cause for petitioners. With him on the brief were *John D. O'Reilly, Jr.* and *Richard S. Sullivan.*

Herbert Burstein argued the cause for respondent. With him on the brief was *William T. Griffin.*

Mr. Justice Minton delivered the opinion of the Court.

Respondent railroad has, since 1937, engaged in hauling, between Boston, Massachusetts, and other points in New England, loaded trailers of the type ordinarily hauled over the highways by motor carriers. This operation is popularly known as "piggy-backing." Trailers to be shipped from Boston are delivered to respondent's freight yard by employees of the motor carriers. There they are detached from the tractors and driven by special devices onto respondent's flatcars by employees of New England Transportation Co., a motor carrier, which is a subsidiary of respondent. The trailers are secured to the flatcars by respondent's employees.

Petitioners are the local teamsters union, one of its officers and two of its business agents. The union, by virtue of collective-bargaining agreements, represents a large number of drivers and helpers of certain motor carriers which are engaged in over-the-road hauling of freight between Boston and other points in New England. Respondent's "piggy-backing" operations have steadily increased over the years, with a resulting loss of work for truck drivers. The union sought, without success, in 1946, and again in 1949, an agreement by the motor carriers to cease shipping trailers by "piggy-back." Having failed in these and subsequent negotiations to dissuade the trucking companies from participating in "piggy-backing," petitioner union assigned petitioners Norton and McCarthy, business agents of the union, to patrol

the entrance to respondent's Yard 5 where trailers are delivered for "piggy-back" operations.

On July 11, 12 and 14, 1952, Norton and McCarthy stopped a number of truck-drawn trailers owned by carriers with whom petitioner union had collective-bargaining agreements and persuaded the drivers to refrain from delivering the trailers to respondent. Employees of New England Transportation Co. were persuaded by Norton and McCarthy not to load previously delivered trailers onto respondent's flatcars.

Respondent filed suit in the Superior Court of Suffolk County, Massachusetts, seeking permanently to enjoin petitioners' conduct and, in addition, damages in the sum of $100,000. In its amended complaint respondent alleged, among other things:

> ". . . the individual respondents and the respondent union prevented the loading of trailers on flat cars and enforced a boycott against petitioner and a withholding of patronage and services by motor truck carriers and shippers.
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> . . . . . .
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> "The petitioner is informed and believes that the object of the acts committed by the respondents on July 11, 12 and 14, 1952, as set forth in paragraphs '8' and '9' of this complaint was to force or require the petitioner to cease handling and transporting the products of various shippers and motor carriers who employ petitioner's flat car service.
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> . . . . . .
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> "The said acts were and are intended to compel shippers and motor truck carriers to assign work to members of the respondent union and to thereby commit an unfair labor practice in violation of the National Labor Relations Act; and

"The said acts were intended to and did, in fact, result in an unlawful secondary boycott in violation of the laws of the Commonwealth of Massachusetts, and of Section 8 (b)(4)(A) of the National Labor Relations Act; . . . ." [1]

After hearing, a permanent injunction was granted and, on appeal, the Supreme Judicial Court of Massachusetts affirmed. 331 Mass. 720, 122 N. E. 2d 759. We granted certiorari to determine whether the state court had jurisdiction to enjoin the petitioners' conduct or whether its jurisdiction had been pre-empted by the authority vested in the National Labor Relations Board. 348 U. S. 969.

Resolution of this question depends upon (1) whether respondent, as a railroad subject to the Railway Labor Act, may avail itself of the processes of the N. L. R. B., and (2) if respondent may do so, was it required, in the circumstances of this case, to seek relief from that tribunal rather than from the state courts.

The Massachusetts court, although recognizing the principle that state courts ordinarily lack authority to enjoin alleged unfair labor practices affecting interstate

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[1] Section 8 (b)(4)(A) provides:

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

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(4)(A).

commerce,[2] determined that it had jurisdiction in this controversy to restrain petitioners' conduct because the Labor Management Relations Act's definition of "employer," as interpreted by the N. L. R. B., cast doubt upon respondent's ability to obtain relief under that Act.

The Act, in its definition of an "employer," expressly excludes anyone subject to the Railway Labor Act. 61 Stat. 137, 29 U. S. C. § 152 (2).[3] It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act,[4] which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N. L. R. B. for resolution. But it does not follow from this that a railroad is precluded from seeking the aid of the Board in circumstances unrelated to its employer-employee relations. Respondent itself has maintained throughout the entire course of this litigation that there is no labor dispute with

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[2] *Garner* v. *Teamsters Union,* 346 U. S. 485; *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468.

[3] "SEC. 2. When used in this Act—

. . . . . .

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[4] 44 Stat. 577, as amended, 45 U. S. C. § 151.

its employees. The Massachusetts court found that petitioner union was in no way concerned with respondent's labor policy, nor was there any claim that the union interfered in any manner whatsoever with the railroad employees.

The N. L. R. B. is empowered to issue complaints whenever "it is charged" that any person subject to the Act is engaged in any proscribed unfair labor practice. § 10 (b). Under the Board's Rules and Regulations such a charge may be filed by "any person." [5] We think it clear that Congress, in excluding "any person subject to the Railway Labor Act" from the statutory definition of "employer," carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by so doing Congress intended to divest the N. L. R. B. of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of "person," they are entitled to Board protection from the kind of unfair labor practice proscribed by § 8 (b)(4)(A). This interpretation permits the harmonious effectuation of three distinct congressional objectives: (1) to provide orderly and peaceful procedures for protecting the rights of employers, employees and the public in labor disputes so as to promote the full, free flow of commerce, as expressed in § 1 (b) of the Labor Management Relations Act; (2) to maintain the traditional separate treatment of employer-employee relationships of railroads subject to

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[5] 29 CFR, 1955 Cum. Supp., § 102.9. The Act defines "person" as follows:

"SEC. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

the Railway Labor Act; and (3) to minimize "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union,* 346 U. S. 485, 490.

Respondent contends, however, that even if railroads may seek the aid of the N. L. R. B., it was not required to do so in this case because petitioners' conduct was neither protected by § 7 nor prohibited by § 8 (b)(4) of the Labor Management Relations Act. As we noted earlier, respondent's amended complaint alleged violations of the Act. Whether the Act was violated or whether, as respondent now claims, it was not, is, of course, a question for the Board to determine. Even if petitioners' conduct is not prohibited by § 8 of the Act, it may come within the protection of § 7, in which case the State was not free to enjoin the conduct. In any event, the Board's jurisdiction in the circumstances of this case is clearly settled by this Court's recent decision in *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 481:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

We therefore hold that the question presented by the facts in this case brings it within the jurisdiction of the N. L. R. B., whose jurisdiction is exclusive, and the respondent railroad may seek any remedy it may have before said Board.

The judgment is

Reversed.

SECRETARY OF AGRICULTURE *v.* UNITED STATES ET AL.

NOS. 6 AND 11. APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.*

Argued October 12, 1955.—Decided January 9, 1956.

The Interstate Commerce Commission issued an order approving tariff regulations providing that railroads will be responsible for claims for physical damage to shell eggs carried by them only to the extent that such damage is in excess of specified percentages or "tolerances." The validity of the regulations was challenged on the ground that they violated § 20 (11) of the Interstate Commerce Act, which provides that any carrier subject to the Act receiving property for interstate transportation "shall be liable . . . for any loss, damage, or injury to such property caused by it" and forbids any limitation of, or exemption from, such liability. The Commission had concluded that, since the tolerances represented pre-shipment and unavoidable damage not "caused by" the railroads, their deduction from damage claims could not limit the railroads' proper liability. *Held:* The Commission's findings were insufficient to support this conclusion or to establish that the tolerances permitted by its order will not operate to limit carrier liability in violation of § 20 (11), and the Commission's order must be set aside. Pp. 163–173.

119 F. Supp. 846, reversed.

Marvin E. Frankel argued the cause for the United States and the Secretary of Agriculture. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, William J. Lamont, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell.*

Samuel R. Howell argued the cause and filed a brief for the Interstate Commerce Commission.

William F. Zearfaus argued the cause for the Intervening Railroads, appellees. With him on the brief was *J. Edgar McDonald.*

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*Together with Nos. 7 and 12, *Utah Poultry & Farmers Cooperative et al.* v. *United States et al.*, also on appeals from the same court.

On a brief were *John H. Pratt* for the Utah Poultry & Farmers Cooperative, *Marcus Whiting* for Armour & Co., and *Arthur C. O'Meara* and *John P. Staley* for Swift & Co., appellants in Nos. 7 and 12.

Opinion of the Court by MR. JUSTICE HARLAN, announced by MR. JUSTICE CLARK.

These cases involve the validity of railroad tariff provisions exonerating the appellee railroads from liability for stated percentages of damage to shell eggs shipped over their lines. The cases come to us by direct appeal [1] from a judgment of a three-judge district court in Utah,[2] which dismissed an action brought to set aside and enjoin an order of the Interstate Commerce Commission [3] approving such tariff provisions. We noted probable jurisdiction on October 14, 1954.[4]

Claims against the railroads for damage to egg shipments steadily and rapidly increased in the years following 1939, particularly on shipments to the eastern seaboard area.[5] In 1950 the railroads, believing that because of the difficulties of proof they were being exposed to liability for damage for which they were not responsible, filed with the Commission proposed tariff provisions similar in form to those approved by the order under review. After an investigation and hearing,[6] the Commission concluded

[1] 28 U. S. C. §§ 1253, 2325. The Secretary of Agriculture's standing in these proceedings derives from 52 Stat. 36, 7 U. S. C. § 1291 (a) and (b).

[2] *Utah Poultry & Farmers Cooperative* v. *United States*, 119 F. Supp. 846.

[3] 284 I. C. C. 377.

[4] 348 U. S. 807.

[5] The Commission found that on eggs shipped to New York the average claim per car increased more than 1800% from 1940 to 1947, 284 I. C. C., at 386, 390, and that the total claims paid in 1947 exceeded 50% of the gross revenue on such shipments, *id.*, at 387.

[6] 36 Stat. 552, as amended, 49 U. S. C. § 15 (7).

that egg shipments ordinarily contained substantial amounts of damage for which the railroads were not responsible—namely, (a) damage existing prior to shipment, and (b) damage unavoidably arising in transit because of the inherently fragile nature of eggs. The average amount of such damage was found to be 3% for eggs packaged at railhead points and 5% for those packaged elsewhere. On the basis of this finding, the Commission, although rejecting the higher-percentage provisions proposed by the railroads,[7] found reasonable—and hence authorized the railroads to include in their tariff schedules[8]—the following tolerance provision:

> "On eggs placed in packages at rail point of origin of the shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 3% of the contents of the packages containing damaged eggs. Where damage exceeds 3%, claims shall be allowed for all damage in excess of 3%, if investigation develops carrier liability.
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> "Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 2%, the percentage of actual damage as shown on such certificates, plus 1% shall be used in lieu of 3% specified in this Section."

An otherwise identical provision applicable to "eggs placed in packages at points other than the rail point of

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[7] The tariff provisions as originally filed established 4% and 6% tolerances as opposed to the 3% and 5% tolerances found reasonable by the Commission. See 284 I. C. C., at 407–408.

[8] Promptly after the Commission's order, the railroads refiled the tariff provisions with the approved percentages. They were permitted to go into effect on May 2, 1952.

origin" was determined to be reasonable with a tolerance of 5%.

It is claimed that these tariff provisions violate § 20 (11) of the Interstate Commerce Act, 24 Stat. 386, as amended, 49 U. S. C. § 20 (11), which provides that any common carrier subject to the Act receiving property for interstate transportation "shall be liable . . . for any loss, damage, or injury to such property caused by it . . . , and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed . . . ."

The Commission and the court below (one judge dissenting) held that the tolerance provisions did not violate § 20 (11) because the pre-shipment and unavoidably-caused damage represented by the tolerances was not damage "caused by" the railroads; hence the tolerance regulations, in providing a means for determining the extent of such damage, did not limit the railroads' proper liability, but operated simply to eliminate from damage claims the damage for which the railroads were not liable.

The appellants attack the provisions on six principal grounds: (1) the Commission has no jurisdiction over damage claims and hence no power to prescribe regulations governing their disposition; (2) tolerances based on averages necessarily embrace a forbidden limitation of liability since, by definition, some shipments will contain less than the "average" damage, resulting in those cases in the carrier being relieved of its full liability; (3) the railroads are liable for in-transit damage even though "unavoidable"; [9] (4) the averages found by the Commission are not supported by the evidence; (5) the approval of uniform nation-wide tolerances was unreasonable in light

[9] It is conceded that § 20 (11) codifies the common-law rule making a carrier liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the public enemy,

of the wide differences in the egg-damage experience of consignees located in different areas of the country; [10] and (6) the conclusion that the tolerances do not limit liability is not supported by the Commission's findings. Our agreement with this last contention makes it unnecessary for us to consider the other arguments, and we may assume, though we do not decide, that the tariff provisions are not invalid for any of the other reasons assigned.

The Commission's justification of the tolerance regulations as not limiting liability rests upon two distinct propositions: (1) that there is present in every case of eggs at destination physical damage not "caused by" the railroads—and hence for which they are not liable under § 20 (11)—in the amount of the specified percentages; and (2) that the deduction of those percentages from damage claims operates merely to prevent liability for such damage from being improperly imposed on the railroads. We

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public authority, or the inherent vice or nature of the commodity. See, *e. g., Bills of Lading,* 52 I. C. C. 671, 679; *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 421–422; *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 506–507, 509. The "unavoidable" damage to eggs is claimed to be within the "inherent vice" exception. The appellants contend, however, that the exception does not include damage induced by external force, however slight or unavoidable, but is limited to loss or damage arising solely from the nature of the property without the intervention of human factors, such as loss from decay, fermentation, evaporation or natural shrinkage. See, *e. g., Austin* v. *Seaboard R. Co.,* 188 F. 2d 239, 240–241 (C. A. 5th Cir.); *Akerly* v. *Railway Exp. Agency,* 96 N. H. 396, 400–402, 77 A. 2d 856, 860–861; *Jackson & Perkins Co.* v. *Mushroom Transp. Co.,* 351 Pa. 583, 590–591, 41 A. 2d 635, 639; *Watson Bros. Transp. Co.* v. *Domenico,* 118 Colo. 133, 135–137, 194 P. 2d 323, 325.

[10] The Commission found that the increase of damage claims to "substantial amounts" had occurred principally in connection with shipments to certain points in the eastern seaboard territory—particularly New York, Baltimore, Philadelphia, Boston and Newark—and that "Generally there has been no increase in the damage claims on shell eggs moved by rail to other territories." 284 I. C. C., at 385–386, 392.

shall accept for purposes of discussion the validity of the first proposition. The infirmity we find in the Commission's report is rather that the second proposition is simply assumed and is supported by no findings upon which we can say that the Commission's conclusion was reasonably based. Such a conclusion being essential to remove the tolerance provisions from the prohibition of § 20 (11), the lack of findings necessary to justify that conclusion renders invalid the Commission's order approving the tolerance regulations. See *Florida* v. *United States,* 282 U. S. 194, 215. Indeed, so far does the report fail to support the Commission's conclusion that it tends affirmatively to support precisely the opposite conclusion—namely, that the tolerances *do* unlawfully limit liability. We know of no better way to illustrate the inadequacies of the report than by showing the manner in which the inferences raised by it and unanswered by the Commission would, if accepted, lead to that opposing conclusion.

In the first place, we are unable to discover in the report any showing that damage claims include—or should reasonably be deemed to include—the exempt damage which is to be deducted from them. At common law, proof that a case of eggs contained a specified amount of damage for which the carrier was not liable would afford no defense to a damage claim not shown to include that damage. To complete the defense, some showing that the damage claimed included the exempt damage would be required, such as evidence that all of the damage had been found and claimed. Similarly, to justify a regulation authorizing the deduction from damage claims of a tolerance representing exempt damage, some basis for inferring that damage claims ordinarily include such damage would seem required, such as a finding that the type of inspection upon which damage claims are based is adequate to reveal substantially all the damage present in a case.

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Far from making such a finding, however, the Commission report indicates that damage claims normally do *not* include all the damage present in a case. As described by the Commission, the customary inspection at destination upon which damage claims are based is simply a visual examination of a layer of 36 eggs at a time, continuing only until a layer in the case with no visible damage is found, at which point none of the succeeding layers is even looked at.[11] Inasmuch as "damage" of the sort represented by the tolerances includes even the most minor shell imperfections, the inference seems inevitable that much damage is overlooked. This inference is strengthened by the Commission's statement that much of the damage normally present in a case could be found only "by candling and clicking, and could not be detected by the kind of inspection performed at" destination.[12] And that damage claims do not in practice include all damage is further indicated by the Department of Agriculture studies cited by the Commission in which the damage overlooked by customary inspections at destination was found to range between 3.6% and 7.3%.[13] Indeed, if the inferences suggested by these latter studies be accepted, it

[11] 284 I. C. C., at 395.

[12] 284 I. C. C., at 393–394. In "candling," each egg is placed before a light to disclose defects not otherwise detectable; in "clicking," two eggs are knocked together, the sound revealing shell imperfections.

[13] 284 I. C. C., at 396. In answer to the implications of these uncontroverted studies, the Commission simply said: "The record does not indicate the handling received by those particular shipments after they were delivered to the consignees. It does indicate, however, based on the number and amount of claims, that the inspection of shipments of eggs arriving at New York is being performed with a view to detecting all damaged eggs. Claims in amounts exceeding 50 percent of the revenue on the entire egg traffic to New York in 1947 do not appear to be based on a cursory inspection." *Ibid.* But this speculative reasoning hardly overcomes the Commission's own explicit finding of the inadequacy of the destination inspections to discover all the damage.

would appear that there is ordinarily overlooked in the destination inspection—and hence *not* included in damage claims—physical damage nearly equal to or greater than the exempt damage represented by the tolerances. If that be true, a further reduction of the claim by the full amount of the tolerance would necessarily operate to "limit" liability by approximately the full amount of the tolerance.

Nor is it an answer to this that the consignee is entitled to make a more thorough inspection than the prevailing practice entails. By in effect requiring a consignee to prove that his damage claim does not include the exempt damage, the tolerances would impose on the consignee the burden of disproving a defense which at common law it would be the carrier's burden to establish. Whether or not the Commission has power so to alter the burden of proof, there is nothing to indicate that it had any intention of doing so. The Commission seems to have believed that under the prevailing commercial practices the carriers were being exposed to an improper liability and that the tolerances, applied in the same commercial setting, would do no more than remedy that situation. It would pervert the Commission's purpose to deal realistically with a commercial problem now to seek to justify the tolerances on the ground that it is technically possible for consignees, by departing from the normal commercial practices, to avoid the limitation of liability caused by the tolerances. Especially is this true in the absence of any suggestion in the Commission's report that such a complete inspection by consignees would be commercially feasible.[14]

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[14] To the contrary, the report notes that, despite the efforts of packers by careful inspection to eliminate all damage, "absolute perfection is commercially impossible" and a substantial amount is overlooked, 284 I. C. C., at 393, and the difficulties would seem even

Another inadequacy of the Commission's report arises from its failure to distinguish between different kinds of physical damage in the application of the tolerances. The most favorable evidence supporting the Commission's conclusions as to the extent of the damage not "caused by" the railroads was a Department of Agriculture study showing that at destination the average case of eggs contains 4.8% "checked" or "stained" eggs and 0.3% broken eggs.[15] Presumably, therefore, the tolerances approved by the Commission represent physical damage in the same proportions—that is, primarily checked and stained eggs with only a nominal percentage of broken eggs. Checked and stained eggs are salable at a reduced price and therefore, unlike broken eggs, represent only a partial loss. The tariff provisions, however, do not differentiate between these types of damage and apparently authorize the deduction of the full tolerance without regard to the nature of the damage claimed. But to permit the offsetting of checked and stained eggs, representing only a partial loss, against broken eggs, representing a total loss, would seem necessarily to limit the railroads' proper liability under § 20 (11).

A third major respect in which the Commission's report falls short of establishing that the tolerances will not limit

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greater under the more adverse conditions prevailing at destination. Nor do the Department of Agriculture test studies upon which the tolerances were based indicate the feasibility of an inspection adequate to uncover all damage. The usual Department of Agriculture grading inspections involve an examination only of 100 eggs from each of 15 cases out of a carload, 284 I. C. C., at 393, and, while the Commission does not clearly say so, apparently the test studies utilized a similar spot-check inspection, from which the total amount of damage was simply inferred. Damage claims, on the other hand, can be asserted only for the damage that is actually found.

[15] 284 I. C. C., at 393–394. "Checked" eggs have slight cracks but the membrane is unbroken; "stained" eggs are sound eggs which have been stained by leakage from other eggs. *Id.*, at 384, 385.

liability results from its failure to consider the relationship between the physical damage represented by the tolerances and the legal loss for which damage claims are asserted. We have thus far assumed that "physical damage" could properly be equated with "loss" and have shown that, even on that assumption, the Commission has not shown the existence of a relationship between the damage represented by the tolerances and that included in damage claims which would justify the deduction authorized by the tariff provisions. In fact, however, it would appear that damage claims are based not on physical damage to individual eggs but rather on the loss of commercial accceptability of a case of eggs as a whole. As the Commission observed, the "commercially sound" case of eggs invariably contains some damage,[16] and it is apparently only when the damage is so great as to make a case commercially unacceptable for its grade that it loses value. When a commercially unsound case is received, the consignee, rather than suffer the presumably greater loss that would result from selling it at a lower grade or as salvage, ordinarily "reconditions" the case by replacing the visibly damaged eggs and, if necessary, the packaging materials. From the character of this process as described by the Commission,[17] it is apparent that the purpose is simply to make the case commercially sound and not to discover and remove all the damage present in the case. The damage claim, if liability is asserted against the carrier, then consists simply of the cost of reconditioning the case—that is, the labor and material costs plus the loss on the damaged eggs removed.[18]

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[16] 284 I. C. C., at 393.

[17] 284 I. C. C., at 395. The eggs are simply transferred from the damaged case to a new case a whole layer (36 eggs) at a time, in the course of which any obviously damaged eggs are removed and replaced.

[18] 284 I. C. C., at 385, 399.

Viewed in the above terms, the probable effect of the tolerances on liability becomes even more apparent. Inasmuch as the highest grade specifications prescribed by the Department of Agriculture permit physical damage of 5%,[19] a case of eggs received at destination with only the tolerance damage of 3% or 5% would presumably be considered "commercially sound" and be salable at the full price. Thus it would seem that presence of the tolerance damage by itself causes the consignee no loss and affords no basis for a damage claim, and that it is only when there is additional damage, making it necessary to recondition the case to make it commercially sound, that there is a loss for which a claim may be asserted. And if the *additional* damage is caused by the railroad, it necessarily follows that the cost of the reconditioning made necessary only because of that damage is a loss "caused by" the railroad within § 20 (11).[20] Any reduction of the damage claim in such circumstances would thus relieve the carrier of its proper liability.

The Commission's report thus leaves us not merely with uncertainty as to the impact of the tolerances, cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S.

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[19] 284 I. C. C., at 401. Of this 5% (for Grade A or AA eggs), no more than 0.5% may consist of broken eggs. As appears above, however, the proportion of broken eggs represented by the tolerances is well within this limit.

[20] It seems immaterial that in a given case the consignee might remove more damage than the minimum necessary to make the case commercially sound. The cost of the extensive inspection that would be necessary to assure that precisely the right amount of damage is removed—a cost the consignee would presumably be entitled to recover—would defeat the mitigation of damages which is the very purpose of the reconditioning. The carrier can ask no more than that the consignee act reasonably in mitigating damages, and there is no suggestion that the commercially accepted method of reconditioning unsound cases is unreasonable.

499, 504–505, 510–511, but with the strong impression that they are likely to operate in a forbidden manner. The report contains no answers to the problems we have raised, if indeed the Commission considered them at all. Since the report falls far short of establishing that the tolerances will not operate to limit carrier liability in violation of § 20 (11), the order of the Commission approving the tolerances must be set aside, and the judgment below

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

It seems desirable to state, summarily, the basis on which I join the Court's opinion.

The starting-point of the Court's determination of the issue in this case is recognition of the fact that the Cummins Amendment to the Interstate Commerce Act, § 20 (11), does not constitute an affirmative congressional formulation of a carrier's liability for damage to goods transported by it. The legal import of that Amendment is to bar the Interstate Commerce Commission from legalizing tariffs limiting the common-law liability of a carrier for such damage. The common law, in imposing liability, dispensed with proof by a shipper of a carrier's negligence in causing the damage. But for breakage unavoidable in the nature of things—whether nature be operating within a thing or from without, it is equally an "inherent vice"—there would be no liability since the common law did not impose a liability unrelated to the carrier's conduct.

These are the general principles to be deduced from the cases decided at common law. A situation as complicated as the one before us precludes mechanical or mathematical application of these generalities. At common law, if a shipper sued for damage to eggs, the carrier

might be able to introduce evidence demonstrating an established percentage of loss not in any sense caused by it. Such fact of inevitable loss could be established by adequately supported averages and would not require demonstration of the incidence of inevitable preshipment or in-transit damage in a particular shipment. To be sure, the shipper might then reply by proving an inevitable percentage of damage caused by the railroad which was undetected or undetectable at destination. One would have to reason from principle, as it is called, to conclude whether the common law would throw on the carrier the burden of showing that the total amount of such loss was inevitably represented in the shipper's damage claim or whether it would allow the carrier to subtract this inevitable damage from whatever damage claim was made and thus throw on the shipper the burden of finding all the damage if he wanted a full recovery.

Likewise, if the common law allowed a carrier to urge that the shipper suffered no loss from the undetected or undetectable damage because he could get full price for the cases containing such damage, it might be equally open to the shipper to urge that the average inevitable loss which was being subtracted from his damage claim was made up in large part of damage which was equally undetectable by ordinary commercial inspection and could therefore not be represented in the damage claims that were being made. A further complicating factor is the fact that the grade specifications prescribed by the Department of Agriculture allow prescribed percentages of damage. See 284 I. C. C., at 401. For example, 5% shell damage is permitted in Grade AA and Grade A eggs, so that the presence of such damage does not prevent a shipper from receiving full price.

The Cummins Amendment requires that common-law principles of liability be not impaired. But the difficul-

ties of proof and the presence of numerous complicating factors, some of which have been indicated, do not permit dogmatic views regarding the common law's treatment of such a situation as this. The unsuitability of common-law proceedings for the trial of such complicated issues was one of the main reasons why the Interstate Commerce Commission was established to deal with problems pertaining to railroad tariffs and the conflicting interests they entail. As long as the Commission is guided by the common-law principles governing the carriers' liability and takes due account of all the factors thereby involved, this Court must stay its hands. The order of the Commission in this case, however, is set aside because the Commission has not made clear the basis on which it approved the allowable "tolerances" in the sanctioned tariffs. Since the basis of the Commission's order is not clear, the foundation for the review of the order is wanting. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 510–511.

This precondition of clarity for the findings of the Commission as a basis for review does not require us to establish the frailty of particular findings or to examine the correctness of alternative meanings to be attributed to dubious findings. An order of the Commission cannot stand if we cannot tell what it has decided or if it leaves foggy the basis of its conclusions.

In joining the opinion of the Court, therefore, I do not read it as implying that, because any proof of tolerances may have infirmities as a matter of mathematical demonstration or may offend theoretical arguments based on laws of probability, it may not satisfy the cruder standards of proof by which adjudications are made in courts of law and which may sustain determinations by the Interstate Commerce Commission. Specifically, I assume that the various inadequacies which generate the uncer-

tainty in which the Commission's report leaves us are not to be deemed controlling rules of law in allowing the Commission to ascertain inevitable preshipment or in-transit damage to eggs, *i. e.*, tolerances, by such substantiality of proof as is appropriate to the subject matter.

MR. JUSTICE MINTON, with whom MR. JUSTICE REED and MR. JUSTICE BURTON join, dissenting.

The Court's opinion does not meet the issue in this case as I see it. The principal question, as was freely conceded at the argument, was whether the Interstate Commerce Commission had the power to promulgate the regulation under § 20 (11). The Court now accepts for the sake of argument that the Commission had the power and then proceeds to find the regulation unfair and unreasonable, although a similar regulation had been in effect since 1919. See *National Poultry, Butter & Egg Assn.* v. *New York Central R. Co.*, 52 I. C. C. 47.

In an earlier case, in which the Commission had under consideration a tariff which provided certain deductions as an incident to the natural shrinkage of grain, it was claimed that the carrier could not so limit its liability because it violated § 20 (11). The Commission said:

> "There appears to be little or no merit in the contention that the rule violates the inhibition clause of the act against the limitation of liability, for the limitation is not against losses *caused by the carrier or its connections,* but rather against liability for losses *due to the inherent nature of the commodities themselves* and attributable to no human agency." *A. B. Crouch Grain Co.* v. *Atchison, T. & S. F. R. Co.*, 41 I. C. C. 717–718. See also *The Cummins Amendment,* 33 I. C. C. 682.

For loss in transportation due to the inherent nature of the goods a carrier is not liable. *Chesapeake & O. R.*

Co. v. *Thompson Mfg. Co.*, 270 U. S. 416. Carrier liability must be limited to damage "caused by it." *Adams Express Co.* v. *Croninger*, 226 U. S. 491. A tolerance regulation that fairly takes into consideration the inherent nature of the goods and the damage existing prior to receipt by the carrier, as this regulation does, is not prohibited by § 20 (11). Obviously there could not be a search and determination egg by egg as to whether the breakage was due to the fault of the carrier or to the inherent nature of the commodity. I think the Commission had the power to promulgate regulations prescribing, after full hearing, a reasonable deduction for loss due to the inherent defects of the commodity transported. The nature of the commodity and the impossibility of deciding this humpty-dumpty question of who or what broke the egg is a proper subject for regulation. Such a regulation would not be a limit of liability but a yardstick for measuring the damage not caused by the carrier but due to the inherent nature of the commodity.

What the Commission did, after long investigation and experience with similar regulations since 1919, was to order that, as to shell eggs packaged at railpoint of origin, no claim should be allowed for damages not in excess of 3%. If in excess of 3% there could be recovery on showing that the damage was caused by the carrier. For eggs packaged off the railhead the tolerance was 5%.

As the basis for its action the Commission specifically found:

> "We find that the present 5 percent tolerance on eggs, other than those rehandled and repacked at the rail point of origin, is not shown to be unreasonable or otherwise unlawful. We further find that the proposed tolerances of 4 percent on eggs packed at the rail point of origin, and 6 percent on eggs packed at points other than the rail point of origin have not

been justified, but that tolerances of 3 and 5 percent, respectively, would be reasonable. . . ." 284 I. C. C., at 403.

The Commission report embodies basic findings to support this conclusion. For example, the Commission concluded, on the basis of certain Department of Agriculture studies, that 3.4% damage is the typical average damage existing in shipments of eggs when loaded into railroad cars at points of origin; and that an average of 1.7% damage was "incident to the movement in transit." 284 I. C. C., at 393–394. Further, the Commission found that the commercial destination inspections at New York, the most important terminal for eggs shipped by rail, are "performed with a view to detecting all damaged eggs." *Id.*, at 396. The tolerances represent the considered judgment of the Commission, after hearing voluminous evidence as to the nature of shell eggs and the way they are handled at railpoint, off railpoint and during shipment. I cannot say that this is not an allowable judgment for the Commission to make. Certainly the treatment of this case by the majority does not make for clarity and understanding, and it leaves yet undecided the question whether the Commission has the power to make an order establishing such a regulation or tariff. I think the regulation is an adequate commercial approximation of noncarrier damage, and is reasonable and within the power of the Commission to make.

For these reasons, and for the reasons set forth at length in the opinion of the District Court, 119 F. Supp. 846, I would affirm the judgment.

UNITED STATES *v.* MINKER.

NO. 35. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued November 14, 1955.—Decided January 16, 1956.

Section 235 (a) of the Immigration and Nationality Act of 1952 provides that "any immigration officer . . . shall have power to require by subpena the attendance and testimony of witnesses before immigration officers . . . relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service . . . ." *Held:* This section does not empower an immigration officer to subpoena a naturalized citizen who is the subject of an investigation by the Service to testify in an administrative proceeding before such officer, where the purpose of the investigation is to determine whether good cause exists for the institution of denaturalization proceedings against such citizen under § 340 (a) of the Act. Pp. 180–190.

(a) In the clause, "concerning any matter which is material and relevant to the enforcement of this Act," the word "Act" embraces the entire statute and may not be construed as referring only to a particular title or section thereof. Pp. 184–186.

(b) In this context, the word "witnesses" is ambiguous, and it must be construed as not including a citizen who is himself the subject of a denaturalization investigation. Pp. 186–190.

217 F. 2d 350, affirmed.

219 F. 2d 137, reversed.

Marvin E. Frankel argued the cause for the United States in No. 35 and for respondent in No. 47. With him on the briefs were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay.*

*Together with No. 47, *Falcone et al.* v. *Barnes, Officer in Charge, Immigration and Naturalization Service,* on certiorari to the United States Court of Appeals for the Second Circuit, argued November 14–15, 1955.

Jacob Kossman argued the cause and filed a brief for respondent in No. 35.

George Morris Fay argued the cause for petitioners in No. 47. With him on a brief was *John P. Burke*. *Anthony S. Falcone* also filed a brief for petitioners in No. 47.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Because of conflicting constructions by the Courts of Appeals for the Second and Third Circuits of § 235 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 198, we brought these cases here. 349 U. S. 904; 349 U. S. 927. They were heard in sequence, and, since minor differences in their facts are irrelevant to the problems now before us, they may be disposed of in one opinion.

Section 235 (a) [1] provides that any immigration officer "shall have power to require by subpena the attendance

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[1] Section 235 (a) in full provides: "The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state

and testimony of witnesses before immigration officers . . . relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States." The controlling issue presented by these cases is whether this section empowers an immigration officer to subpoena a naturalized citizen who is the subject of an investigation by the Service, where the purpose of the investigation is to determine if good cause exists for the institution of denaturalization proceedings under § 340 (a) of the Act.[2]

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under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[2] Section 340 (a) provides: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit

In No. 35, the District Director of the Immigration and Naturalization Service at Philadelphia, in accordance with § 340.11 of the Service's regulations,[3] instituted an investigation of respondent for the aforementioned purpose. In furtherance of this inquiry into the legality of

showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

[3] 8 CFR § 340.11 provides: "*Investigation and report.* Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution."

Minker's naturalization the Director subpoenaed him to give testimony at the offices of the Service. Prior to the required date of his appearance, he moved to quash the subpoena in the United States District Court for the Eastern District of Pennsylvania upon the ground, *inter alia,* that it was unauthorized by the Act. This motion was denied, *In re Minker,* 118 F. Supp. 264, and no appeal was taken. When respondent thereafter failed to obey the subpoena, the District Court, on application of the District Director, ordered respondent to appear before the Service and testify. He disregarded this order. After a hearing he was adjudged in contempt for so doing and fined $500. The Court of Appeals for the Third Circuit reversed, holding that while the power to subpoena under § 235 (a) was available for investigations directed toward denaturalization proceedings, respondent as a putative defendant in such a proceeding was not a "witness" within the meaning of the section, and the Service was, therefore, without power to subpoena him.[4] 217 F. 2d 350.

In No. 47, each petitioner was served with a subpoena issued by the officer in charge of the Immigration and Naturalization Service at Syracuse, New York. The subpoenas commanded petitioners' appearance and testimony, and required them to produce specified documents. They appeared with documents as ordered, but refused to be sworn or to testify. Thereupon an application for an order of compliance was made by the Service in the United States District Court for the Northern District of New York; but the court, denying the Service's authority, refused to compel petitioners to appear and give testimony. 116 F. Supp. 464. On appeal, to the Court of

[4] The question whether respondent was required to obey the order of the District Court irrespective of that court's power under § 235 (a) has not been raised. See *United States* v. *United Mine Workers of America,* 330 U. S. 258.

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Appeals for the Second Circuit, this judgment was reversed. 219 F. 2d 137. The court held that § 235 (a) of the Act permitted the immigration officer to subpoena the petitioners in furtherance of the Service's investigation of them under § 340.11 of the regulations. The decision assumed, although the court did not discuss the question, that each petitioner, even though a subject of investigation, was a "witness" within the meaning of § 235 (a).[5]

This brings us to an examination of the scope of § 235 (a). It had its genesis in § 16 of the Immigration Act of 1917, 39 Stat. 874, 885, which dealt with the examination of entering aliens by the Immigration Service. With respect to subpoenas the section provided: "Any commissioner of immigration or inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States . . . ." Obviously, this provision strictly defined the purposes for which officers of the Service could subpoena witnesses. It did not give them power to issue subpoenas as aids in investigating potential naturalization offenses.

The 1952 Act in § 235 (a) retained the substance of this language in § 16. But the word "alien" was changed to "person," and additional language extended the subpoena power to "any matter which is material and relevant to the enforcement of this Act and the administration of the Service." If the additional clause, following the portion "relating to the privilege of any person to enter, reenter, reside in, or pass through the United States," had merely read "and any other matter which is material and

[5] The Court of Appeals for the Fifth Circuit has taken the same view. *Lansky et al.* v. *Savoretti,* 220 F. 2d 906.

relevant," the doctrine of *ejusdem generis* would appropriately be invoked to limit the subpoena power to an investigation pertaining to questions of admission and deportation. The comprehensive addition of the clause "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," precludes such narrowing reading. "Act" encompasses the full range of subjects covered by the statute. The Immigration and Nationality Act of 1952 brought together in one statute the previously atomized subjects of immigration, nationality and naturalization. The unqualified use of the word "Act" in § 235 (a), if read as ordinary English, embraces all of these subjects even though § 235 (a) is itself in the immigration title of the statute. But "the title of a statute and the heading of a section cannot limit the plain meaning . . . ." *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529. Throughout this statute the word "Act" is given its full significance. The word embraces the entire statute.[6] On the other hand, when

[6] *E. g.*, § 215 (g): "Passports, visas, reentry permits, and other documents required for entry under this Act may be considered as permits to enter for the purposes of this section." § 241 (a) (2): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States." § 290 (a): "There shall be established in the office of the Commissioner for the use of the security and enforcement agencies of the Government of the United States, a central index, which shall contain the names of all aliens heretofore admitted to the United States, or excluded therefrom, insofar as such information is available from the existing records of the Service, and the names of all aliens hereafter admitted to the United States, or excluded therefrom, the names of their sponsors of record, if any, and such other relevant information as the Attorney General shall require as an aid to the proper enforcement of this Act."

only a particular title is referred to, it is designated as such, and when the reference is to a section, that word is employed.[7] No justification appears for treating "Act" in § 235 (a) as meaning "section." Thus far the Second and Third Circuits are in agreement.

We come then to the question upon which the two Courts of Appeals part ways in their construction of § 235 (a), namely, whether Salvatore and Joseph Falcone in the one case and Abraham Minker in the other, although each the subject of a denaturalization investigation under § 340.11 of the regulations, were "witnesses" within the meaning of the power given to "any immigration officer" to require "by subpoena the attendance and testimony of witnesses" before immigration officers.

If the answer to the question merely depended upon whether, as a matter of allowable English usage, the word "witness" may fairly describe a person in the position of Minker and the Falcones, it could not be denied that the word could as readily be deemed to cover persons in their position as not. In short, the word is patently ambiguous: it can fairly be applied to anyone who gives testimony in a proceeding, although the proceeding immediately or potentially involves him as a party, or it may be restricted to the person who gives testimony in another's case.

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[7] *E. g.*, § 284: "Nothing contained in this title shall be construed so as to limit, restrict, deny, or affect the coming into or departure from the United States of an alien member of the Armed Forces of the United States who is in the uniform of, or who bears documents identifying him as a member of, such Armed Forces, and who is coming to or departing from the United States under official orders or permit of such Armed Forces: *Provided,* That nothing contained in this section shall be construed to give to or confer upon any such alien any other privileges, rights, benefits, exemptions, or immunities under this Act, which are not otherwise specifically granted by this Act."

It is pertinent to note the breadth of § 235 (a) not only with respect to the type of investigation in which a subpoena may be issued ("any matter which is material and relevant to the enforcement of this Act"), but also with respect to the member of the Service empowered to issue it. The power is granted "any immigration officer," who in turn is defined in § 101 (a)(18) of the Act as "any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof." This extensive delegated authority reinforces the considerations inherent in the nature of the power sought to be exercised that make for a restrictive reading of the Janus-faced word "witness." The subpoena power "is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. . . . True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation." *Cudahy Packing Co., Ltd.* v. *Holland,* 315 U. S. 357, 363–364.

These concerns, relevant to the construction of this ambiguously worded power, are emphatically pertinent to investigations that constitute the first step in proceedings calculated to bring about the denaturalization of citizens. See *Schneiderman* v. *United States,* 320 U. S. 118; *Baumgartner* v. *United States,* 322 U. S. 665. This may result in "loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White,* 259 U. S. 276,

284. In such a situation where there is doubt it must be resolved in the citizen's favor. Especially must we be sensitive to the citizen's rights where the proceeding is nonjudicial because of "[t]he difference in security of judicial over administrative action . . . ." *Ng Fung Ho* v. *White, supra,* at 285.

These considerations of policy, which determined the Court's decisions in requiring judicial as against administrative adjudication of the issue of citizenship in a deportation proceeding and those defining the heavy criterion of proof to be exacted by the lower courts from the Government before decreeing denaturalization, are important guides in reaching decision here. They give coherence to law and are fairly to be assumed as congressional presuppositions, unless by appropriate explicitness the lawmakers make them inapplicable. Cf. *Bell* v. *United States,* 349 U. S. 81, 83. It does not bespeak deprecation of official zeal, nor does it bring into question disinterestedness, to conclude that compulsory *ex parte* administrative examinations, untrammelled by the safeguards of a public adversary judicial proceeding, afford too ready opportunities for unhappy consequences to prospective defendants in denaturalization suits.

These general considerations find specific reinforcement in the language of other provisions of the Act, wherein the person who is the subject of an investigation is referred to with particularity. The most striking example of this is to be found in § 335 and its legislative history which pertains to the investigation of an alien who petitions for naturalization. Section 335 (b) provides: "The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization . . . . For such purposes any such employee so designated is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturali-

zation, to administer oaths, including the oath of the petitioner for naturalization and the oaths of petitioner's witnesses to the petition for naturalization, and to require by subpena the attendance and testimony of witnesses, including petitioner . . . ." Contrast this with § 335 (b)'s predecessor, § 333 (a) of the Nationality Act of 1940, 54 Stat. 1137, 1156: ". . . any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpena witnesses, and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner's witnesses." [8] Other examples of Congress' careful differentiation between a witness who is not the subject of an investigation and the person who is, may be found in §§ 236 (a),[9] 242 (b)[10] and 336 (d)[11] of the 1952 Act.

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[8] "While the Nationality Act [§ 333 (a) of the 1940 Act] provides for subpena of witnesses at a preliminary [naturalization] hearing and for calling of witnesses in any naturalization proceedings in court, specific provision is not made for subpenaing the petitioner. The subcommittee feels that the proposed bill should contain the requirement that the petitioner be required to attend hearings and is so recommending." S. Rep. No. 1515, 81st Cong., 2d Sess. 739.

[9] Section 236 (a) provides: "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses."

[10] Section 242 (b) provides: "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation."

[11] Section 336 (d) provides: "The Attorney General shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching

All these considerations converge to the conclusion that Congress has not provided with sufficient clarity that the subpoena power granted by § 235 (a) extends over persons who are the subject of denaturalization investigations; therefore Congress is not to be deemed to have done so impliedly. Since this is so, we are not called upon to consider whether Congress may empower an immigration officer to secure evidence, under the authority of a subpoena, from a citizen who is himself the subject of an investigation directed toward his denaturalization. The judgment in No. 35 is affirmed; in No. 47, the judgment is reversed.

Affirmed and reversed respectively.

MR. JUSTICE BLACK, concurring.

The respondent Minker is a naturalized citizen of the United States.[1] He was subpoenaed by an immigration officer to appear and give testimony as a "witness." But Minker was not to be a witness within the traditional meaning of that word, that is, one who testifies in a court proceeding or in a public quasi-judicial hearing of some kind. The immigration officer summoning Minker was not a judge or "grand jury" of any kind, nor was he at the time acting in any quasi-judicial capacity. Cf. *In re Oliver,* 333 U. S. 257. He was acting under his broad power as a law enforcement officer to follow up clues and find information that might be useful in later civil or criminal prosecutions brought against persons suspected

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or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, including the petitioner, produce evidence, and be heard in opposition to, or in favor of, the granting of any petition in naturalization proceedings."

[1] Minker is respondent in No. 35. He and the petitioners in No. 47, Salvatore and Joseph Falcone, raise the same questions, and what I say about Minker's case applies also to that of the Falcones.

of violating the immigration and naturalization laws. See, *e. g.*, § 287, Immigration and Nationality Act, 66 Stat. 233, 8 U. S. C. § 1357; 8 CFR §§ 287.1–287.5. The object in summoning Minker was to interrogate him in the immigration officer's private chambers to try to elicit information "relating to the possible institution of proceedings seeking the revocation of . . . [Minker's] naturalization . . . ." Information so obtained might be used under some circumstances in court to take away Minker's American citizenship or convict him of perjury or some other crime.[2] Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors. *McNabb* v. *United States,* 318 U. S. 332; *Upshaw* v. *United States,* 335 U. S. 410. And we have frequently set aside state criminal convictions as a denial of due process of law because of coercive questioning of suspects by public prosecutors and other law enforcement officers in their official chambers. See, *e. g., Watts* v. *Indiana,* 338 U. S. 49; *Harris* v. *South Carolina,* 338 U. S. 68; *Chambers* v. *Florida,* 309 U. S. 227. Yet power of the Attorney General and immigration officers to compel persons, including suspects, to appear and subject themselves

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[2] See § 348, 66 Stat. 267, 8 U. S. C. § 1459; 18 U. S. C. § 1621. See also *Gonzales* v. *Landon,* 350 U. S. 920, reversing 215 F. 2d 955. But see *Boyd* v. *United States,* 116 U. S. 616; majority and dissenting opinions in *Feldman* v. *United States,* 322 U. S. 487; *Adams* v. *Maryland,* 347 U. S. 179.

to questioning by law enforcement officers in their private chambers is precisely what the Department of Justice claims here. This is no less true because a federal judge must be called on to "aid" the immigration officer in subjecting a summoned person to questioning. § 235 (a), 66 Stat. 198, 8 U. S. C. § 1225 (a). For after a court order, as before, the person summoned must go to an immigration officer's private chambers for questioning by him, out of which may come a prosecution against the "witness" for perjury or some other crime. A purpose to subject aliens, much less citizens, to a police practice so dangerous to individual liberty as this should not be read into an Act of Congress in the absence of a clear and unequivocal congressional mandate. I think the Act relied on here by the Department of Justice should not be so read. I would hold that immigration officers are wholly without statutory authority to summon persons, whether suspects or not, to testify in private as "witnesses" in denaturalization matters. For this reason I concur in the Court's judgment in this case.

The Department of Justice finds the sweeping power it claims in § 235 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 198, 8 U. S. C. §§ 1101, 1225. That Act is a comprehensive codification of laws relating to entry, exclusion, domestic control, deportation and naturalization of aliens; the Act also provides the controlling rules and procedures for denaturalizing naturalized citizens. Primary responsibility for administration and enforcement of the Act is vested in the Attorney General, acting chiefly through his subordinates in the Immigration and Naturalization Service. § 103, 66 Stat. 173, 8 U. S. C. § 1103.

This Court has drawn sharp and highly important distinctions between the constitutional power of Congress to bar and exclude aliens and congressional power to strip

citizens of their citizenship. Former cases have held that Congress has full power to bar or exclude aliens from the country. See, *e. g., United States* v. *Ju Toy,* 198 U. S. 253; *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206. But citizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden. See, *e. g., Ng Fung Ho* v. *White,* 259 U. S. 276; *Baumgartner* v. *United States,* 322 U. S. 665; *Gonzales* v. *Landon,* 350 U. S. 920. Congress, apparently taking note of these basic distinctions, divided the Act into different "Titles" and "Chapters." Section 235, on which the Government relies here, appears in Chapter IV of Title II. Title II as a whole contains provisions relating to "Immigration" and Chapter IV of that Title contains the "Provisions Relating to Entry and Exclusion." It is in the context of Chapter IV that § 235 gives the Attorney General and immigration officers, "including special inquiry officers," broad power to subpoena and require testimony of "witnesses" as to "the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service . . . ." I think that context indicates that § 235 was designed to apply only to the examination of "witnesses" by immigration officers in relation to "entry and exclusion" of aliens, and matters material and relevant to entry and exclusion. Such a reading makes the subpoena power given fit into the carefully devised pattern of Title II, which deals with aliens and immigration, not with naturalization or denaturalization. Even if limited to matters pertaining to the entry and exclusion of aliens, compulsory private examination of "witnesses" might be invalid. The broad powers here claimed by the

Attorney General and his immigration officers could be more nearly defended, if they can be defended at all, by confining use of the powers to the field of treatment of aliens, where this Court has said Congress has most power.

Limitation of the subpoena and investigatory powers in § 235 to matters relating to entry, control and exclusion of aliens is strengthened by consideration of Title III of the Act which covers "Nationality and Naturalization." That Title provides procedures for investigation and trial of naturalization and denaturalization cases, wholly adequate in themselves without reliance on the subpoena and examination powers of immigration officers under § 235. The naturalization and denaturalization procedures of Title III are not merely adequate, but are in a measure inconsistent with § 235 procedure. Looking first at naturalization procedure under §§ 332–336, 66 Stat. 252–258, 8 U. S. C. §§ 1443–1447, it appears that Congress with meticulous care provided a procedure for investigation of naturalization cases. These sections provide their own way for summoning and examining witnesses. Without mentioning immigration officers, the sections provide for investigations, etc., to be carried on by any employee of the Service or of the United States designated by the Attorney General. An examination under this Title is carried on by a public hearing at which an applicant for citizenship can produce his own witnesses.[3] The designated

[3] The Attorney General's regulations for the conduct of these examinations, 8 CFR §§ 335.11–335.13, also provide that the petitioner for naturalization may be represented by counsel and that the petitioner may cross-examine government witnesses. If petitioner is not represented by counsel, the hearing examiner must assist him in introducing his evidence. Furthermore the decision of the examiner may not be based on evidence which is not in the record or which would be inadmissible in judicial proceedings. Thus the regulations emphasize the difference between a subpoena to testify before a § 335 naturalization hearing officer and a subpoena to testify before a § 235

hearing examiner is given the power to subpoena witnesses by § 335 (b), 66 Stat. 255, 8 U. S. C. § 1446 (b), and the naturalization judge is authorized to compel compliance with the subpoena. After the hearing the examiner reports his findings and recommendations to the Attorney General. The views of the designated examiner, and of the Attorney General if in conflict, are then reported to the naturalization court for its consideration. All of this persuades me that reliance on the subpoena and private examination powers of immigration officers under § 235 would actually conflict with the public hearing procedure Congress and the Attorney General have provided for naturalization cases in §§ 332–335, 66 Stat. 252–257, 8 U. S. C. §§ 1443–1446, and 8 CFR §§ 335.11–335.13.

It seems even clearer that immigration officers' powers under § 235 are not applicable in denaturalization cases. Section 340 of Title III of the Act, 66 Stat. 260, 8 U. S. C. § 1451, provides for revocation of naturalization. Responsibility for initiating such cases is placed on *district attorneys* "upon affidavit showing good cause therefor . . . ." Many of the grounds for denaturalization are also grounds for felony prosecutions. Under these circumstances it is not surprising that Congress expressly placed responsibility for instituting denaturalization proceedings on district attorneys, leaving them to summon persons to appear as witnesses in the traditional manner before grand juries or courts. It would have been surprising had Congress attempted to authorize the Nation's chief prosecuting officer and his subordinates to compel a citizen to appear in government private offices to

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immigration officer seeking to obtain evidence for criminal prosecution or deportation. And they show that naturalization procedures are completely independent from entry and exclusion procedures. Cf. §§ 235 (c), 236 (a), 292, 66 Stat. 199, 200, 235, 8 U. S. C. §§ 1225 (c), 1226 (a), 1362; 8 CFR §§ 235.15, 236.11–236.16.

answer questions in secret about that citizen's conduct, associations and beliefs. Some countries give such powers to their officials. It is to be hoped that this country never will.

MR. JUSTICE DOUGLAS, concurring.

While I agree with the result reached by the Court, I do not think this case is comparable to those controversies that frequently rage over the scope of the investigative power in support of administrative action. Cf. *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, with *United States* v. *Morton Salt Co.,* 338 U. S. 632. Congress has provided a special judicial procedure which must be followed, if a citizen is denaturalized. That procedure is contained in § 340 of the Immigration and Nationality Act of 1952. 66 Stat. 163, 8 U. S. C. § 1451. It provides for canceling a certificate of naturalization on the ground that it was procured "by concealment of a material fact or by willful misrepresentation." § 340 (a). Suit may be brought by the United States Attorney in the District Court "upon affidavit showing good cause." *Id.* The citizen whose citizenship is challenged has 60 days "in which to make answer to the petition of the United States." § 340 (b). There is no pretrial administrative procedure provided in the section governing denaturalization. One can search § 340 in vain for any suggestion that the judicial procedure is supplemented by a pretrial procedure. So to hold would make the 60-day period for answer "empty words," as Judge Foley ruled in *Application of Barnes,* 116 F. Supp. 464, 469. As Judge Hastie, writing for the court below in the *Minker* case, said, the administrative pretrial procedure is not consistent with the safeguards which Congress has provided in the judicial proceedings. 217 F. 2d 350, 352. I agree with that view and would, therefore, read

§ 235 (a) to exclude witnesses who are potential defendants in § 340 cases.

There is another reason for reading the section narrowly. When we deal with citizenship we tread on sensitive ground. The citizenship of a naturalized person has the same dignity and status as the citizenship of those of us born here, save only for eligibility to the Presidency. He is a member of a community included within the protection of all the guarantees of the Constitution. Those safeguards would be imperiled if prior to the institution of the proceedings the citizen could be compelled to be a witness against himself and furnish out of his own mouth the evidence used to denaturalize him. I would require the Government to proceed with meticulous regard for the basic notions of Due Process which protect every vital right of the American citizen.

BERNHARDT *v.* POLYGRAPHIC COMPANY OF AMERICA, INC.

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

No. 49. Argued December 5, 1955.—Decided January 16, 1956.

Petitioner's action against respondent in a Vermont state court, for damages for the discharge of petitioner under an employment contract, was removed to the Federal District Court on grounds of diversity of citizenship. The contract had been made in New York, where both parties resided at the time, and provided that the parties would submit any dispute to arbitration under New York law; but petitioner had later become a resident of Vermont, where he was to perform his duties. Respondent's motion for a stay of the proceedings so that the controversy could go to arbitration in New York was denied by the District Court, which ruled that the arbitration provision of the contract was governed by Vermont law and that, under Vermont law, the agreement to arbitrate was revocable any time before an award was actually made. The Court of Appeals reversed. *Held:* The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court. Pp. 199–205.

1. The provision of § 3 of the United States Arbitration Act for stay of the trial of an action until arbitration has been had does not apply to all arbitration agreements but only to those covered by §§ 1 and 2 of the Act (those relating to maritime transactions and those involving interstate or foreign commerce), and there is no showing that the contract here involved is in either of those classes. Pp. 200–202.

2. The differences between arbitration and judicial determination of a controversy substantially affect the cause of action arising under state law and make the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, applicable. Pp. 202–204.

3. If in this case arbitration could not be compelled in the Vermont state courts, it should not be compelled in the Federal District Court. Pp. 204–205.

4. In the circumstances of this case, there is no reason to remand the case to the Court of Appeals to pass on the question of local law. P. 205.

5. On remand of the cause to the District Court, there will be open for consideration the question whether New York arbitration

law should be applied to the enforcement of the contract—a question of conflict of laws governed by Vermont law and on which it is not clear that the District Court ruled. P. 205.

218 F. 2d 948, reversed and remanded.

Manfred W. Ehrich, Jr. and *Eugene V. Clark* argued the cause and filed a brief for petitioner.

Joseph A. McNamara and *Guy M. Page, Jr.* argued the cause for respondent. On the brief were *Guy M. Page* and *Guy M. Page, Jr.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit, removed from a Vermont court to the District Court on grounds of diversity of citizenship, was brought for damages for the discharge of petitioner under an employment contract. At the time the contract was made petitioner was a resident of New York. Respondent is a New York corporation. The contract was made in New York. Petitioner later became a resident of Vermont, where he was to perform his duties under the contract, and asserts his rights there.

The contract contains a provision that in case of any dispute the parties will submit the matter to arbitration under New York law by the American Arbitration Association, whose determination "shall be final and absolute." After the case had been removed to the District Court, respondent moved for a stay of the proceedings so that the controversy could go to arbitration in New York. The motion alleged that the law of New York governs the question whether the arbitration provision of the contract is binding.

The District Court ruled that under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the arbitration provision of the contract was governed by Vermont law and that the law of Vermont makes revocable an agreement to arbitrate

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at any time before an award is actually made. The District Court therefore denied the stay, 122 F. Supp. 733. The Court of Appeals reversed, 218 F. 2d 948. The case is here on a petition for certiorari which we granted, 349 U. S. 943, because of the doubtful application by the Court of Appeals of *Erie R. Co.* v. *Tompkins, supra.*

A question under the United States Arbitration Act, 43 Stat. 883, as amended, 61 Stat. 669, 9 U. S. C. §§ 1–3, lies at the threshold of the case. Section 2 of that Act makes "valid, irrevocable, and enforceable" provisions for arbitration in certain classes of contracts; [1] and § 3 provides for a stay of actions in the federal courts of issues referable to arbitration under those contracts.[2] Section 2 makes "valid, irrevocable, and enforceable" only two types of contracts: those relating to a maritime transaction and those involving commerce. No maritime transaction is involved here. Nor does this contract evidence "a transaction involving commerce" within the meaning of § 2 of the Act. There is no showing that petitioner

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[1] Section 2 provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[2] Section 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.[3]

The Court of Appeals went on to hold that in any event § 3 of the Act stands on its own footing. It concluded that while § 2 makes enforceable arbitration agreements in maritime transactions and in transactions involving commerce, § 3 covers all arbitration agreements even though they do not involve maritime transactions or transactions in commerce. We disagree with that reading of the Act. Sections 1, 2, and 3 are integral parts of a whole. To be sure, § 3 does not repeat the words "maritime transaction" or "transaction involving commerce," used in §§ 1 and 2. But §§ 1 and 2 define the field in which Congress was legislating. Since § 3 is a part of the regulatory scheme, we can only assume that the "agreement in writing" for arbitration referred to in § 3 is the kind of agreement which §§ 1 and 2 have brought under federal regulation. There is no intimation or suggestion in the Committee Reports that §§ 1 and 2 cover a narrower field than § 3. On the contrary, S. Rep. No. 536, 68th Cong., 1st Sess., p. 2, states that § 1 defines the contracts to which "the bill will be applicable." And H. R. Rep. No. 96, 68th Cong., 1st

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[3] Section 1 defines "commerce" as:

". . . commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Since no transaction involving commerce appears to be involved here, we do not reach the further question whether in any event petitioner would be included in "any other class of workers" within the exceptions of § 1 of the Act.

Sess., p. 1, states that one foundation of the new regulating measure is "the Federal control over interstate commerce and over admiralty." If respondent's contention is correct, a constitutional question might be presented. *Erie R. Co.* v. *Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, applied the Federal Act in a diversity case. But that decision antedated *Erie R. Co.* v. *Tompkins;* and the Court did not consider the larger question presented here—that is, whether arbitration touched on substantive rights, which *Erie R. Co.* v. *Tompkins* held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe. Our view, as will be developed, is that § 3, so read, would invade the local law field. We therefore read § 3 narrowly to avoid that issue. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307. We conclude that the stay provided in § 3 reaches only those contracts covered by §§ 1 and 2.

The question remains whether, apart from the Federal Act, a provision of a contract providing for arbitration is enforceable in a diversity case.

The Court of Appeals, in disagreeing with the District Court as to the effect of an arbitration agreement under *Erie R. Co.* v. *Tompkins,* followed its earlier decision of *Murray Oil Products Co.* v. *Mitsui & Co.,* 146 F. 2d 381, 383, which held that, "Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure . . . ."

We disagree with that conclusion. We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court en-

forces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, in substance "only another court of the State." The federal court therefore may not "substantially affect the enforcement of the right as given by the State." *Id.,* 109. If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko* v. *Swan,* 346 U. S. 427, 435–438.[4] We said in the

[4] Whether the arbitrators misconstrued a contract is not open to judicial review. *The Hartbridge,* 62 F. 2d 72; *Mutual Benefit Health & Acc. Assn.* v. *United Cas. Co.,* 142 F. 2d 390. Questions of fault or neglect are solely for the arbitrators' consideration. *James Richardson & Sons* v. *W. E. Hedger Transportation Corp.,* 98 F. 2d 55. Arbitrators are not bound by the rules of evidence. *Burchell* v. *Marsh,* 17 How. 344; *Springs Cotton Mills* v. *Buster Boy Suit Co.,* 275 App. Div. 196, 200, 88 N. Y. S. 2d 295, 298, affirmed, 300 N. Y. 586, 89 N. E. 2d 877. They may draw on their personal knowledge in making an award. *American Almond Products Co.* v. *Consolidated*

York case that "The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." 326 U. S., at 109. There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be.

The District Court found that if the parties were in a Vermont court, the agreement to submit to arbitration would not be binding and could be revoked at any time before an award was made. He gave as his authority *Mead's Admx.* v. *Owen,* 83 Vt. 132, 135, 74 A. 1058, 1059, and *Sartwell* v. *Sowles,* 72 Vt. 270, 277, 48 A. 11, 14, decided by the Supreme Court of Vermont. In the *Owen* case the court, in speaking of an agreement to arbitrate, held that ". . . either party may revoke the submission at any time before the publication of an award." 83 Vt., at 135, 74 A., at 1059. That case was decided in 1910. But it was agreed on oral argument that there is no later authority from the Vermont courts, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is under way in Vermont to change the result of those cases. Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is. See

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Pecan Sales Co., 144 F. 2d 448; *The Guldborg,* 1 F. Supp. 380; *Springs Cotton Mills* v. *Buster Boy Suit Co., supra.* Absent agreement of the parties, a written transcript of the proceedings is unnecessary. *A. O. Andersen Trading Co.* v. *Brimberg,* 119 Misc. 784, 197 N. Y. S. 289; *Application of Shapiro,* 197 Misc. 241, 97 N. Y. S. 2d 644, modified, 277 App. Div. 927, 98 N. Y. S. 2d 451. Swearing of witnesses may not be required. *Application of Shapiro, supra.* And the arbitrators need not disclose the facts or reasons behind their award. *Shirley Silk Co.* v. *American Silk Mills, Inc.,* 257 App. Div. 375, 377, 13 N. Y. S. 2d 309, 311.

MacGregor v. *State Mutual Co.*, 315 U. S. 280; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Steele* v. *General Mills*, 329 U. S. 433, 439. We agree with him that if arbitration could not be compelled in the Vermont courts, it should not be compelled in the Federal District Court. Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of Vermont law. But, as we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule. We see no reason, therefore, to remand the case to the Court of Appeals to pass on this question of local law.

Respondent argues that since the contract was made in New York and the parties contracted for arbitration under New York law, New York arbitration law should be applied to the enforcement of the contract. A question of conflict of laws is tendered, a question that is also governed by Vermont law. See *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487. It is not clear to some of us that the District Court ruled on that question. We mention it explicitly so that it will be open for consideration on remand of the cause to the District Court.

The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER, concurring.

It is my view that the judgment of the Court of Appeals should be reversed and the case remanded to that court and not to the District Court.

This action was brought in the Bennington County Court of the State of Vermont by petitioner, a citizen of

Vermont, against respondent, a corporation of the State of New York. Respondent removed the case to the United States District Court for the District of Vermont. The subject matter of the litigation is a contract made between the parties in New York, and the sole basis of the jurisdiction of the District Court is diversity of citizenship. Not only was the contract made in New York, but the parties agreed to the following provision in it:

> "Fourteenth: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

Respondent invoked another provision of the contract whereby disputes under the agreement were to be submitted to arbitration subject to the regulations of the American Arbitration Association and the pertinent provisions of the New York Arbitration Act. It did so by a motion to stay the proceeding in the District Court pending arbitration.

The District Court denied the stay because, on its reading of the Vermont cases, Vermont law, while recognizing the binding force of such an agreement by way of a suit for damages, does not allow specific performance or a stay pending arbitration. It rested on a decision rendered by the Supreme Court of Vermont in a bill for an accounting

evidently between two Vermonters and relating wholly to a Vermont transaction, *i. e.*, a controversy about personal property on a Vermont farm. *Mead's Admx.* v. *Owen,* 83 Vt. 132, 74 A. 1058.[1] This case was decided in 1910 and, in turn, relied on *Aspinwall* v. *Tousey,* 2 Tyler (Vt.) 328, decided in 1803, authorizing revocation of a submission to arbitration at any time before the publication of an award.

The Court of Appeals found it unnecessary to consider what the Vermont law was today, for it held that the arbitration provision did not concern a matter of "substantive" law, for which, in this diversity case, Vermont law would be controlling on the United States District Court sitting in Vermont. It held that the arbitration provision fell within the law of "procedure" governing an action in the federal court, whatever the source of the jurisdiction. So holding, the Court of Appeals found § 3 of the United States Arbitration Act, 9 U. S. C. § 3, applicable and, accordingly, directed the District Court to heed that Act and allow the matter to go to arbitration. 218 F. 2d 948.

This Court explained in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, why the categories of "substance" and "procedure" are, in relation to the application of the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, less than self-defining. They are delusive. The intrinsic content of what is thought to be conveyed by those terms in the particular context of a particular litigation becomes the essential inquiry. This mode of approaching the problem has had several applications since the *York* decision. I agree with the Court's opinion that the differences between arbitral and judicial determination of a controversy under a contract sufficiently go to the merits of the

[1] The court also cited *Sartwell* v. *Sowles,* 72 Vt. 270, 48 A. 11.

outcome, and not merely because of the contingencies of different individuals passing on the same question, to make the matter one of "substance" in the sense relevant for *Erie R. Co.* v. *Tompkins*. In view of the ground that was taken in that case for its decision, it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is "between Citizens of different States," U. S. Const., Art. III, § 2, in disregard of the law of the State in which a federal court is sitting. Since the United States Arbitration Act of 1925 does not obviously apply to diversity cases, in the light of its terms and the relevant interpretive materials, avoidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases.[2] Of course this implies no opinion on the constitutional question that would be presented were Congress specifically to make the Arbitration Act applicable in such cases. Furthermore, because the Act is not here applicable, I abstain from any consideration of the scope of its provisions in cases which are in federal courts on a jurisdictional basis other than diversity of citizenship.

Vermont law regarding such an arbitration agreement as the one before us, therefore, becomes decisive of the litigation. But what is Vermont law? One of the difficulties, of course, resulting from *Erie R. Co.* v. *Tompkins*, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state

[2] *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, was a diversity case wherein § 3 of the Arbitration Act was applied. But the case was pre-*Erie*, and the Court's attention was not directed toward the question.

policies going to the heart of those rights. If Judge Gibson's statement of what is the contemporary Vermont law relevant to the arbitration provision now before him were determinative, that would be that. But the defendant is entitled to have the view of the Court of Appeals on Vermont law and cannot, under the Act of Congress, be foreclosed by the District Court's interpretation.

As long as there is diversity jurisdiction, "estimates" are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law.[3] See *Pomerantz* v. *Clark,* 101 F. Supp. 341. This Court ought not to by-pass the Court of Appeals on an issue which, if the Court of Appeals had made a different estimate from the District Court's, of contemporaneous Vermont law regarding such a contract as the one before us, this Court, one can confidently say, would not have set its view of Vermont law against that of the Court of Appeals. For the mere fact that Vermont in 1910 restated its old law against denying equitable relief for breach of a promise to arbitrate a contract made under such Vermont law, is hardly a conclusive ground for attributing to the Vermont Supreme Court application of this equitable doctrine in 1956 to a contract made in New York with explicit agreement by the parties that the law of New York which allows such a stay as was here sought, New York Civil Practice Act, § 1451, should govern. Cf. *Brown* v. *Perry,* 104 Vt. 66, 156 A. 910. Law does change with times and circumstances, and not merely through legislative reforms.[4] It is also to be noted that

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[3] It is peculiarly true of the problem before us, that law is a prophecy "of what the courts will do in fact." Holmes, The Path of the Law, in Collected Legal Papers, p. 173.

[4] That the Vermont Supreme Court does not obstinately adhere to its past decisions, that for it too law is living, is illustrated by the following instances: *Capello's Administrator* v. *Aero Mayflower Transit Co.,* 116 Vt. 64, 68 A. 2d 913, overruling *Ronan* v. *Turnbull*

law is not restricted to what is found in Law Reports, or otherwise written. See *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369. The Supreme Court of Vermont last spoke on this matter in 1910. The doctrine that it referred to was not a peculiar indigenous Vermont rule. The attitude reflected by that decision nearly half a century ago was the current traditional judicial hostility against ousting courts, as the phrase ran, of their jurisdiction. See the adverse comments of Judge Hough in *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co., Ltd.,* 222 F. 1006, against what he assumed to be the law in the federal courts, and compare with the shift in judicial attitude reflected by the reservation of this

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Co., 99 Vt. 280, 287–288, 131 A. 788, 791–792 (proof that an automobile involved in an accident was owned by the defendant at the time of the accident does not make a prima facie case that the operator of the automobile was engaged in the defendant's service); *Bartlett* v. *Bonazzi,* 91 Vt. 192, 99 A. 886, overruling *Fisher* v. *Brown,* 1 Tyler (Vt.) 387 (action for deceit will not lie for seller's fraudulent misrepresentations concerning his financial position which induced buyer to extend credit); *State* v. *Pianfetti,* 79 Vt. 236, 65 A. 84, overruling *State* v. *Kittle,* 2 Tyler (Vt.) 471 (jury verdict of guilty on one of four counts in an indictment operated as an acquittal on the other three counts); *Perry* v. *Shumway,* 73 Vt. 191, 50 A. 1069, overruling *Hartland* v. *Hackett,* 57 Vt. 92 (the issuing of an *extent* against a delinquent tax collector constitutes an election of remedies which bars an action on the collector's bond); *State* v. *Burpee,* 65 Vt. 1, 25 A. 964, overruling *State* v. *Croteau,* 23 Vt. 14 (in a criminal trial all questions of law as well as fact are for the jury); *Woodrow* v. *O'Conner,* 28 Vt. 776, and *Bagley* v. *Wiswall,* Brayton 23, overruling *Drake* v. *Collins,* 1 Tyler (Vt.) 79 (an arbitration note is void for want of consideration). See also *Grenier* v. *Alta Crest Farms, Inc.,* 115 Vt. 324, 58 A. 2d 884, deciding that the character of the employee right created by the Vermont Workmen's Compensation Act is not the same as the character of the right which existed at common law. The opinion draws upon the recorded attitude of other jurisdictions to justify its departure from the contrary theory which it had set forth in *Kelley* v. *Hoosac Lumber Co.,* 96 Vt. 153, 118 A. 520.

question in Mr. Justice Brandeis' opinion for the Court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109.[5] To be sure, a vigorous legislative movement got under way in the 1920's expressive of a broadened outlook of view on this subject. But courts do not always wait for legislation to find a judicial doctrine outmoded. Only last Term, although we had no statute governing an adjudication, we found significance in a relevant body of enactments elsewhere: "A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process." *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 360.

Surely in the light of all that has happened since 1910 in the general field of the law of arbitration, it is not for us to assume that the Court of Appeals, if it had that question for consideration, could not have found that the law of Vermont today does not require disregard of a pro-

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[5] Judge Hough, in 1915, stated:

"It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery, 4 H. L. Cas. 811)—'in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'

"A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason . . . ." 222 F., at 1007.

"I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted [the arbitration clause] . . . is void in a federal forum." 222 F., at 1012.

On the other hand, in 1924 this Court observed in *Red Cross Line:* "we have no occasion to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified." 264 U. S., at 125.

vision of a contract made in New York, with a purposeful desire to have the law of New York govern, to accomplish a result that today may be deemed to be a general doctrine of the law. Of course, if the Court of Appeals, versed in the general jurisprudence of Vermont and having among its members a Vermont lawyer, should find that the Vermont court would, despite the New York incidents of the contract, apply Vermont law and that it is the habit of the Vermont court to adhere to its precedents and to leave changes to the legislature, it would not be for the federal court to gainsay that policy. I am not suggesting what the Court of Appeals' answer to these questions would be, still less what it should be. I do maintain that the defendant does have the right to have the judgment of the Court of Appeals on that question and that it is not for us to deny him that right.

I would remand the case to the Court of Appeals for its determination of Vermont law on matters which the basis of its decision heretofore rendered it needless to consider.

MR. JUSTICE HARLAN, concurring.

I concur in the opinion of the Court except insofar as it undertakes to review and affirm the District Court's interpretation of Vermont law. I agree with MR. JUSTICE FRANKFURTER that the review of questions of state law should ordinarily be left to the Courts of Appeals and would remand the case to the Court of Appeals for that purpose.

MR. JUSTICE BURTON, dissenting.

Whether or not § 3 of the Federal Arbitration Act is applicable to this contract, the judgment of the Court of Appeals should be affirmed.

Assuming the validity of the arbitration clause in the New York contract here involved, I regard the procedure

which it prescribes as a permissible "form of trial." See *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381. Accordingly, the United States District Court for the District of Vermont may stay its own proceedings to await completion of the arbitration proceedings, although a state court of Vermont would not do likewise. I do not interpret *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, or *Guaranty Trust Co.* v. *York*, 326 U. S. 99, as requiring the contrary.

REA *v.* UNITED STATES.

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

No. 30. Argued November 10, 1955.—Decided January 16, 1956.

On the basis of evidence seized under an invalid federal search warrant, petitioner was indicted in a federal court for unlawful acquisition of marihuana. On his motion under Rule 41 (e) of the Federal Rules of Criminal Procedure, this evidence was suppressed. Thereafter he was charged in a state court with possession of marihuana in violation of state law. Alleging that the evidence suppressed in the federal court was the basis of the state charge, petitioner moved in a federal court for an order enjoining the federal agent who had seized the evidence from transferring it to state authorities or testifying with respect thereto in the state courts. *Held:* The motion should have been granted. Pp. 214–218.

218 F. 2d 237, reversed.

Joseph A. Sommer argued the cause for petitioner. With him on the brief was *Thomas F. McKenna.*

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Marvin E. Frankel.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was indicted for the unlawful acquisition of marihuana in violation of 26 U. S. C. § 2593 (a). The indictment, found in September 1953, was based on evidence obtained by a search warrant issued by a United States Commissioner, as authorized by Rule 41 (a) of the Rules of Criminal Procedure, in August 1953. Petitioner moved under Rule 41 (e) to suppress the evidence on the ground that the search warrant was improperly issued under Rule 41 (c) in that it was insufficient on its face,

no probable cause existed, and the affidavit was based on unsworn statements.* The District Court granted the motion to suppress and, on the Government's later motion, dismissed the indictment. No motion for return of the evidence was made. The evidence seized was indeed contraband. Since the crime charged was a violation of a provision of the Internal Revenue Code, 28 U. S. C. § 2463 was applicable. That section provides against the return of the property in the following words:

> "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." And see 26 U. S. C. § 2598.

After the District Court suppressed the evidence, a federal narcotics agent swore to a complaint before a New Mexico judge and caused a warrant for petitioner's arrest to issue. Petitioner has now been charged with being in possession of marihuana in violation of New Mexico law and awaits trial in the state court. The case against petitioner in the state court will be made by testimony of the federal agent based on the illegal search and on the evidence seized under the illegal federal warrant.

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*Rule 41 (c) provides in relevant part as follows:
"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof."

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That at least is the basis of the motion in the District Court to enjoin the federal narcotics agent from testifying in the state case with respect to the narcotics obtained in the illegal search and, if the evidence seized is out of the custody of the United States, to direct the agent to reacquire the evidence and destroy it or transfer it to other agents. The District Court denied the motion and the Court of Appeals affirmed. 218 F. 2d 237. The case is here on a petition for certiorari which we granted because of the importance in federal law enforcement of the question presented. 348 U. S. 958.

The briefs and oral argument have been largely devoted to constitutional questions. It is said, for example, that while the Fourth Amendment, as judicially construed, would bar the use of this evidence in a federal prosecution (*Weeks* v. *United States,* 232 U. S. 383), our decision in *Wolf* v. *Colorado,* 338 U. S. 25, would permit New Mexico to use the evidence in its prosecution of petitioner. Moreover, it is said that to suppress the use of the evidence in the state criminal proceedings would run counter to our decision in *Stefanelli* v. *Minard,* 342 U. S. 117.

We put all the constitutional questions to one side. We have here no problem concerning the interplay of the Fourth and the Fourteenth Amendments nor the use which New Mexico might make of the evidence. The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law. Cf. *Boske* v. *Comingore,* 177 U. S. 459. The only relief asked is against a federal agent, who obtained the property as a result of the abuse of process issued by a United States Commissioner. The property seized is contraband which Congress has made "subject only to the orders and decrees of the courts of the United States having jurisdiction thereof," as provided in 28 U. S. C. § 2463, already quoted. In this posture we have then a

case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies. Cf. *McNabb* v. *United States,* 318 U. S. 332.

A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U. S. 821 *et seq.* The power of the federal courts extends to policing those requirements and making certain that they are observed. As stated in *Wise* v. *Henkel,* 220 U. S. 556, 558, which involved an order directing the district attorney to return certain books and papers unlawfully seized:

> ". . . it was within the power of the court to take jurisdiction of the subject of the return and pass upon it as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court."

No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court. To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them.

The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforce-

ment. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE MINTON join, dissenting.

Without discussion of the competing state and federal interests involved, the Court holds that a federal law enforcement officer should be enjoined from turning over to state authorities for use in a state prosecution evidence which he has obtained in contravention of the Fourth Amendment, and from giving testimony concerning the evidence in the state proceedings. This holding so far departs from the concepts which have hitherto been considered to govern state and federal relationships in this area that I am constrained to dissent.

1. The holding that an injunction should issue against making available to New Mexico the evidence and testimony in question is rested on this Court's "supervisory powers over federal law enforcement agencies." So far as I know, this is the first time it has been suggested that the federal courts share with the executive branch of the Government responsibility for supervising law enforcement activities as such. *McNabb* v. *United States*, 318 U. S. 332, cited by the Court, stands for no such proposition. Indeed, in excluding the *McNabb* evidence in a federal trial, the Court was careful to say: ". . . we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law

enforcement." 318 U. S., at 347. I do not think that this case can be brought within *McNabb* simply because the enjoined evidence was seized under an invalid court process. Would the Court's decision have been different had there been no search warrant at all? Moreover, the Court has heretofore refused to extend the *McNabb* rule to state criminal trials. *Stein* v. *New York,* 346 U. S. 156, 186–188; *Gallegos* v. *Nebraska,* 342 U. S. 55, 63–64.

2. Nor can this decision be supported under any general equity power. For although the federal courts undeniably have the power to issue an injunction in this case, they also have the discretion to withhold equitable relief when, on the balance, the power should not be exercised. On that basis, I think the decision cannot be reconciled with the rationale of *Stefanelli* v. *Minard,* 342 U. S. 117. There, in a case brought under the Civil Rights Act, R. S. § 1979, now 42 U. S. C. § 1983, claiming violation of petitioner's rights under the Fourteenth Amendment, the Court refused to enjoin the use of state-seized evidence in a state prosecution, saying that "the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." *Id.,* at 120. That holding was based on the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." The same consideration is applicable here. The Court distinguishes *Stefanelli* because we are "not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law." But this seems to me illusory, for, as the Court recognizes, the State's case against petitioner appears to depend wholly on the evidence in question; the injunction will operate quite as effectively, albeit indirectly, to stultify the state prosecution as if it had been issued directly against New Mexico or its officials. New Mexico's prosecution is at least as

far advanced as was the state prosecution in *Stefanelli.* If New Mexico should now seek to subpoena the federal agent, would the Court permit him to honor the State's process? And if not, how could that properly be said not to impinge directly upon the New Mexico prosecution? Today's decision represents a reversal of the sound policy followed in *Stefanelli;* I can find no justification for it. It was not an abuse of discretion to withhold the relief here.

3. It is said that the federal policies against unlawful searches and seizures will be flouted if a federal agent can "use the fruits of his unlawful act either in federal or state proceedings." But this Court has already held that although the substance of the Fourth Amendment is "implicit in 'the concept of ordered liberty' " and hence enforceable against the States through the Fourteenth Amendment, evidence unlawfully seized by a State can nevertheless be used in state prosecutions. *Wolf* v. *Colorado,* 338 U. S. 25. That being so, I am unable to understand how an exercise of federal equity power designed to deny the State the use of this evidence can be squared with the policies underlying *Wolf.* The fact that the injunction operates only against evidence still in possession of the federal authorities and against testimony by a federal officer is for me not a sufficient answer, since the only difference I can see between the *Wolf* decision and *Weeks* v. *United States,* 232 U. S. 383, excluding in federal criminal trials evidence obtained in contravention of the Fourth Amendment, is the difference between state and federal courts; in each case, the substance of the constitutional command is the same, but the nature of enforcement varies with the forum. So that, had the petitioner here been convicted in the state courts by use of this evidence, I take it that *Wolf* means we would not have interfered, at least absent any showing of a more aggravated search and seizure than this record discloses. To say that

federal interference is nevertheless justified at this point in the proceedings whenever the State has not yet obtained the evidence seems to me to make the matter simply a race between a state prosecution and a federal injunction proceeding. I do not believe that a rule dependent on the fortuitous circumstance of winning that race is a sound one in this important field of federal-state relations. If, on the other hand, the Court is now saying that it is the difference between the Fourth Amendment and the Fourteenth which requires this result—a conclusion disclaimed by the majority—then I would still regard the injunction as improvidently issued, since New Mexico should be given the first opportunity to suppress the evidence, with this Court sitting in review if the State improperly refuses to do so. Cf. *Douglas* v. *Jeannette,* 319 U. S. 157.

In accommodating state and federal interests in criminal law enforcement, this Court has hitherto taken the view that the States should be left free to follow or not the federal exclusionary rule set forth in *Weeks* v. *United States, supra.* The present decision seems to me to be a step in the opposite and wrong direction. I think the judgment below should be affirmed.

UNITED STATES *v.* TWIN CITY POWER CO. ET AL.

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

No. 21. Argued October 18, 1955.—Decided January 23, 1956.

In a suit brought by the United States for the condemnation of private land adjoining a navigable river as part of a project for the improvement of the Savannah River basin, the just compensation which the Fifth Amendment requires to be paid does not include the value of the water power in the flow of the stream. Pp. 223–228.

(a) A federal court may not substitute its judgment for a congressional determination that the taking is for the improvement or protection of navigation. P. 224.

(b) If the interests of navigation are served, it is constitutionally irrelevant that other purposes also may be advanced. P. 224.

(c) The interest of the United States in the flow of a navigable stream derives from the Commerce Clause and can be asserted to the exclusion of any competing or conflicting interest. Pp. 224–225.

(d) The fact that the land does not lie in the bed of the river nor below high water, but above and beyond the ordinary high-water mark, does not entitle the owner to compensation based on a value in the flow of the stream. Pp. 225–226.

(e) *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, and *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, distinguished. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, followed. Pp. 225–228.

(f) The fact that the private owners had interests in the water that were recognized by state law does not entitle them to compensation for such value. Pp. 227–228.

(g) Under the Fifth Amendment, only loss to the owner, not gain to the taker, is compensable. P. 228.

(h) To require the United States to pay for this water-power value would be to create private claims in the public domain. P. 228.

215 F. 2d 592, reversed.

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Roger P. Marquis.*

David W. Robinson argued the cause for respondents. With him on the brief were *James F. Dreher* and *R. Hoke Robinson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for condemnation of land instituted by the United States against respondent power company. A single question of valuation is presented. It is whether the just compensation which the United States must pay by force of the Fifth Amendment includes the value of the land as a site for hydroelectric power operations. The Fourth Circuit Court of Appeals held that it does. 215 F. 2d 592. The Court of Appeals for the Fifth Circuit reached the same result in litigation involving other lands in the same hydroelectric project. *United States* v. *Twin City Power Co.*, 221 F. 2d 299. We granted the petition for certiorari in the former case because of the importance of the issue presented. 348 U. S. 910.

The condemnation proceedings are part of the procedure for completion of the Clark Hill project on the Savannah River, a navigable stream in southeastern United States. The Clark Hill project is the first in a series of steps recommended by the Chief of Army Engineers for the improvement of the basin of that river. H. R. Doc. No. 657, 78th Cong., 2d Sess. That Report conceives of the Clark Hill project as serving multiple purposes—hydroelectric, flood control, and navigation. It states that the Clark Hill project, "if suitably constructed and operated primarily for hydroelectric-power development, would incidentally reduce downstream flood damages and improve low-water flows for navigation." *Id.*,

p. 3. Congress approved this project as part of "the comprehensive development of the Savannah River Basin for flood control and other purposes." Section 10 of the Flood Control Act of 1944, 58 Stat. 887. And see *United States ex rel. Chapman* v. *Federal Power Commission,* 345 U. S. 153, 170.

The Court of Appeals concluded that the improvement of navigation was not the purpose of the taking but that the Clark Hill project was designed to serve flood control and water-power development. 215 F. 2d, at 597. It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. See *Arizona* v. *California,* 283 U. S. 423, 455–457. The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. See *Berman* v. *Parker,* 348 U. S. 26, 32; *United States ex rel. TVA* v. *Welch,* 327 U. S. 546, 552. The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown "to involve an impossibility," as Mr. Justice Holmes expressed it in *Old Dominion Co.* v. *United States,* 269 U. S. 55, 66. If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced. *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 426; *Oklahoma ex rel. Phillips* v. *Atkinson Co.,* 313 U. S. 508, 525, 533–534. As we said in the *Appalachian Power Co.* case, "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." 311 U. S., at 426.

The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the

exclusion of any competing or conflicting one. The power is a privilege which we have called "a dominant servitude" (see *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 391; *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 249) or "a superior navigation easement." *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 736. The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States* v. *Gerlach Live Stock Co., supra,* and *Federal Power Commission* v. *Niagara Mohawk Power Corp., supra.* We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose.

We can also put aside such cases as *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, where assertion of the dominant servitude in the navigable river injured property beyond the bed of the stream. Here we are dealing with the stream itself, for it is in the water power that respondents have been granted a compensable interest.

It is argued, however, that the special water-rights value should be awarded the owners of this land since it lies not in the bed of the river nor below high water but above and beyond the ordinary high-water mark. An effort is made by this argument to establish that this private land is not burdened with the Government's servitude. The flaw in that reasoning is that the landowner here seeks a value *in the flow of the stream,* a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. It is no answer to say that payment is

sought only for the location value of the fast lands. That special location value is due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account.

That is illustrated by *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, the case that controls this one. In that case a private company installed a power project in St. Mary's River under a permit from the Government, revocable at will. The permit was revoked, Congress appropriating the entire flow of the stream for navigation purposes. The Court unanimously held that the riparian owner had no compensable interest in the water power of which it had been deprived. Mr. Justice Lurton, speaking for the Court, said, "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *Id.*, at 69. The Court accordingly reversed a judgment that awarded the riparian owner what respondents have obtained in this case, *viz.*, "the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land." *Id.*, at 74. The Court said, "The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use."* *Id.*, at 76. Some of the land owned by the pri-

*In the *Chandler-Dunbar* case, an award of compensation was made for the value of the land for a lock and canal, passing "around the falls and rapids." *United States* v. *Chandler-Dunbar Co.*, 229 U. S., at 67, 76–78. It may be that the Court was influenced by the fact that, on the special facts of the case, the use of the land for canals and

vate company was in the bed of the stream, some above ordinary high water. But the location of the land was not determinative. It was the dominion of the Government over the water power that controlled the decision. Both in *Chandler-Dunbar* and in this case it is the water power that creates the special value, whether the lands are above or below ordinary high water. The holding in *Chandler-Dunbar* led us to say in *United States* v. *Appalachian Power Co., supra,* at 424, that the "exclusion of riparian owners" from the benefits of the power in a navigable stream "without compensation is entirely within the Government's discretion." And again, "If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power." *Id.*, at 427.

The power company in the present case is certainly in no stronger position than the owner of the hydroelectric site in the *Chandler-Dunbar* case. While the latter was deprived of a going private power project by the Government, the present private owners never had a power project on the Savannah and as a result of the Government's pre-emption never can have one.

It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute "private property" within the meaning of the Fifth Amendment. Location of the lands might under some circumstances give them special value,

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locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation. Whatever may be said for that phase of the case, it affords no support for respondent, since water-power value, held to be compensable by the Court of Appeals, was ruled to be noncompensable in the *Chandler-Dunbar* case.

as our cases have illustrated. But to attach a value of water power of the Savannah River due to location and to enforce that value against the United States would go *contra* to the teaching of *Chandler-Dunbar*—"that the running water in a great navigable stream is capable of private ownership is inconceivable." 229 U. S., at 69.

The holding of the *Chandler-Dunbar* case that water power in a navigable stream is not by force of the Fifth Amendment a compensable interest when the United States asserts its easement of navigation is in harmony with another rule of law expressed in *United States* v. *Miller*, 317 U. S. 369, 375.

> "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus, although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value."

The Court in the *Chandler-Dunbar* case emphasized that it was only loss to the owner, not gain to the taker, that is compensable. 229 U. S., at 76. If the owner of the fast lands can demand water-power value as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. The right has value or is an empty one dependent solely on the Government. What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys. Cf. *U. S. ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273 *et seq.* To require the United States to pay for this water-power value would be to create private claims in the public domain.

Reversed.

MR. JUSTICE BURTON, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE MINTON, and MR. JUSTICE HARLAN join, dissenting.

The issue here is the determination of the compensation which, under the Fifth Amendment, must be paid for privately owned fast land adjoining a navigable stream when such land is taken by the United States for a public use. For the reasons hereafter stated, I agree with the courts below that the proper measure of such compensation is the fair market value of the land at the time it is taken, and that this includes recognition of any fair market value of the land that is due to its riparian character.

This issue has confronted the United States ever since it proposed to construct a multipurpose dam across the Savannah River, and found it necessary to acquire privately owned land on which to locate its Clark Hill dam, plant and reservoir. Part of the needed land lay in South Carolina on the north bank of the river and the remainder on its south bank in Georgia. Of the 70,000 or more acres thus required, about 4,700, at the heart of the project, are the ones before us. Those in South Carolina are owned by the Twin City Power Company, a South Carolina corporation. Those in Georgia are owned by the Twin City Power Company of Georgia, a Georgia corporation. The latter is a wholly owned subsidiary of the former and the two will be referred to as Twin City.

In 1947, the United States, in seven proceedings, but under a single program, took possession of the 4,700 acres. It filed four actions in the United States District Court for the Western District of South Carolina, and three in the corresponding court for the Southern District of Georgia. Each sought to condemn the title to some of the property taken and to fix the compensation to be paid for it.

Because of the necessity for proceeding in two jurisdictions, the compensation issue has been passed upon by

two District Courts and two Courts of Appeals, as well as by three Commissioners appointed jointly by the District Courts to recommend the compensation to be paid. All of the opinions rendered have held that the fair market value of the land taken should include recognition of the value of its location, availability and exceptional suitability for use as a dam site, plant site or reservoir basin incidental to a water-power development. By doing so, they have expressly declined to limit their estimates of the fair market value of the Twin City land merely to its market value for agricultural purposes and the supplying of timber as contended by the Government.[1]

For over 50 years, the land in question has been the subject of frequent consideration and negotiation in connection with the proposed construction of some dam to raise the level of the Savannah River from 60 to 100 feet in that vicinity. Twin City was organized for the development of a hydroelectric plant in this area and began acquiring this property for that purpose in 1901. By 1911, it owned practically all of the land necessary for an integrated site for a hydroelectric power project with a

[1] See opinion of District Judge Wyche speaking, in 1949, for the District Courts for the Western District of South Carolina and the Southern District of Georgia, 86 F. Supp. 467; report of Commissioners, in 1953 (R. 14); opinion of District Judge Wyche confirming, in 1953, the Commissioner's report which also was confirmed by District Judge Scarlett for the Southern District of Georgia, 114 F. Supp. 719; opinion of District Judge Wyche, sitting with District Judge Scarlett, overruling, in 1953, motion to amend findings and enter a new judgment (R. 55); opinion of Chief Judge Parker, in 1954, joined by Circuit Judges Soper and Dobie, constituting the Court of Appeals for the Fourth Circuit, 215 F. 2d 592; and opinion of Chief Judge Hutcheson, in 1955, joined by Circuit Judge Holmes and District Judge Dawkins, constituting the Court of Appeals for the Fifth Circuit, 221 F. 2d 299. See also, opinion rendered, in 1947, in *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408, by the Court of Appeals for the Fourth Circuit.

60-foot head at Price's Island.[2] Under six Acts of Congress, passed between 1901 and 1919, Twin City was authorized to build power dams in the Savannah River at Price's Island utilizing the land involved here. The Secretary of War and the Chief of Engineers of the United States approved those plans. The land before us included an excellent dam site where the river narrowed to 900 feet. At appropriate points, the land included sound foundation rock and much clay suitable for earth dam purposes. The stream flow at Price's Island exceeded that of most hydro developments in North Carolina, South Carolina or Georgia. At all material times, there has been an ample and growing market for the electrical energy to be produced. The area contained substantially no improvements requiring removal and was suited for a reservoir basin extending 11 or more miles up the river.

In 1925, the Federal Power Commission granted Twin City a preliminary permit for a development at Price's Island involving a dam with a 60-foot head of water. In 1926, the Southeastern Power & Light Company negotiated with Twin City for the purchase of its land. Shortly thereafter, the Savannah River Electric Company intervened and obtained a license from the Commission to construct a 90-foot dam for a hydroelectric development which would have absorbed the land now before us. The Savannah River Electric Company also instituted, but later abandoned, proceedings to condemn the Twin City

[2] Twin City's 4,700 acres would include all except about 170 acres of the land and rights necessary for the location of a dam, plant and reservoir basin with a 60-foot head of water at Price's Island. A 60-foot head at that point with a 5-foot surcharge would require about 400 additional acres instead of 170, a 70-foot head with a 5-foot surcharge, 1,250 acres, and an 80-foot head with a 5-foot surcharge, 2,800 acres. The Twin City land was not only available but essential for such developments in the vicinity of Price's Island. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266; *Olson* v. *United States*, 292 U. S. 246.

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property. After World War II, the Savannah River Electric Company applied to the Commission for a permit to construct a dam for the development of water power at a point almost identical with the Clark Hill site. That proposal called for occupation of the Twin City land and negotiations for its purchase were renewed. By then, however, the United States had made plans for its own comprehensive improvement of the Savannah River for flood control, navigation and power purposes. In 1944, Congress had authorized the Clark Hill project. 58 Stat. 894. In 1947, the efforts of the Savannah River Electric Company came to an end with its unsuccessful petition for a federal license.[3] In that year, the Government took possession of the land for its present Clark Hill project, calling for a 130-foot dam about six miles below Price's Island and for the complete absorption of the Twin City land.

Included in the 4,707.65 acres to be evaluated are 4,519.15 acres owned in fee, and 188.50 over which Twin City merely has flowage rights.[4] The latter are significant because a market for flowage rights is a recognition of a special value of the land for that use.

There is no need to discuss here the question whether the Clark Hill project, as authorized by Congress, is primarily in the interest of navigation, rather than of flood control or power development, for, in any event, the United States has the power of eminent domain. By

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[3] *Savannah River Electric Co.* v. *Federal Power Commission, supra.*

[4] These 188.50 acres are those on which the flowage rights have been found by the lower courts to be valid and enforceable, as distinguished from the 745.58 acres of "options" which have been treated by the lower courts as unenforceable. The flowage rights were acquired by Twin City through deeds of purchase and, for reservoir purposes, they are as valuable as a title in fee. They evidence a control over riparian land without which water rights are useless for the development of a hydroelectric project.

payment of just compensation, it may acquire whatever private property may be necessary and appropriate for the project, including the Twin City fast land and flowage rights.

There also is no need to discuss the traditional servitude, generally referred to as the navigation servitude, which the United States enjoys within the banks and bed of the Savannah River. All of the Twin City land and flowage rights involved are located above and beyond the ordinary high-water mark of the river. It is conceded that the United States has a right to exercise its navigation servitude without payment of compensation within the limits of the servitude. There is no claim made here for payment for any value in the flow of the stream, for any part of the bed of the river or for any land below the ordinary high-water mark of the river.[5]

> "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases [*United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and *United States* v. *Willow River Power Co.*, 324 U. S. 499]. When the Government exercises this servitude, it is exercising its paramount power

[5] The answers filed by the condemnees in this action were so construed by the District Court. The United States, relying on *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, moved to strike portions of the amended answers filed by the condemnees. In denying these motions, the District Court said:

". . . But, I do not understand that the condemnee by its answers claims to have any private property right in the 'water power capacity' or the 'raw water' of the river; neither has it built, nor does it own, any structures in the stream for which it claims compensation. On the contrary, its claim is limited to the fair market value of its *fast* lands, based upon 'the most profitable use to which the land can probably be put in the reasonably near future.'" *United States* v. *1532.63 Acres of Land*, 86 F. Supp. 467, 476.

in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, §§ 86–90 (1883); I Farnham, Waters and Water Rights, c. III, § 29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream. The relevance of the high-water level of the navigable stream is that it marks its bed. Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened." *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 808.[6]

Similarly, there is no controversy here between the United States, any State, or private landowner as to the paramount right of the United States to take possession of the land in question for the purposes stated. Unlike the situation in *Federal Power Commission* v. *Niagara Mohawk Corp.*, 347 U. S. 239, there are no vested water rights claimed here under state law. Twin City does not contest the right of the United States to develop the

[6] Following the above statement, we illustrated, in a footnote, the limitation of the servitude to the bed of the stream as fixed by its ordinary high-water mark. We showed that in the *Chicago* case, *supra*, this Court permitted the overflowing, without compensation, of land within the bed of the stream but denied application of the servitude to nearby land outside of the bed of the stream. The Court also remanded that case for a determination of whether or not certain other lands were within the bed of the stream.

power resources of the river. It asks only that, to the extent that the United States takes private fast land for public use, it shall pay its fair market value, including its fair market value for riparian uses.

". . . The statement in that opinion (p. 326) [*Monongahela Navigation Co.* v. *United States,* 148 U. S. 312] that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399.

"That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. . . .

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n,* 291 U. S. 227. 2 Lewis, Eminent Domain, 3d ed., § 707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., § 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the

possibility of combination is reasonably sufficient to affect market value." [7] *Olson* v. *United States*, 292 U. S. 246, 254–256.

In the instant case, the Commissioners, the District Courts and the Court of Appeals have applied the above rule. The Commissioners considered all elements of value which they could ascertain with reasonable accuracy, provided those elements were sufficiently assured to be reflected in the fair market value of the premises.[8]

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[7] Near this point, there also appears the following statement which has significance here in view of the competition between Twin City and others prior to the taking of the land in question by the United States:

". . . It is common knowledge that public service corporations and others having that power [of condemnation] frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account." 292 U. S., at 256.

See *United States ex rel. T. V. A.* v. *Powelson*, *supra*, at 275; and also *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359; *United States* v. *Miller*, 317 U. S. 369; *McCandless* v. *United States*, 298 U. S. 342; *City of New York* v. *Sage*, 239 U. S. 57; *Boom Co.* v. *Patterson*, 98 U. S. 403, 407–408.

[8] The following are excerpts from the Commissioner's report:

". . . By reason of their geographical location, these lands and other property rights of Twin City had a peculiar value for water power purposes . . . .

. . . . . .

". . . all the witnesses, in the main, had taken the steam plant comparison method as one of the principal bases for arriving at the water power value of the property of Twin City . . . . In that connection, we wish to make it clear that the figure arrived at by the so-called 'steam plant comparison method' [$1,600,000], was not taken as an absolute guide, or basis, but was used as one of the principal bases, together with numerous other factors considered by these expert witnesses . . . ."

In confirming the report of the Commissioners, the District Court said:

> "Since the award to Twin City of $1,257,033.20 is not the value of its property for any particular purpose but represents its fair market value after considering all of the reasonable uses of the property which were not too remote or speculative, this amount is the 'just compensation' required by the Fifth Amendment and the applicable statutes. . . . This is the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." 114 F. Supp., at 725.

The potential use of this land for dam, plant and reservoir purposes is far from speculative in the light of the 50 years of recognition of its availability and suitability for those purposes. The land was accumulated by Twin City for this very purpose and it is now flooded as part of the Clark Hill project. The steam-plant comparison computations made by the Commissioners are substantially uncontroverted. If a purchase price had been sought by negotiation in 1947, it is inevitable that a primary consideration would have been the value of the flowage rights and of the dam and plant locations in relation to water-power development. We cannot realistically imagine that such a negotiation would have been limited to a consideration of the land's timber and its minor value for agricultural uses.[9]

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[9] The estimate which the Commissioners made of the value of the land based upon its timber and agricultural value, plus an allowance of $5 per acre for the assembly of the title under a single ownership, was about $37 per acre in South Carolina and $31 per acre in Georgia, producing a total of $150,841.85. This contrasts with the $267.02 per acre, and a total "just compensation" of $1,257,033.20, approved by the Commissioners and the courts below.

The value recommended by the Commissioners and approved by the courts below includes nothing for strategic or "hold-up" value. It reflects no inflation due to the "taking" of the property by the Government and no deflation due to the absence of other bidders after the Government announced that it would take the property. There was nothing condemned or valued that could be described as "in the flow of the stream." Only the fast land was taken and valued. It is because of that land's location near, but apart from, the flow of the stream that an additional fair market value, long recognized in this land, was recommended and approved below. The location of land is always a factor, and often a primary factor, in determining its market value. Every public utility exercising the right of eminent domain is required to pay it.

Before passage of the Water Power Act, the paramount, but unexercised, right of the Government to control the water power in the Savannah River did not exclude the development of that river under state control. The Water Power Act imposed additional conditions and provided for federal licensing. See *Federal Power Commission* v. *Niagara Mohawk Corp.*, 347 U. S. 239, and *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359. But, even though a federal license then became generally necessary, a substantial market for the fast land still existed, because of its importance to any licensee. Up to the time of its "taking" of the property, the Government was but one of several prospective purchasers.

After the Federal Government announced that it would, itself, develop and use the water power, it still had to acquire fast land for its dam and plant site and for its reservoir basin. Although its taking of the property cut off further competitive bids for the land, the Government had the *same constitutional obligation to*

pay "just compensation" for whatever private property it took.

A classic comment upon a comparable situation was made by this Court when the Federal Government, after condemning a lock and dam, sought to pay only for the tangible property taken, without recognizing the established value of a franchise issued by a State to exact tolls for the use of the canal and lock. In requiring recognition of the latter value, the Court said:

> "And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. It would seem strange that if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and, having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice." *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 337–338.

While the United States enjoys special rights in relation to navigable streams, such as its navigation servitude, there is no good reason why, when the Government condemns private property for a public use, its condemnee should not receive from the Government the same measure of "just compensation" as from other condemnors. If the property taken is "private property," the constitutional compensation for it should be the same. That measure includes the "highest and most profitable use for which the property is adaptable . . . to the full extent

that the prospect of demand for such use affects the market value while the property is privately held." *Olson* v. *United States, supra,* at 255.

> ". . . No precedent has been advanced which suggests that a *different* measure of compensation should be required where the United States rather than the state is the taker of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a *different* measure of compensation in such a case. . . .
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> ". . . The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation." *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 278, 284. See also, *United States* v. *Cress,* 243 U. S. 316, 319, 326–327, 329–330.

The Government contends, however, that since it need not pay for appropriating the water in the stream, it should not be required to pay for any value in the fast lands that is predicated upon the riparian location of such lands, or their special value in relation to the use of that water. In this connection, the issues decided and the statements made by Justice Lurton for a unanimous Court in *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, are helpful. The *Chandler* case was a condemnation proceeding brought by the United States under a special Act of Congress relating to all the land and other property between the St. Mary's Falls Ship Canal at Sault Sainte Marie, Michigan, and the international boundary to the north. The United States "took" this land and property so as to improve navigation in these highly navigable waters. It exercised plenary control over the entire river

and over everything within its bed up to its ordinary high-water mark. It thus exercised its navigation servitude and eliminated, without compensation, a hydroelectric development which the Chandler-Dunbar Company had constructed on the latter's submerged land within the bed of the river. That elimination was no longer in issue in this Court. The principal questions related to the District Court's awards for water rights claimed by Chandler and for fast land owned by Chandler above and beyond the bed of the river.[10]

1. The District Court allowed Chandler $550,000 for the water rights. Chandler, however, established no vested right to such water under state law and this Court disallowed the entire claim. It said:

> ". . . Unless . . . the water power rights asserted by the Chandler-Dunbar Company are determined to be private property the court below was not authorized to award compensation for such rights.
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> ". . . Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *Id.*, at 69.

That conclusion is not questioned.

2. In fixing compensation to Chandler for its strip of eight acres of fast land, the District Court allowed for "use for canal and lock purposes, an additional value of $25,000," and for a smaller area consisting of two other parcels of fast land for "its special value for canal and lock purposes an additional sum of $10,000." *Id.*, at 75.

[10] The allowances of value are here discussed in the following order: (1) for water rights; (2) for value of land for canal and lock purposes; (3) for value of land for general purposes; and (4) for value of land for factory sites contingent upon availability of surplus privately developed electric power. In the text of the *Chandler* case, at pages 74–75, the value of canal and lock purposes is treated last.

These allowances of additional value for fast lands, due to their suitability and availability for canal and lock purposes, are significant for our present purposes. The Court explained them as follows:

> ". . . That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, *it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.* Lewis on Eminent Domain, § 707. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408; *Shoemaker* v. *United States,* 147 U. S. 282; *Young* v. *Harrison,* 17 Georgia, 30; *Alloway* v. *Nashville,* 88 Tennessee, 510; *Sargent* v. *Merrimac,* 196 Massachusetts, 171." (Emphasis supplied.) *Id.,* at 76–77.

Justice Lurton then reviewed and quoted at length from the opinions in *Boom Co.* v. *Patterson, supra,* and *Shoemaker* v. *United States, supra.*[11]

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[11] Although erroneously referring to it as having been used in a lower court instruction in the *Shoemaker* case, Justice Lurton's quotation of the following language lends this Court's approval to it:

". . . 'the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement or its intrinsic character, it is peculiarly adapted to

Coupled with the reasoning of the Court and its quotations from earlier cases, these allowances support the position taken by the lower courts in the instant case. They are "additional values" allowed for the location, special suitability and availability of the riparian land for use in connection with the recognized future public use of the area. In fact, the uses for which the allowances are made are of the very same type as that for which the land has been condemned. There is no allowance for strategic or "hold-up" value. The *Chandler* case thus supplies specific authority for the decision of the lower courts in the instant case.

3. In fixing the compensation for the same eight acres and the smaller area, the District Court also made a basic allowance of $20,000 for the value of the strip "for all general purposes, like residences, or hotels, factory sites, disconnected with water power etc.," and $10,000 in relation to the smaller area for "general wharfage, dock and warehouse purposes." *Id.*, at 74, 75. This Court upheld both, thereby further demonstrating that the location of land is a proper element to be considered in determining "just compensation."

4. On the other hand, the District Court approved one other element of "additional value" in relation to these land areas which this Court rejected. In valuing the eight acres, the District Court allowed an "additional value" of $20,000 for "use as factory site in connection with the development of 6,500 horse power, either as a single site or for several factories to use the surplus of 6,500 horse power not now used in the city." *Id.*, at 74–75. Likewise, in valuing the smaller area, the District Court allowed an additional value of $5,000 in "connec-

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some particular use—e. g., to the use of a public park—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.'" 229 U. S., at 78.

tion with the canal along the rapids, if used as a part of the development of 4,500 (6,500) horse power." *Id.*, at 75. It has been suggested that these rejections are in conflict with the Court's simultaneous approval of the additional values of the same land for canal or lock purposes. The Government also claims to find in these rejections some support for its opposition in the instant case to any allowance reflecting the favorable location of the fast land it has taken on the banks of the Savannah River.

The Court's reasons for rejecting these particular values in the *Chandler* case, as expressly stated by Justice Lurton, lend no such support to the Government's position in the instant case. He said:

> ". . . These 'additional' values were based upon the erroneous hypothesis that that company [Chandler-Dunbar] had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable, by some extension of their works already in the river, of producing 6,500 horse power.
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> "Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland." *Id.*, at 75–76.

In other words, the rejected values were not part of the fair market value of the land for any assured use. They sought to recognize a value in the fast land for factory sites which were conditioned upon there being excess water in the stream not needed by the Government for

navigation, and further conditioned upon the development by Chandler of structures in the bed of the stream to develop 6,500 additional horsepower from this excess water. Not only was there found to be no such excess water but Chandler's potential power development within the bed of the stream was expressly disallowed. The rejection thus was due to the speculative nature of the proposed use and not to the favorable riparian location of the land for assured uses. It was thoroughly consistent with the Court's allowance of established values of the land for canal and lock purposes.

To accept the Government's position in the instant case would, in effect, extend its navigation servitude far above and beyond the high-water mark of the Savannah River. In the face of decisions uniformly limiting that servitude to the bed of the stream, the Government would take 4,700 acres of private property for a public use, substantially without compensation therefor. This would enforce the Government's right of condemnation, while repudiating its constitutional obligation to pay for the private property taken.

The justice of sustaining the interpretation placed on the Fifth Amendment by the courts below is emphasized in the following statements made by this Court in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324, 325:

> ". . . The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individ-

> ual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.
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> ". . . And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

STEINER ET AL., DOING BUSINESS AS CUMBERLAND BATTERY MANUFACTURING CO., *v.* MITCHELL, SECRETARY OF LABOR.

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

No. 22. Argued November 16, 1955.—Decided January 30, 1956.

Workers in a plant manufacturing wet storage batteries, in which extensive use is made of dangerously caustic and toxic materials, are compelled by vital considerations of health and hygiene and by other considerations to change clothes before and after work and to shower after work in facilities which state law requires their employer to provide. *Held:* Changing clothes and showering are parts of their "principal," rather than their "preliminary" or "postliminary," activities, within the meaning of § 4 (a) (2) of the Portal-to-Portal Act, and the time spent in these activities must be counted in measuring the work-time for which compensation is required by the Fair Labor Standards Act. Pp. 248–256.

(a) Activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act, if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by § 4 (a) (1). P. 256.

(b) The conclusion here reached is supported by the legislative history of the Portal-to-Portal Act and by other provisions of the Act and amendments thereto. Pp. 253–256.

(c) On the facts of this case, changing clothes and showering by these employees clearly are integral and indispensable parts of the principal activity of their employment. Pp. 249–252, 256.

215 F. 2d 171, affirmed.

Cecil Sims argued the cause for petitioners. With him on the brief was *Louis Leftwich, Jr.*

Bessie Margolin argued the cause for respondent. With her on the brief were *Solicitor General Sobeloff, Ralph S. Spritzer, Stuart Rothman* and *Sylvia S. Ellison.*

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

This case raises an issue of coverage under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act of 1947, with respect to work performed before or after the direct or productive labor for which the worker is primarily paid.

The precise question is whether workers in a battery plant must be paid as a part of their "principal" activities for the time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employer to provide, or whether these activities are "preliminary" or "postliminary" within the meaning of the Portal-to-Portal Act and, therefore, not to be included in measuring the work time for which compensation is required under the Fair Labor Standards Act.

The Secretary of Labor, contending that these activities are so covered, brought this action in the United States District Court for the Middle District of Tennessee to enjoin petitioners from violating the overtime and record-keeping requirements of Sections 7 and 11 (c) of the Fair Labor Standards Act of 1938, as amended, in the employment of production workers, and from violating Section 15 (a)(1) of the Act by making interstate shipments of the goods produced by such workers.

The District Court gave judgment for the plaintiff, and the Court of Appeals for the Sixth Circuit affirmed. 215 F. 2d 171. Because of the importance of the interpretation of the portal-to-portal provisions in the administration of the Fair Labor Standards Act, and because of a conflict between the circuits on the subject, *Mitchell* v.

King Packing Co., 216 F. 2d 618, we granted certiorari in both cases, 349 U. S. 914.

There is no question of back pay involved here because the Court limited its judgment to prospective relief. Nor is the question of changing clothes and showering under normal conditions involved because the Government concedes that these activities ordinarily constitute "preliminary" or "postliminary" activities excluded from compensable work time as contemplated in the Act. It contends, however, that such activities in the circumstances of this case are an integral and indispensable part of the production of batteries, the "principal activity" in which these employees were engaged, and are, therefore, compensable under the relevant provisions of the Act.

The petitioners own and operate a plant where they are engaged in manufacturing automotive-type wet storage batteries which they sell in interstate commerce. All of the production employees, such as those with whom we are here concerned, customarily work with or near the various chemicals used in the plant. These include lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid. Some of these are in liquid form; some are in powder form, and some are solid. In the manufacturing process, some of the materials go through various changes and give off dangerous fumes. Some are spilled or dropped, and thus become a part of the dust in the air. In general, the chemicals permeate the entire plant and everything and everyone in it. Lead and its compounds are toxic to human beings. Regular exposure to atmosphere containing 1.5 milligrams or more of lead per 10 cubic meters is regarded by the medical profession as hazardous and involving the possibility of lead intoxication or lead poisoning. In battery plants, such as this one, it is "almost impossible," it was testified, to keep lead concentration in the air "within absolutely safe limits," and in petitioners' plant "lead oxide was on the floor

and in the air and on the plates which employees handled." Abnormal concentrations of lead were discovered in the bodies of some of petitioners' employees, and petitioners' insurance doctor recommended that such employees be segregated from their customary duties. The primary ways in which lead poisoning is contracted are by inhalation and ingestion; *i. e.*, by taking in particles through the nose or mouth, an open cut or sore, or any other body cavity. The risk is "very great" and even exists outside the plant because the lead dust and lead fumes which are prevalent in the plant attach themselves to the skin, clothing and hair of the employees. Even the families of battery workers may be placed in some danger if lead particles are brought home in the workers' clothing or shoes. Sulphuric acid in the plant is also a hazard. It is irritating to the skin and can cause severe burns. When the acid contacts clothing, it causes disintegration or rapid deterioration. Moreover, the effects of sulphuric acid make the employee more susceptible than he would otherwise be to contamination by particles of lead and lead compounds.

Petitioners, like other manufacturers, try to minimize these hazards by plant ventilation, but industrial and medical experts are in agreement that ventilation alone is not sufficient to avoid the dangers of lead poisoning. Safe operation also requires the removal of clothing and showering at the end of the work period. This has become a recognized part of industrial hygiene programs in the industry, and the state law of Tennessee requires facilities for this purpose. Tenn. Code Ann. (Williams 1934), 1952 Supp., Section 5788.15. In addition, the Tennessee Workmen's Compensation Act, Tenn. Code Ann. (Williams 1934), 1952 Supp., Sections 6851–6901, which covers petitioners, makes lead poisoning a compensable occupational disease (Section 6852 (d)). In order to comply with this statute, petitioners carry insurance, under Section 6895, to protect against liability, and

the insurance carrier would not accept the insurance risk if defendants refused to have showering and clothes-changing facilities for their employees.

Accordingly, in order to make their plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation, petitioners have equipped it with shower facilities and a locker room with separate lockers for work and street clothing. Also, they furnish without charge old but clean work clothes which the employees wear. The cost of providing their own work clothing would be prohibitive for the employees, since the acid causes such rapid deterioration that the clothes sometimes last only a few days. Employees regularly change into work clothes before the beginning of the productive work period, and shower and change back at the end of that period.[1]

Petitioners issued no written instructions to employees on this subject, but the employees testified and the foreman declared in a signed statement that "In the afternoon the men are required by the company to take a bath because lead oxide might be absorbed into the blood stream. It protects the company and the employee both."

Petitioners do not record or pay for the time which their employees spend in these activities, which was found to amount to thirty minutes a day, ten minutes in the morning and twenty minutes in the afternoon, for each employee. They do not challenge the concurrent findings of the courts below that the clothes-changing and showering activities of the employees are indispensable to the performance of their productive work and integrally related thereto. They do contend that these activities fall without the concept of "principal activity" and that,

[1] The only exception was one injured employee who, because of the danger of infection to his wounded foot in a common shower, bathed at his home which is about five blocks from the plant.

being performed off the production line and before or after regular shift hours, they are beyond the protection of the Fair Labor Standards Act.

The trial court held that these activities "are made necessary by the nature of the work performed"; that they fulfill "mutual obligations" between petitioners and their employees; that they "directly benefit" petitioners in the operation of their business, and that they "are so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and are, therefore, included among the principal activities of said employees." It concluded that the time thereby consumed is not excluded from coverage by Section 4 of the Portal-to-Portal Act, but constitutes time worked within the meaning of the Fair Labor Standards Act. The Court of Appeals affirmed, likewise holding that the term "principal activity or activities" in Section 4 [2] embraces all

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[2] "SEC. 4. . . .

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in

activities which are "an integral and indispensable part of the principal activities," and that the activities in question fall within this category.

With this conclusion, we agree.

The Portal-to-Portal Act was designed primarily to meet an "existing emergency" resulting from claims which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, would have created "wholly unexpected liabilities, immense in amount and retroactive in operation." [3] This purpose was fulfilled by the enactment of Section 2.[4] The trial court specifically

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effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer." 61 Stat. 86, 29 U. S. C. § 254.

[3] § 1 (a), 61 Stat. 84, 29 U. S. C. § 251 (a).

[4] "SEC. 2. . . .

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer." 61 Stat. 85, 29 U. S. C. § 252.

limited the effect of this judgment to services rendered after the judgment becomes final. We are not, therefore, concerned with the provisions of Section 2, which is inapplicable to actions relating to activities of employees performed after May 14, 1947.

The language of Section 4 is not free from ambiguity and the legislative history of the Portal-to-Portal Act becomes of importance. That Act originated in a House bill, which had no provision comparable to Section 4, but rather gave similar treatment to retroactive and prospective claims; *i. e.*, excluding coverage except by contract or custom in the industry. H. R. Rep. No. 326, 80th Cong., 1st Sess. 12. The Conference Report stated that the language of Section 4 follows the Senate bill. S. Rep. No. 48, 80th Cong., 1st Sess. 48. In the Senate, the colloquy between several Senators and Senator Cooper, a sponsor of the bill and a member of the three-man subcommittee that held hearings for the Committee on the Judiciary which reported it, demonstrates that the Senate intended the activities of changing clothes and showering to be within the protection of the Act if they are an integral part of and are essential to the principal activities of the employees.[5]

There is some conflicting history in the House,[6] but the Senate discussion is more clear cut and, because the Section originated in that body, is more persuasive.

In 1949, Section 3 (o) was added to the Act.[7] Both sides apparently take comfort from it, but the position

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[5] See the colloquy quoted in an appendix to this opinion, *post*, p. 256.

[6] See Remarks of Representative Gwynne, 93 Cong. Rec. 4388–4389; Remarks of Representative Walter, *id.*, at 4389; Remarks of Representative Michener, *ibid.*

[7] "SEC. 3 (o). Hours Worked.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at

of the Government is strengthened by it since its clear implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement. The congressional understanding of the scope of Section 4 is further marked by the fact that the Congress also enacted Section 16 (c) [8] at the same time, after hearing from the Administrator his outstanding interpretation of the coverage of certain preparatory activities closely related to the principal activity and indispensable to its performance.[9]

On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities. Had Congress intended the result urged by petitioner, the

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the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 63 Stat. 911, 29 U. S. C. § 203 (o).

[8] "SEC. 16 (c). Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act." 63 Stat. 920.

[9] 29 CFR § 790.8.

very different provisions of Sections 2 and 4 would have been unnecessary; Section 2 could have been given prospective as well as retroactive effect.

We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4 (a)(1).

We find no difficulty in fitting the facts of this case to that conclusion because it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees.

The judgment is

Affirmed.

APPENDIX TO OPINION OF THE COURT.

Colloquy Between Senator Cooper and Other Senators.

"Mr. COOPER. . . . Before the enactment of the Fair Labor Standards Act an employee might have worked upon a lathe under a contract, and his contract may have provided that his pay should commence at a scheduled hour, say at 7 o'clock when the lathe began to run, and he began to apply his energy to a casting or to a block upon the lathe. After the enactment of the Fair Labor Standards Act, by interpretations of the Wage and Hour Administrator, it was held that certain preparatory activities such as sharpening the tools, oiling the machinery, preparing his machinery for work, were so closely related to his productive activity that the employer must compensate the employee for it. We believe that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion

that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity. And to make our position clear we have given examples in the report. . . .

"Mr. McGRATH. I think that at this point we might very definitely make contribution to the legislative history of what we are doing here. Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?

"Mr. COOPER. I can read the language used in the report, and I think that language should be used in this connection, because the words and phrases it employs were adopted by the committee. On page 48 of the report, in the definition of 'principal activity,' we find these words:

> " 'It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities marked the beginning and the end of his workday. The term "principal activity or activities" includes all activities which are an integral part thereof as illustrated by the following examples:
>
> " '1. In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
>
> " '2. In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.'

"We believe that our bill provides that the employee must receive compensation for such activities.

. . . . . .

"Mr. McGRATH. . . . Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time.

"Mr. COOPER. I should certainly say so, as a part of the principal activity.

"Mr. McGRATH. There are innumerable instances of operations which have to be performed that are not covered in these two particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?

"Mr. COOPER. I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of activity which we consider compensable and the type which should not be compensable. In accordance with our intention as to the definition of 'principal activity,' if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity. On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable." 93 Cong. Rec. 2297–2298.

. . . . . .

"Mr. BARKLEY. . . . Suppose that a man is a machinist or a mechanic of some kind. He is required to go to work at 8 o'clock. Let us assume for a moment that he is not a member of an organization. He is required to enter upon the actual labor, which might be termed his principal employment, at 8 o'clock in the morning and to spend 8 hours at such principal employment. But let us suppose that his employer requires him to be on the grounds and within the shop at 7:30 in the morning in order that he may spend half an hour sharpening and preparing the tools with which he himself or his colleagues in the factory are to work. Can anybody say that under those circumstances the 40-hour workweek has been complied with, as intended by the Fair Labor Standards Act? If he is required to do that every day, instead of working 8 hours a day he will be working 8½ hours a day. If he works 6 days a week, instead of 40 hours a week, he will be working more than 50 hours, every moment of which he is under the control of his employer, working with tools which belong to his employer, and he must abide by his orders or run the risk of discharge from his employment.

"Is that a part of his principal employment, or is that preliminary; or, if he is required to do it after the close of the shop in the afternoon, is that a part of the 'postliminary' work for which there is to be no compensation unless there is a contract or unless it has been the practice and custom for the employer to pay for the extra work done at his command?

. . . . . .

"Mr. COOPER. The distinguished Senator has perhaps not had the opportunity to read the report of the committee. Let me say that on page 48 of the report of the committee that exact situation, or one as nearly comparable to it as probably could be cited, is discussed. In the report it is clearly stated that under such circumstances it is the intention of the framers of the bill that such activities shall be compensable, as a part of the principal activity." 93 Cong. Rec. 2350.

MITCHELL, SECRETARY OF LABOR, *v.* KING PACKING CO.

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

No. 39. Argued November 16–17, 1955.—Decided January 30, 1956.

Knifemen employed in butchering and trimming meat in respondent's meat-packing plant spend time each workday in sharpening the knives which they use in their work. Such knife sharpening is necessary for the proper performance of the work, and respondent requires it to be done outside the scheduled eight-hour shift of these employees and provides a room and equipment for its accomplishment. *Held:* This activity is a "principal," rather than a "preliminary" or "postliminary," activity, within the meaning of § 4 (a) (2) of the Portal-to-Portal Act, and it is compensable under the Fair Labor Standards Act. *Steiner* v. *Mitchell, ante,* p. 247. Pp. 260–263.

216 F. 2d 618, reversed and remanded.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Ralph S. Spritzer, Stuart Rothman* and *Sylvia S. Ellison.*

Willard S. Johnston argued the cause and filed a brief for respondent.

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

This case like *Steiner* v. *Mitchell, ante,* p. 247, raises an issue of coverage under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act of 1947, with respect to work performed before or after the direct or productive labor for which the worker is primarily paid.

The District Court denied to the Secretary of Labor an injunction to enforce compliance with the Act, and the Court of Appeals for the Ninth Circuit affirmed. 216 F. 2d 618.

The court below recognized a conflict with *Steiner,*[1] and, although holding that Section 4 controls the situation here, determined, contrary to the holding in the *Steiner* case, that "the terms 'preliminary' or 'postliminary' cannot be interpreted so as to exclude [from the exemptions from the Act] all activity 'indispensable to the performance of productive work.' To do so would deny effect to the intended meaning of the Portal-to-Portal Act." [2] We granted certiorari to resolve this conflict. 349 U. S. 914.

In *Steiner,* for reasons therein set forth, we concluded that after the enforcement date of the Portal-to-Portal Act activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4 (a)(1).

The only question to be determined in this case is whether the knife-sharpening activities of the employees of respondent King Packing Co. are within this classification.

Respondent is an interstate meat packer engaged in slaughtering, butchering, dressing and distributing meat and meat products. It employs at its packing plant

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[1] "The Secretary argues that the sharpening of knives is not 'preliminary' or 'postliminary' but rather 'an integral part of a principal activity,' since it is indispensable to the proper performance of the employees' work. He relies on a statement by Senator Cooper, one of the sponsors of the Portal-to-Portal Act, made during Senate debate on the bill that the term 'principal activities' is 'sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.' The case of Steiner v. Mitchell [215 F. 2d 171], supports this contention." 216 F. 2d, at 621.

[2] 216 F. 2d, at 621.

about 75 persons, of whom about one-third are knifemen, whose compensation rights are involved in this litigation. The knifemen perform various butchering operations, 12 or 14 of them working in the killing room and the others in the cutting room. Various knives and three types of electric saws are used in the butchering operations. Some of the knives are furnished by the knifemen under the terms of their employment. These are the boning, the shaving, the legging and the skinning or siding knives. The saws and the more expensive loin pulling, ham skinning, shoulder trimming and spareribb knives are furnished by respondent. All of the knives as well as the saws must be "razor sharp" for the proper performance of the work. Respondent's production manager and one of the knifemen testified a dull knife would slow down production which is conducted on an assembly line basis, affect the appearance of the meat as well as the quality of the hides, cause waste and make for accidents; "that a knife to be of any practical value in a knife job has to be . . . sharp."

Though the entire cost of keeping the saws in proper condition is borne by respondent, the knifemen are required to sharpen their own knives outside the scheduled shift of eight hours, and for this activity they are not compensated. The sharpening of these knives is done either before or after the work shift or during the lunch hour in a room equipped by respondent with an emery wheel and grindstone. A knifeman ordinarily sharpens from two to four knives a day. At the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives. He is expected to perform that task as well as other tasks connected with the job.

The knifemen are paid by the hour and, excluding the knife-sharpening time in controversy, they work eight hours a day, five days a week.

We believe the facts clearly demonstrate that the knife-sharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed, and that they must be compensated for by respondent in compliance with the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, and as construed by us today in *Steiner* v. *Mitchell*.[3] Because the decision of the court below, resting solely upon an erroneous reading of Section 4, is not in accordance with our construction, the judgment must be reversed and remanded for proceedings not inconsistent herewith.

Reversed and remanded.

[3] The discussion between Senator Cooper and Senator Barkley, quoted in an appendix to our opinion in the *Steiner* case, is particularly apposite to the facts of the instant case.

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NATIONAL LABOR RELATIONS BOARD *v.* COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

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

No. 79. Argued January 17, 1956.—Decided February 27, 1956.

A labor union instituted proceedings before the National Labor Relations Board charging an employer with unfair labor practices in violation of §§ 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act. A complaint based on these charges was issued. At the hearing, the employer challenged the Board's jurisdiction on the ground that the union had not satisfied the requirements of § 9 (h), which requires the filing of non-Communist affidavits by all "officers" of the union and of any national or international labor organization of which it is an affiliate, and offered to prove that the Regional Director of the CIO for Kentucky, who had not filed such an affidavit, was an "officer" within the meaning of § 9 (h). *Held:*

1. The Board erred in ruling that, during the course of the unfair labor practice hearing, the employer could not show that the labor organization had not complied with § 9 (h) and thereby establish the Board's want of jurisdiction. *Labor Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322. Pp. 266–268.

2. The Board's construction of the word "officer" in § 9 (h) as meaning "any person occupying a position identified as an office in the constitution of the labor organization," and its finding that the Regional Director of the CIO for Kentucky is not such an "officer," are sustained. Pp. 268–269.

219 F. 2d 441, reversed and remanded.

David P. Findling argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Theophil C. Kammholz, Dominick L. Manoli* and *Samuel M. Singer.*

John K. Skaggs, Jr. argued the cause for respondent. With him on the brief was *James E. Fahey.*

Arthur J. Goldberg argued the cause for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal. With him on the brief were *J. Albert Woll* and *Thomas E. Harris.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Charging respondent with coercion of its employees and discrimination against pro-union employees, Local 20 of the United Brewery Workers, CIO, instituted proceedings before the National Labor Relations Board for violation of §§ 8 (a)(1) and 8 (a)(3) of the National Labor Relations Act, as amended, 61 Stat. 136, 140, 65 Stat. 601, 602, which outlaw such unfair labor practices. Pursuant to this charge, a complaint was issued; at the hearing which followed, respondent challenged the jurisdiction of the Board upon the ground that the union had not satisfied the requirements of § 9 (h) of the Act. Section 9 (h) provides that "no complaint shall be issued pursuant to [an unfair labor practice] charge made by a labor organization . . . unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." Respondent offered to prove, by evidence of his duties and functions, that Taylor, the Regional Director of the CIO for Kentucky, who admittedly had not filed a non-Communist affidavit, was an "officer" within the meaning of § 9 (h).

The Board rejected this contention on two grounds: First, "the compliance status of a union . . . is a matter for administrative determination, and not one to be litigated in complaint or representation proceedings." 108 N. L. R. B. 490, 491. Second, "had the Respondent established in a collateral proceeding what it had offered to prove at the hearing herein, we are satisfied, and find, that under the Board's present 'constitutional' test, such proof would fall short of substantiating the Respondent's contention that Taylor was an officer of the CIO." 108 N. L. R. B. 490, 492–493.

On the merits, the Board found that respondent had committed the unfair practices charged. When the Board sought enforcement of its decree, the Court of Appeals for the Sixth Circuit, without passing upon the unfair practices, remanded the case to the Board for determination of the issue tendered by respondent in its claim that Taylor's functions constituted him an "officer." 219 F. 2d 441. We granted certiorari because of the importance of the questions raised in the administration of the statute. 350 U. S. 819.

These questions are two in number: (1) May an employer, during the course of an unfair labor practice hearing, show that a labor organization has not complied with § 9 (h) and thereby establish the Board's want of jurisdiction? (2) Assuming the answer to this question is "yes," is the Board's construction of "officer" in § 9 (h)—*viz.*, "any person occupying a position identified as an office in the constitution of the labor organization"—proper? 29 CFR, 1955 Supp., § 102.13.*

*The only qualification to this practically automatic definition of who is or is not an officer is the following provision of § 102.13 (b) (3) of the Board's Rules and Regulations:

". . . where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing

The Court of Appeals answered the first question in the affirmative upon the authority of *Labor Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322. In that case an employer, defendant in an unfair labor practice suit, challenged the Board's interpretation of "national or international labor organization" in § 9 (h). The agency had read this language as not including labor federations, *i. e.*, the AFL or CIO. Therefore, it had not required affidavits from officers of these federations. Highland Park's challenge was rejected by the Board under its then settled policy that the employer could not raise noncompliance with § 9 (h) as a bar to a proceeding on an unfair labor practice. The Court of Appeals held to the contrary, 184 F. 2d 98, and we affirmed its decision.

The Board distinguishes *Highland Park* by suggesting that here the "employer seeks to question only the *fact* of compliance, as distinguished from the *necessity* of compliance." The genesis of this distinction comes from the following in *Highland Park:* "If there were dispute as to whether the C. I. O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented." 341 U. S. 322, 325. The Board misconceives the significance of the passage. Both *Highland Park* and this case involve the scope of § 9 (h), the meaning to

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the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act." 29 CFR, 1955 Supp., § 102.13 (b) (3).

We interpret this to mean that the application of this exception is wholly within the Board's control and cannot be litigated in an unfair labor practice proceeding.

be derived from its language; neither case involves an inquiry into disputed facts, the situation referred to in *Highland Park*. Acceptance of a differentiation between these cases upon any such theory as that suggested by the Board would make of law too thin a dialectic enterprise.

But if the Board's distinction is overly subtle, its reason for attempting a distinction has force, namely, a concern with "the need to expedite the hearing of cases and the resolution of issues on their merits . . . ." 108 N. L. R. B. 490, 491. Much may be said for the claim that an employer should not be permitted to disrupt or delay complaint or representation cases by raising questions respecting § 9 (h). But after *Highland Park* the argument comes too late.

In any event, whether the impediment to the effectiveness of the administrative process in determining the merits of a charge of unfair labor practice may be serious or negligible by injecting into it the subsidiary issue of compliance with § 9 (h), depends upon the scope of the inquiry opened up by the latter issue. This brings us to that question. Our concern specifically is with the appropriate construction of "officers" in § 9 (h). The Court of Appeals rejected the Board's "constitutional" rule for determining who is a union "officer" in favor of a so-called "functional" test. Presumably this test would require those members of a union who are effective instruments of its policies to file affidavits as "officers," regardless of the fact that they do not fill the offices designated by their organization's constitution.

Neither § 9 (h) itself nor its legislative history attempts a definition of "officers." "Officers" is a word of familiar usage and "[a]fter all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v.

Holly Hill Co., 322 U. S. 607, 618. "Officers" normally means those who hold defined offices. It does not mean the boys in the back room or other agencies of invisible government, whether in politics or in the trade-union movement. A definition of officer as "any person occupying a position identified as an office in the constitution of the labor organization" accords with this lay understanding. 29 CFR, 1955 Supp., § 102.13.

But if the word be deemed to have a peculiar connotation for those intimate with trade-union affairs, it is incumbent upon us to give the word its technical meaning, *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48, for § 9 (h) is an integral part of a statute whose sponsors were familiar with labor organization and labor problems and which was doubtless drawn by specialists in labor relations. If such be the case, then of course the Board's expertness comes into play. We should affirm its definition if that definition does not appear too farfetched, *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130. The statute provides some evidence to support the Board, for § 9 (f), which requires unions to report specific information to the Secretary of Labor, differentiates between "officers" and "agents" of labor organizations.

We conclude that the Board's criterion for determining who are officers both accords with the lay definition of the word and is a reasonable, if indeed not a compelling, construction of the statute. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings.

Reversed and remanded.

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

MASTRO PLASTICS CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 19. Argued October 17, 1955.—Decided February 27, 1956.

1. In the collective-bargaining contract here involved, the union's undertaking "to refrain from engaging in any strike or work stoppage during the term of this agreement" did not waive the employees' right to strike solely in protest against unfair labor practices of their employers. Pp. 279–284.

   (a) The words "any strike" do not exclude all room for interpretation or necessarily include all strikes, even those against unlawful practices destructive of the foundation upon which collective bargaining must rest. Pp. 281–283.

   (b) Section 13 of the National Labor Relations Act, as amended, providing that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right," does not preclude reliance upon the Act for support of this interpretation of the strike-waiver clause. Pp. 283–284.

2. In the circumstances of this case, including the express finding of the National Labor Relations Board that the purpose of the strike here involved was not to "terminate or modify" the existing collective-bargaining contract but was solely to protest against the employers' unfair labor practices designed to oust the employees' bargaining representative, *held* that § 8 (d) of the National Labor Relations Act, as amended, did not deprive the individual strikers of their status as employees, even though they struck within the 60-day waiting period prescribed by § 8 (d) (4) following the union's written notice of its desire to modify its existing contract with the employers. Pp. 284–289.

   (a) Since the 60-day waiting period prescribed by § 8 (d) (4) begins to run upon the giving of notice of a desire to "terminate or modify" an existing contract and its purpose is to relieve the parties during the renegotiation period from the economic pressure of a strike or lockout in relation to the subjects of the negotiations, the provision that any employee who engages in a strike

during such waiting period shall lose his status as an employee should be construed as referring to strikes relating to the subjects of the negotiations and not to strikes designed solely to protest against unfair labor practices of the employers. Pp. 285–286.

(b) A different construction would produce incongruous results. Pp. 286–287.

(c) Much more explicit language would be needed to deprive employees of their right to strike in protest against violations of §§ 7 and 8 (a), which protect their freedom of concerted action and freedom of choice of representatives. P. 287.

(d) While the relevant legislative history provides no conclusive answer to the problem of interpretation here involved, it is consistent with the conclusion here reached. Pp. 287–289.

(e) The cross-references to §§ 8, 9 and 10 of the Act in the loss-of-status clause do not require a different result. P. 289.

214 F. 2d 462, affirmed.

Bernard H. Fitzpatrick argued the cause and filed a brief for petitioners.

Dominick L. Manoli argued the cause for respondent. With him on the brief were *Solicitor General Sobeloff, Theophil C. Kammholz* and *David P. Findling.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This case presents two principal questions: (1) whether, in the collective-bargaining contract before us, the union's undertaking "to refrain from engaging in any strike or work stoppage during the term of this agreement" waives not only the employees' right to strike for economic benefits but also their right to strike solely against unfair labor practices of their employers, and (2) whether § 8 (d) of the National Labor Relations Act, as amended,[1] deprives individuals of their status as employees if, within the waiting period prescribed by § 8 (d)(4), they engage in a strike solely against unfair labor practices of their em-

[1] 61 Stat. 140, 142–143, 29 U. S. C. § 158 (d).

ployers. For the reasons hereafter stated, we answer each in the negative.

Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc., petitioners herein, are New York corporations which, in 1949 and 1950, were engaged in interstate commerce, manufacturing, selling and distributing plastic articles, including reeds and other accessories for musical instruments. They operated in the City of New York within the same plant, under the same management and with the same employees. For collective bargaining, their employees were represented by Local 22045, American Federation of Labor, or by Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL. These locals occupied the same office and used the services of the same representatives. During the period in question, the right of representation of petitioners' employees was transferred back and forth between them for reasons not material here. Accordingly, they are referred to in this opinion as the "Carpenters."

In August 1950, Local 65 of the Wholesale and Warehouse Workers Union began a campaign among petitioners' employees in an effort to become their collective-bargaining representative. Petitioners bitterly opposed the movement, believing Local 65 to be Communist-controlled. Feeling that the Carpenters were too weak to cope successfully with Local 65, petitioners asked the Carpenters to transfer their bargaining rights to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL. When the Carpenters declined to do so, petitioners selected a committee of employees to visit 318, obtain membership cards and seek members for that union. The cards were distributed during working hours and petitioners paid their employees for time spent in the campaign, including attendance at a meeting of 318. Petitioners' officers and supervisors instructed

employees to sign these cards and indicated that those refusing to do so would be "out."

September 28, Local 65 filed with the National Labor Relations Board its petition for certification as bargaining representative. October 24, Local 318 intervened in the representation proceedings and asked that it be certified. However, many employees revoked their applications for membership in 318 and reaffirmed their adherence to the Carpenters. This was followed on October 31 by the Carpenters' refusal to consent to an election on the ground that petitioners had unlawfully assisted 318 in the campaign.[2]

November 10, 1950, a crisis developed when the president of petitioners summarily discharged Frank Ciccone, an employee of over four years' standing, because of the latter's activity in support of the Carpenters and his opposition to 318. We accept the finding of the National Labor Relations Board that petitioners "discriminatorily discharged, and thereafter refused to reinstate, Frank Ciccone because of his organizational activities in support of the . . . [Carpenters]." [3] This discharge at once precipitated the strike which is before us and which the Board found "was clearly caused and prolonged by the cumulative effects of the [petitioners'] unfair labor practices culminating in the discriminatory discharge of Ciccone." [4]

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[2] In December, Locals 318 and 65 withdrew their representation proceedings from before the Board and the Carpenters (through Local 3127) filed its own representation proceeding. January 29, 1951, the Board issued a direction of election in the latter proceeding but, after the Carpenters filed charges of unfair practices, the Board postponed the holding of any election until the regional director might deem it proper.

[3] 103 N. L. R. B. 511, 512, and see 214 F. 2d 462, 464.

[4] 103 N. L. R. B., at 513. See also, the following findings of the trial examiner:

". . . the purpose of the strike was to protest and seek to remedy the [petitioners'] unfair labor practices. The record does not sup-

There was no disorder but the plant was virtually shut down until December 11 and it was March 9, 1951, before the Carpenters, on behalf of petitioners' employees, made an unconditional request to return to work. Petitioners ignored that request and neither Ciccone nor any of the other 76 striking employees has been reinstated.

While the strike against petitioners' unfair labor practices continued, the collective-bargaining contract between petitioners and the Carpenters approached its expiration date of November 30, 1950, and, apart from the above-described organizational controversy, the Carpenters had taken timely steps to secure modification of their agreement. October 10, they had delivered to petitioners a notice (dated September 29, 1950) "requesting modification" of the contract.[5] They thus had started the statutory negotiating period running as prescribed by

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port a finding that the strike also had as an additional objective the termination or modification of the existing contract. It is true that demands for contract changes had previously been presented to the [petitioners], and there had been some discussion at meetings of Local 22045 or Local 3127 of a possible strike if such demands were not met. But no strike vote on that issue had ever been taken, nor was any strike action otherwise determined upon. On the record as a whole, I am fully satisfied, and I find, that the strike which immediately followed Ciccone's discharge was unplanned and began as a spontaneous demonstration by employees of their protest of the [petitioners'] unfair labor practices. Nor does the record reflect that its character changed after it began to one where the strikers were seeking to compel changes or modifications in economic terms or conditions of employment. There is no evidence that any negotiations were conducted or overtures made along such lines at any time after the commencement of the strike. The [petitioners] at the hearing made no such claim, and offered no evidence to establish that the strike had any purpose other than, or in addition to, that claimed by the General Counsel." 103 N. L. R. B., at 560. These were adopted by the Board, *id.*, at 511–512, and confirmed by the Court of Appeals, 214 F. 2d, at 465.

[5] 103 N. L. R. B., at 560 and 512, n. 2.

the above-mentioned § 8 (d).[6] The Carpenters met several times with petitioners and pressed their demands for changes in the contract but the expiration date passed without any agreement being reached.

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[6] "SEC. 8. . . .

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That *where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—*

"(1) *serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof,* or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) *continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days* after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon

In January 1951, the Carpenters initiated the present proceedings before the National Labor Relations Board by charging petitioners with unfair labor practices. Acting on those charges, the Board's general counsel filed a complaint alleging petitioners' support of Local 318 and discharge of numerous employees, including Ciccone, as violations of § 8 (a)(1), (2) and (3) of the Act.[7]

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an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute,* for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis supplied except for the word *"Provided."*) 61 Stat. 140, 142–143, 29 U. S. C. § 158 (d).

[7] "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ." 61 Stat. 140, 29 U. S. C. §§ 157, 158 (a)(1), (2) and (3).

Petitioners admitted that they had discharged the employees in question and had not rehired them. They denied, however, that in so doing they had committed any unfair labor practices. Their first affirmative defense was that the waiver of the right to strike, expressed by their employees in their collective-bargaining contract, applied to strikes not only for economic benefits but to any and all strikes by such employees, including strikes directed solely against unfair labor practices of the employer.

Petitioners' other principal defense was that the existing strike began during the statutory waiting period initiated by the employees' request for modification of the contract and that, by virtue of § 8 (d) of the Act,[8] the strikers had lost their status as employees. That defense turned upon petitioners' interpretation of § 8 (d), applying it not only to strikes for economic benefits but to any and all strikes occurring during the waiting period, including strikes solely against unfair labor practices of the employer.

The trial examiner made findings of fact sustaining the complaint and recommended that petitioners be ordered to cease and desist from the interference complained of and be required to offer to Ciccone and the 76 other discharged employees full reinstatement, together with back pay for Ciccone from November 10, 1950, and for the other employees from March 9, 1951. See 103 N. L. R. B. 511, 526–563. With minor modifications, the Board adopted the examiner's findings and conclusions and issued the recommended order. 103 N. L. R. B. 511. The chairman and one member dissented in part.

The Court of Appeals, with one judge dissenting in part, accepted the Board's findings of fact and conclusions of law and enforced the Board's order. 214 F. 2d 462. Since then, the Court of Appeals for the Seventh Circuit has reached a similar conclusion. *Labor Board* v. *Wagner*

[8] See note 6, *supra*.

Iron Works, 220 F. 2d 126. Because of the importance of the issues in industrial relations and in the interpretation of the National Labor Relations Act, as amended, we granted certiorari. 348 U. S. 910.

Apart from the issues raised by petitioners' affirmative defenses, the proceedings reflect a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative. The findings disclose vigorous efforts by the employers to influence and even to coerce their employees to abandon the Carpenters as their bargaining representatives and to substitute Local 318. Accordingly, unless petitioners sustain at least one of their affirmative defenses, they must suffer the consequences of their unfair labor practices violating § 8 (a) (1), (2) or (3) of the Act, as amended.

In the absence of some contractual or statutory provision to the contrary, petitioners' unfair labor practices provide adequate ground for the orderly strike that occurred here. Under those circumstances, the striking employees do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made.[9] Failure of the Board to enjoin petitioners' illegal conduct or failure of the Board to sustain the right to strike against that conduct would seriously undermine the primary objectives of the Labor Act.

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[9] Before the 1947 amendments to the National Labor Relations Act, see *Labor Board* v. *Poultrymen's Service Corp.*, 138 F. 2d 204, 210; *Labor Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927–928; *Labor Board* v. *Moore-Lowry Flour Mills Co.*, 122 F. 2d 419, 426; *Ritzwoller Co.* v. *Labor Board,* 114 F. 2d 432, 437; *Labor Board* v. *Sunshine Mining Co.*, 110 F. 2d 780, 792; *Labor Board* v. *Boss Manufacturing Co.*, 107 F. 2d 574, 579; *Labor Board* v. *Carlisle Lumber Co.*, 99 F. 2d 533, 535; *Labor Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 871. Since the 1947 amendments, see *Labor Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 907–908; *Labor Board* v. *Kobritz,* 193 F. 2d 8, 16–17.

See *Labor Board* v. *Rice Milling Co.*, 341 U. S. 665, 673. While we assume that the employees, by explicit contractual provision, could have waived their right to strike against such unfair labor practices and that Congress, by explicit statutory provision, could have deprived strikers, under the circumstances of this case, of their status as employees, the questions before us are whether or not such a waiver was made by the Carpenters in their 1949–1950 contract and whether or not such a deprivation of status was enacted by Congress in § 8 (d) of the Act, as amended in 1947.

I. *Does the collective-bargaining contract waive the employees' right to strike against the unfair labor practices committed by their employers?* The answer turns upon the proper interpretation of the particular contract before us. Like other contracts, it must be read as a whole and in the light of the law relating to it when made.

> ". . . we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, 806.

This contract was made in the light of that declared policy. A similar dual purpose is emphasized as follows in § 1 of the National Labor Relations Act, as amended:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they

> have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 61 Stat. 137, 29 U. S. C. § 151. See also, the declaration of policy in § 1 (b) of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. § 141 (b).

The two policies are complementary. They depend for their foundation upon assurance of "full freedom of association." *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining "the normal flow of commerce and . . . the full production of articles and commodities . . . ." 61 Stat. 136, 29 U. S. C. § 141 (b).

On the premise of fair representation, collective-bargaining contracts frequently have included certain waivers of the employees' right to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free,* such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees.[10]

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[10] See *Dyson & Sons,* 72 N. L. R. B. 445, 457; *Scullin Steel Co.,* 65 N. L. R. B. 1294, enforced as modified, 161 F. 2d 143. While these cases were decided under the Act before its 1947 amendments, there is nothing in the amendments to suggest their subsequent inapplicability. Both are referred to with approval in the House Conference Report on the 1947 amendments. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 39. See also, 93 Cong. Rec. 6442. But see *National Electric Products Corp.,* 80 N. L. R. B. 995, distinguished by the Board in the instant case, 103 N. L. R. B., at 514.

The waiver in the contract before us, upon which petitioners rely, is as follows:

> "5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement."

That clause expresses concern for the continued operation of the plant and has a natural application to strikes and work stoppages involving the subject matter of the contract.

Conceding that the words "in any strike or work stoppage during the [one-year] term of this agreement," if read in complete isolation, may include all strikes and work stoppages of every nature, yet the trial examiner, the Board and the Court of Appeals agree that those words do not have that scope when read in their context and in the light of the law under which the contract was made. This unanimity of interpretation is entitled to much weight.[11]

Petitioners argue that the words "any strike" leave no room for interpretation and necessarily include all strikes, even those against unlawful practices destructive of the foundation on which collective bargaining must rest. We disagree. We believe that the contract, taken as a whole, deals solely with the economic relationship between the employers and their employees.[12] It is a typical collec-

[11] While two members of the Board and one of the Court of Appeals disagreed with their respective majorities as to petitioners' defense based upon § 8 (d), no member of either body has expressed a dissent from the Board's interpretation of the contract.

[12] The preamble states that "the parties hereto desire to enter into an agreement relating to the rates of pay, hours of work and other conditions of employment which will provide methods of harmonious

tive-bargaining contract dealing with terms of employment and the normal operations of the plant. It is for one year and assumes the existence of a lawfully designated bargaining representative. Its strike and lockout clauses are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships. The main function of arbitration under the contract is to provide a mechanism for avoiding similar stoppages due to

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co-operation between the Employers and their employees and to that end accomplish fair and peaceful adjustments which may arise without interruption of the Employers' businesses . . . ."

The balance of the contract relates to: (1) Limitation of employment to union members in good standing; definitions of exempt employees and union shop; (2) Availability of arbitration, under § 19, in disputes as to failures to maintain union memberships; (3) Check-off of union dues; (4) Exempt employees and new employees; (5) Strike waiver as quoted in text; (6) Lockout waiver as follows: "The Employers agree that there shall be no lockout during the term of this agreement." (7) Arbitration, under § 19, to determine whether a strike, work stoppage or lockout has actually occurred; (8) Probationary periods for new employees; (9) Employers to have control over plant production and business requirements resulting in layoffs, furloughs or intra-plant transfers; (10) Employee seniority; (11) Hours of work; (12) Work weeks and extra shifts; (13) Rest periods; (14) Overtime; (15) Holidays; (16) Rates of pay and wage incentives; (17) Contract not to be interpreted so as to reduce wages, standards or working conditions; (18) Union officers who are active employees and union stewards governed by plant rules; (19) (a) Disputes as to meaning and application of the contract are subject to arbitration; (b) Rights of employees to present grievances to their employers are assured; (20) Notice of work days; (21) Vacations; (22) Employers' rights to manage plant and to discharge employees "for proper cause" preserved; union to cooperate with employers in interest of employee efficiency; (23) A specific wage increase is prescribed in lieu of an increase recently awarded by arbitration; (24) Effective December 1, 1949—November 30, 1950, with 60-day notice of intention to modify or terminate, and in such event "negotiations shall be promptly started."

disputes over the meaning and application of the various contractual provisions.

To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in § 5 of this contract.

There has been no court decision called to our attention which has held that the employees' right to strike against unfair labor practices has been waived by language such as that which is before us. On the other hand, prior to such contract, such language had been held by the Board to apply appropriately to economic strikes with consequent loss of employee status.[13]

It is suggested that § 13 of the Act, as amended, precludes reliance by the Board upon the Act for support of its interpretation of the strike-waiver clause. That section provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U. S. C. § 163. On the basis of the above language, petitioners claim that because the contract-waiver clause prohibits all strikes of every nature, nothing in the Act may be construed to affect the "limitations or qualifications" which the contract thus places on that right. Such a claim assumes the point at issue. The Board relies upon the context of the

[13] See note 10, *supra*.

contract and upon the language of the clause itself, rather than upon the statute, to define the kind of strike that is waived.

As a matter of fact, the initial provision in § 13 that nothing in the Act "shall be construed so as either to interfere with or impede or diminish in any way the right to strike" adds emphasis to the Board's insistence upon preserving the employees' right to strike to protect their freedom of concerted action. Inasmuch as strikes against unfair labor practices are not anywhere specifically excepted from lawful strikes, § 13 adds emphasis to the congressional recognition of their propriety.[14]

For the reasons stated above and those given by the Board and the court below, we conclude that the contract did not waive the employees' right to strike solely against the unfair labor practices of their employers.

II. *Does § 8 (d) of the National Labor Relations Act, as amended, deprive individuals of their status as employees if, within the waiting period prescribed by § 8 (d)(4), they engage in a strike solely against unfair labor practices of their employers?* Here again the background is the dual purpose of the Act (1) to protect the right of employees to be free to take concerted action as provided in §§ 7 and 8 (a),[15] and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions. Section 8 (d) [16] seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods, while §§ 7 and 8 (a) seek to insure freedom of concerted action by employees at all times.

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[14] See *Labor Board* v. *Rice Milling Co.*, 341 U. S., at 673.

[15] See note 7, *supra*.

[16] See note 6, *supra*.

The language in § 8 (d) especially relied upon by petitioners is as follows: "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended . . . ." 61 Stat. 143, 29 U. S. C. § 158 (d).

Petitioners contend that the above words must be so read that employees who engage in any strike, regardless of its purpose, within the 60-day waiting period, thereby lose their status as employees. That interpretation would deprive Ciccone and his fellow strikers of their rights to reinstatement and would require the reversal of the judgment of the Court of Appeals.[17] If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Boisdoré's Heirs,* 8 How. 113, 122. See also, *Peck* v. *Jenness,* 7 How. 612, 622–623; *Duparquet Co.* v. *Evans,* 297 U. S. 216, and *United States* v. *American Trucking Assns.,* 310 U. S. 534, 542–543.

Reading the clause in conjunction with the rest of § 8, the Board points out that "the sixty-day period" referred to is the period mentioned in paragraph (4) of § 8 (d). That paragraph requires the party giving notice of a desire to *"terminate or modify"* such a contract, as part of its obligation to bargain under § 8 (a)(5) or § 8 (b)(3), to continue "in full force and effect, without resorting to

[17] Although the notice required to put the 60-day waiting period into operation in this case was not delivered until 51 days before the expiration of the contract, it was dated more than 60 days before such expiration date and it has been treated by all concerned as putting the waiting period into effect.

strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." Section 8 (d) thus seeks, during this natural renegotiation period, to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation. The final clause of § 8 (d) also warns employees that, if they join a proscribed strike, they shall thereby lose their status as employees and, consequently, their right to reinstatement.

The Board reasons that the words which provide the key to a proper interpretation of § 8 (d) with respect to this problem are "termination or modification." Since the Board expressly found that the instant strike was *not to terminate or modify* the contract,[18] but was designed instead to protest the unfair labor practices of petitioners, the loss-of-status provision of § 8 (d) is not applicable. We sustain that interpretation. Petitioners' construction would produce incongruous results. It concedes that prior to the 60-day negotiating period, employees have a right to strike against unfair labor practices designed to oust the employees' bargaining representative, yet petitioners' interpretation of § 8 (d) means that if the employees give the 60-day notice of their desire to modify the contract, they are penalized for exercising that right to strike. This would deprive them of their most effective weapon at a time when their need for it is obvious. Although the employees' request to modify the contract would demonstrate their need for the services of their freely chosen representative, petitioners' interpretation would have the incongruous effect of cutting off the employees' freedom to strike against unfair labor practices aimed at that representative. This would relegate the employees to filing charges under a procedure too slow

[18] See note 4, *supra*.

to be effective. The result would unduly favor the employers and handicap the employees during negotiation periods contrary to the purpose of the Act. There also is inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.[19]

Petitioners contend that, unless the loss-of-status clause is applicable to unfair labor practice strikes, as well as to economic strikes, it adds nothing to the existing law relating to loss of status. Assuming that to be so, the clause is justifiable as a clarification of the law and as a warning to employees against engaging in economic strikes during the statutory waiting period. Moreover, in the face of the affirmative emphasis that is placed by the Act upon freedom of concerted action and freedom of choice of representatives, any limitation on the employees' right to strike against violations of §§ 7 and 8 (a), protecting those freedoms, must be more explicit and clear than it is here in order to restrict them at the very time they may be most needed.

There is sufficient ambiguity here to permit consideration of relevant legislative history. While such history provides no conclusive answer, it is consistent with the view taken by the Board and by the Courts of Appeals for the Second and Seventh Circuits.[20]

Senator Ball, who was a manager for the 1947 amendments in the Senate and one of the conferees on the bill, stated that § 8 (d) made mandatory what was already

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[19] See Note, 53 Col. L. Rev. 1023, 1025.

[20] With the exception of one suggestion in a minority report, which is discussed elsewhere, the relevant committee reports describe the provisions of § 8 (d) as being applicable to economic strikes and do not suggest their applicability to strikes against unfair labor practices in violation of §§ 7 and 8 (a). S. Rep. No. 105, 80th Cong., 1st Sess. 24; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34–35.

good practice and was aimed at preventing such interruptions of production as the "quickie strikes" occasionally used to gain economic advantages.

> "The provision in the National Labor Relations Act defining collective bargaining, and providing that where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to protect [bargain] collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, is another provision aimed primarily at protecting the public, as well as the employee, who have been the victims of 'quickie' strikes. I do not think that is taking away any rights of labor . . . it is simply saying that they should all follow the sound, fair, and sane procedure which a majority of the good ones now follow." 93 Cong. Rec. 5014.

One minority report suggested a fear that § 8 (d) would be applicable to unfair practice strikes. The suggestion, however, was not even made the subject of comment by the majority reports or in the debates.[21] An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill.[22]

The record shows that the supporters of the bill were aware of the established practice which distinguished between the effect on employees of engaging in economic strikes and that of engaging in unfair practice strikes.[23]

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[21] S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 21–22; 93 Cong. Rec. 6385, 4036, 6503.

[22] "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 394–395, and see *S. H. Camp & Co.* v. *Labor Board*, 160 F. 2d 519, 521.

[23] ". . . to hold that a worker who because of an unfair labor practice has . . . gone on strike is no longer an employee, would be

If Congress had wanted to modify that practice, it could readily have done so by specific provision. Congress cannot fairly be held to have made such an intrusion on employees' rights, as petitioners claim, without some more explicit expression of its purpose to do so than appears here.[24]

Finally, petitioners seek support for their interpretation of § 8 (d) from the fact that its last clause makes a cross-reference to §§ 8, 9 and 10 of the Act. Such reference does not expand the scope of § 8 (d). It merely makes it clear that *if* § 8 (d) is violated by the employees to whom it applies, then they lose their status as employees for the purposes of §§ 8, 9 and 10.[25]

As neither the collective-bargaining contract nor § 8 (d) of the National Labor Relations Act, as amended, stands in the way, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE MINTON and MR. JUSTICE HARLAN join, dissenting.

The petitioners are corporations in the plastics manufacturing business in New York and are subject to the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 141. In November 1949 they negotiated a one-year collective bargaining agreement with the Carpenters Union, A. F. L.,

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to give legal sanction to an illegal act and to deny redress to the individual injured thereby." S. Rep. No. 573, 74th Cong., 1st Sess. 6–7.

[24] For example, Senator Ball proposed an amendment, to the definition of "employee" in § 2 (3) of the Act, which unintentionally might have abrogated the distinction which favored the employees' right to engage in unfair practice strikes as against economic strikes, but at once withdrew the amendment as going "too far," when this possible effect of it was brought to his attention. 93 Cong. Rec. 1827–1828.

[25] See H. R. Rep. No. 245, 80th Cong., 1st Sess. 27; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 38–39.

governing wages, hours and working conditions. The agreement provided for the arbitration of disputes and contained a clause outlawing strikes. During the life of this agreement, the Wholesale and Warehouse Workers Union commenced the solicitation of members among petitioners' employees, and in September 1950 requested the National Labor Relations Board to certify them as exclusive bargaining representative.

In an effort to keep the Warehouse Workers out of their plant, the petitioners enlisted the aid of a third union, the Pulp and Mill Workers. This latter organization had bested the Wholesale and Warehouse Workers elsewhere in organizational wars. Petitioners proselytized among their employees on behalf of the Pulp and Mill Workers, which in late October, having gained sufficient adherents, intervened in the representation proceeding initiated before the Board by the Warehouse Workers.

Meanwhile the Carpenters had written petitioners on October 10, stating that they wished to negotiate a new contract to take effect upon the expiration of the current agreement. The letter made specific demands, and bargaining over them followed. When the petitioners' organizational activities became manifest, the Carpenters lodged unfair-labor-practice charges with the Board. Some members of the incumbent union tried to counteract the influence of the petitioners upon the employees. Frank Ciccone, a machinist, was one who was active in urging employees to remain loyal to the Carpenters.

On November 10 Ciccone was discharged because of this. The discharge, in conjunction with the antecedent employer unfair labor practices, precipitated a plant-wide strike accompanied by peaceful picketing. The strike continued until early February when the participants requested reinstatement. The request was rejected by the petitioners which had earlier notified the strikers of their discharge.

The proceedings that followed before the Board resulted in findings against the employers of unfair labor practices under § 8 (a)(1), (2) and (3). The Board entered a cease and desist order, and affirmatively directed petitioners to reinstate the discharged strikers with back pay. 103 N. L. R. B. 511. Chairman Herzog and Member Murdock dissented from the latter portion of the Board's order. The Court of Appeals for the Second Circuit (Swan, J., dissenting in part) enforced the Board's order. 214 F. 2d 462. We granted certiorari because of the important question of the construction of the Taft-Hartley Act raised by the case. 348 U. S. 910.

Petitioners did not contend in the Court of Appeals, nor have they argued here, that the Board erred either in finding them guilty of committing unfair labor practices, or in concluding that the strike was precipitated by these illegal practices. Rather they maintain that the Board lacked the power to order the discharged strikers reinstated. Two reasons are urged. First, the strike is claimed to constitute a breach of the labor agreement between petitioners and the bargaining representative of the strikers, and was therefore unprotected activity. Such is not the case. The Board and the Court of Appeals rightly held that the "no-strike" clause in the contract does not cover a work stoppage provoked by the petitioners' unfair labor practices. The second reason is that the strikers ceased to be employees within the meaning of the Act, and therefore were not entitled to reinstatement. Petitioners contend that the discharged workers lost their status as employees by reason of the 60-day "cooling-off" period provided by § 8 (d) of the Act.

Section 8 (d) defines the duty of the employer and the union to bargain collectively. A long proviso in the section treats specifically of the duty during the period

of contract renegotiation. The relevant portions of the section follow:

> ". . . where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> "(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> . . . . .
>
> "(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." 61 Stat. 142–143, 29 U. S. C. § 158 (d).

The discharged employees struck during the 60-day period, for the notification required by § 8 (d)(1) was given on October 10, and the strike began on November 10. The holding of the Board, however, sustained by the Court of Appeals, is that the loss-of-status provision does not apply to an unfair-labor-practice striker.

This provision was one of the amendments to the Wagner Act made by the Labor Management Relations Act, 61 Stat. 136. If the provision, couched in ordinary nontechnical language, is to be read as ordinary English words, concededly the striking employees lost their "status" as employees of petitioners "for the purposes of sections 8, 9, and 10 . . . ." Accordingly they were not entitled to re-employment by the petitioners, and the Board was without authority to order their reinstatement. The real problem, then, is to determine whether controlling considerations preclude giving the ordinary meaning to what Congress has written. While literalness of construction does not conclude ascertainment of a statute's meaning, it certainly is the beginning.

The so-called canons of construction are not technical rules of law which afford the answer to a problem like this. But they are "axiom[s] of experience" (*Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48), helpful guides in determining when language as plain as ours should be respected and enforced. Relevant guides in construing an amendatory provision like the one in issue are: (1) what was the state of the law before the amendment and (2) what light is shed on the specific provision by placing it in the context of the legislation, *i. e.,* the Taft-Hartley Act, of which it is a part, in order to secure harmony and not discord of result. In a word, enactments like the Wagner Act and the Taft-Hartley Act must be considered as an organic whole.

Under the original Wagner Act, employees were given the right in § 7 "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Duties were imposed upon the employer under § 8. Among these, he could not interfere with the exercise by employees of their

rights under § 7, and he was required to bargain in good faith with the employees' representative. When the Board found that an employer had violated his duty under § 8, it was empowered under § 10 to order the employer to cease and desist from so doing and to take action undoing his violation, including the reinstatement of discharged employees, if such reinstatement would effectuate the policies of the Act.

While the employer had numerous obligations to his employees and their bargaining representative, the union and the employees were under no statutory duty to the employer. For example, the union was not required to bargain in good faith, and it was not forbidden to strike in order to achieve its demands during a period of contract renegotiation.

If this case had come up under the Wagner Act the results would be clear. The employers violated § 8 and thereby unleashed the strike. Such a strike would not have been in violation of any statutory duty because the union and the employees had no duties under the Wagner Act. Since the employers had committed an unfair labor practice, the Board had jurisdiction and could order the discharged strikers reinstated with back pay. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. Furthermore, the employers' discharge of their employees because they engaged in a strike was itself an unfair labor practice under § 8 for it interfered with their § 7 right to engage in "concerted activities."

The Wagner Act did not define "concerted activities." All collective action, however, was not concerted activity protected by § 7. We held in *Labor Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, that a sit-down strike was not § 7 activity; and in *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31, we decided that a strike in violation of the laws against mutiny was not protected under § 7. If an employer interferes with collective

employee action which is not sanctioned by § 7, he does not violate § 8, and in the absence of a violation of § 8 the Board cannot take action under § 10. Thus if an employer discharges workers because they engaged in a sit-down strike for higher wages, the Board cannot order him to reinstate the strikers. Since § 8, however, did not place any duties upon employees or unions, most peaceful collective action was protected under § 7, because most peaceful activity did not infringe some implicit federal labor policy or some other federal policy, such as that represented by the statute against mutiny.

The Taft-Hartley Act changed the situation. Section 8 of the Wagner Act was amended and duties were placed upon unions. Collective action which violates any of these duties is of course activity unprotected by § 7. See Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J. 319, 325–333 (1951). One of these new union duties, and an important one, is contained in § 8 (d): unions may not strike to enforce their demands during the 60-day "cooling-off" period.

By reason of this new enactment, participating workers would not be engaged in a protected activity under § 7 by striking for the most legitimate economic reasons during the 60-day period. The strike would be in violation of the provision of that section which says that during the period there shall be no resort to a strike. The employer could discharge such strikers without violating § 8. This would be so if § 8 were without the loss-of-status provision. The Board would be powerless to order reinstatement under § 10. The loss-of-status provision in § 8 (d) does not curtail the Board's power, since it did not have power to order reinstatement where a strike is resorted to for economic reasons before the 60-day period has expired. In such a situation the striker has no rights under §§ 8 and 10. Yet the Board would have us construe the loss-of-status provision as applicable only

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to the economic striker and qualifying a power which the Board does not have.

It is with respect to the unfair-labor-practice striker that the provision serves a purpose. This becomes clear if we assume that there were no such provision and examine the consequences of its absence. On such an assumption, a strike based on an unfair labor practice by the employer during the 60-day period may or may not be a protected activity under § 7. If it is, obviously discharged strikers would be entitled to reinstatement. The strike would not be a § 7 activity, however, if, for example, it were in breach of a no-strike clause in the contract which extends to a work stoppage provoked by an employer unfair labor practice, cf. *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344, or if the no-strike clause in § 8 (d)(4) (not to be confused with the loss-of-status provision) extends to such a work stoppage. However, even if the strike is not a § 7 activity, the Board in the unfair-labor-practice strike situation as distinguished from the economic strike situation, may in its discretion order the discharged participants reinstated. This is so because of the antecedent employer unfair practice which caused the strike, and which gave employees rights under § 8. If the Board finds that reinstatement of such strikers is a remedy that would effectuate the policies of the Act, it has the power under § 10 (c) to issue the necessary order.

This would not be the case, however, if the loss-of-status provision were held applicable to unfair-labor-practice strikes, because participating workers would lose their rights as "employees" for the purposes of §§ 8 and 10. Under the Act only "employees" are eligible for reinstatement. The unfair-labor-practice strike, then, is the one situation where loss of status for the purposes of §§ 8 and 10 is of significance. At any rate, we have not been advised of any other situation to which the provision would apply.

We are therefore confronted with the demonstrable fact that if the provision stripping strikers of their status as employees during the 60-day period is to have any usefulness at all and not be an idle collection of words, the fact that a strike during that period is induced by the employer's unfair labor practice is immaterial.* Even though this might on first impression seem an undesirable result, it is so only by rejecting the important considerations in promoting peaceful industrial relations which might well have determined the action of Congress. In the first place, the Congress may have set a very high value on peaceful adjustments, *i. e.*, the absence of strikes. One may take judicial notice of the fact that this consideration was at the very forefront of the thinking and feeling of the Eightieth Congress. And there is another consideration not unrelated to this. While in a particular case the cause of a strike may be clear, and in a particular case there may be no controversy regarding the

*It may be noted that the opponents of the Taft-Hartley Act objected to the loss-of-status provision for just this reason:

"[T]he section is silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer. Under this section an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter 'cease and desist' from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, employees unwilling idly to countenance abuse, who resort to self-help under the circumstances are removed from the protection of the statute and lose 'employee' status. An employer is at liberty under such circumstances freely to replace any employee bold enough to insist upon justice. The provision denies to the Board the exercise of any discretion to accommodate the equitable doctrine of 'clean hands.' The provisions of the section are conclusive—the employee is subject to summary dismissal irrespective of the employer's conduct." S. Rep. No. 105 (Minority), Part 2, 80th Cong., 1st Sess. 21–22 (1947).

circumstances which prove that an employer committed an unfair labor practice, as a matter of experience that is not always true, indeed often it is not true. One of the sharpest controversies, one of the issues most difficult of determination, is the very question of what precipitated a work stoppage. This is especially true where a new contract is being negotiated. It is not at all unreasonable, therefore, to find a congressional desire to preclude litigation over what all too often is a contentious subject and to deter all strikes during the crucial period of negotiation.

We need not agree with a legislative judgment in order to obey a legislative command. It is enough for us that Congress did not legislate idly, but did intend the loss-of-status provision to have an effect. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Market Co.* v. *Hoffman,* 101 U. S. 112, 115–116. Since the loss-of-status provision has an effect only in an unfair-labor-practice strike, the judgment of the Court of Appeals should be reversed.

UNITED STATES *v.* RYAN.

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

No. 281. Argued January 19, 1956.—Decided February 27, 1956.

Within the meaning of § 302 (b) of the Labor Management Relations Act, which makes it unlawful for "any representative of any employees" to receive money or other thing of value from the employer, an individual who was the president and principal negotiator of a labor union is a "representative" of employees. Pp. 300–307.

(a) The term "representative" in § 302 (b) is not limited to "the exclusive bargaining representative" of the employees, but includes any person authorized by the employees to act for them in dealings with their employers. Pp. 301–307.

(b) A narrow reading of the term "representative" would substantially defeat the purpose of the Act. Pp. 304–305.

(c) In this legislation Congress was not aiming solely at the welfare fund problem. P. 305.

(d) The legislative history supports the construction here given § 302 (b). Pp. 305–306.

(e) The provision in the Labor Management Relations Act that the term "representative" shall have the meaning that it has in the National Labor Relations Act does not require that the term as used in § 302 be construed to include only the exclusive bargaining representative. Pp. 306–307.

225 F. 2d 417, reversed and remanded.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard.*

Louis Waldman argued the cause for respondent. With him on the brief were *Seymour M. Waldman* and *Martin Markson.*

Pierce Butler, John C. Benson and *M. J. Doherty* filed a brief, as *amici curiae,* supporting respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

The question for decision in this case is whether the president and principal negotiator of a labor union is a "representative" of employees within the meaning of § 302 (b) of the Labor Management Relations Act of 1947. 61 Stat. 136, 29 U. S. C. § 141. That section makes it unlawful for "any representative of any employees" to receive money or other thing of value from the employer. The District Court, 128 F. Supp. 128, held that respondent Joseph P. Ryan was a "representative" within the meaning of § 302 (b), but the Court of Appeals for the Second Circuit reversed, Judge Hand dissenting. 225 F. 2d 417. Because of the importance of this question in the administration of the Act, we granted certiorari, 350 U. S. 860.

Ryan was president of The International Longshoremen's Association (ILA) during the years 1950 and 1951. The ILA and its affiliated groups were the recognized collective-bargaining agents for longshore labor in the Port of New York, and bargained through a wage scale committee of which Ryan was a member. He signed the agreements negotiated during that period. J. Arthur Kennedy & Son, Inc., and Daniels & Kennedy, Inc., were concerns engaged in stevedoring operations; their employees were members of the ILA, and they were bound by the agreements negotiated with that union by the New York Shipping Association. The District Court found that James C. Kennedy, president of both Kennedy companies, had given Ryan $1,000 in December of each year from 1946 through 1951, and $500 in April 1951. These findings are not disputed. Ryan was indicted under § 302 (b) for accepting the one 1950 and two 1951 payments.[1] He was found guilty and sentenced to

[1] The previous section, 302 (a), makes it unlawful for any employer "to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees

six months' imprisonment on each of the three counts, the sentences to run concurrently, and fined $2,500.

The Court of Appeals reversed solely on its interpretation of the term "representative" in § 302 (b) of the LMRA. It concluded that the term had a technical meaning in labor legislation and was limited to "the exclusive bargaining representative" of the employees, which in this case was the ILA itself. Since the section applied only to the "representative," payments to Ryan individually were not covered even though as president of the representative union, he was a member of its wage scale committee and signed all negotiated agreements. We do not decide whether any official of a union is *ex officio* a representative of employees under § 302. We believe, however, that respondent's relationship brings him within that term.

The LMRA provides that the term "representative" shall have "the same meaning as when used in the National Labor Relations Act as amended by this Act." § 501 (3). The pertinent definition appears in § 2 (4) of the NLRA: "The term 'representatives' includes any individual or labor organization." 49 Stat. 449, 450, 29 U. S. C. §§ 151, 152 (4).

The Board has held that employees may choose to elect an individual as exclusive or sole bargaining representative.[2] The Court of Appeals, laying much stress on these holdings, assumes that the possibility of such a one-man exclusive bargaining representative, though extremely rare,[3] is the only reason for the inclusion of the word "indi-

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who are employed in an industry affecting commerce." The record does not disclose whether the Government has taken any action under this section against the employers involved.

[2] See *The Robinson-Ransbottom Pottery Co.*, 27 N. L. R. B. 1093; *Louisville Sanitary Wiper Co.*, 65 N. L. R. B. 88.

[3] Statistics supplied by the NLRB for the last two years show that one-man exclusive bargaining representatives constitute less than

vidual" in this definition. We cannot accept such an anomalous view. It is obvious that any labor organization, even when serving as an exclusive bargaining representative, can negotiate, speak, and act only through individuals. All collective bargaining is conducted by individuals who represent labor and management. Many limitations or prohibitions upon labor organization action can be effective only if there are corresponding limitations or prohibitions on the individuals who act for the labor organization. Congress, we believe, placed the identical limitations on both individuals and organizations by terming both "representatives" of employees in § 2 (4). We agree with Judge Hand that in using the term "representative" Congress intended that it include any person authorized by the employees to act for them in dealings with their employers.

Considering the precise words of the statute—"any representative of any employees"—it is plain that their literal meaning strongly suggests that they were meant to include someone in the position of respondent Ryan who represented employees both as a union president and principal negotiator. And this interpretation is strengthened by a consideration of the full text of § 302.[4] Para-

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0.1% of all representatives certified by the Board. In fiscal year 1955, the Board certified 1 individual in 2,904 elections in which representatives were chosen. There were 10 petitions for certification filed by individuals in 4,372 elections. In fiscal 1954, 5 individuals were certified in 3,108 elections in which representatives were chosen. There were 11 such petitions and a total of 4,813 elections.

[4] "SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with

graphs (a) and (b) of § 302 make it unlawful for any employer to offer, or any representative to accept, money or other thing of value. Paragraph (c) lists five exceptions to these broad prohibitions. The first exempts payments as compensation for services "to any representative who is an employee" of the employer. Thus it is clear that § 302 anticipates that a "representative" may be an individual. Of the remaining four exceptions, one could

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respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration

apply only to unions but each of the other three could apply as readily to individuals.[5]

Further, a narrow reading of the term "representative" would substantially defeat the congressional purpose. In 1946 Congress was disturbed by the demands of certain unions that the employers contribute to "welfare funds" which were in the sole control of the union or its officers and could be used as the individual officers saw fit. The United Mine Workers' demand that mine

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of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both. . . ." 61 Stat. 157, 29 U. S. C. § 186.

[5] Subsection (4), relating to check-off payments for union dues, presupposes that the "representative" is the labor union itself. Subsections (2), relating to payments of judgments or arbitration awards, (3), relating to purchase or sale of goods in the ordinary course of business, and (5), relating to payments to trust or welfare funds, however, are consistent with either interpretation of the term "representative."

operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined, caused the Congress to act. The Case Bill, H. R. 4908, 79th Cong., 2d Sess., which regulated welfare funds in a manner similar to § 302, was enacted in 1946, but was vetoed by the President. The following year the Taft-Hartley Act containing § 302 was passed over another veto. But, if "representative" means only the "exclusive bargaining representative," the explicit limitations on welfare funds in § 302 (c)(5) may be easily evaded. Payments made directly to union officials, or to other individuals as trustees, would apparently be excluded from § 302. Thus, a narrow construction would frustrate the primary intent of Congress.

Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of § 302 is such that the only reference to welfare funds is contained in § 302 (c)(5). If Congress intended to deal with that problem alone, it could have done so directly, without writing a broad prohibition in subsections (a) and (b) and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds. As the statute reads, it appears to be a criminal provision, *malum prohibitum,* which outlaws all payments, with stated exceptions, between employer and representative.

The legislative history supports these conclusions. As passed by the House of Representatives, the Hartley Bill forbade employer contributions to union welfare funds, and made it an unfair labor practice to give favors to "any person in a position of trust in a labor organization . . . ." H. R. 3020, 80th Cong., 1st Sess., § 8 (a)(2). The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a "case

where the union representative is shaking down the employer . . . ." 93 Cong. Rec. 4746. The resulting Senate amendment made it criminal both for the employer and the "representative" of employees to engage in such practices.

It is not disputed that the plain language of the Senate version of the bill brought within its coverage any individual who dealt with an employer on behalf of two or more of the latter's employees concerning employment matters. As passed by the Senate, § 302 contained a special definition of the term "representative." [6] The Joint Conference Committee substituted for it the definition of that term in the NLRA, as amended. § 501 (3). This substitution was among those described by the Joint Conference Committee Report as "minor clarifying changes." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 67.

We cannot read this history as supporting the conclusion that the scope of § 302 was limited by the Joint Conference to include only the "exclusive bargaining representative" of employees. Such a change would have drastically reduced the scope of the section, and could hardly be described as a "minor clarifying" change. Certainly, in the face of this legislative history, we should not reduce the legislation to a practical nullity.

It is insisted that this interpretation clashes with the use of the term "representative" in various sections of the NLRA. In the majority of the examples given, the scope of the term is made clear by other words in the pro-

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[6] Section 302 (g) of the Senate version stated, "For the purposes of this section, the term 'representative' means any labor organization which, or any individual who, is authorized or purports to be authorized to deal with an employer, on behalf of two or more of his employees, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work . . . ."

visions themselves.[7] But further, the provision in the LMRA that "representative" shall have its NLRA meaning is no more applicable to § 302 than to any other section of the LMRA, and in several other sections of that Act it is patent that "representative" cannot be construed to include only the exclusive bargaining representative. For example, § 204 (a) refers to "employers and employees and their representatives," and § 211 (a) refers to "interested representatives of employers, employees, and the general public." There are other examples, but these are sufficient. If the severely restricted construction contended for the word "representative" is inapplicable to one section of the LMRA, there is no compulsion to apply it to any other section.

We conclude, therefore, that § 302 prohibits payments by employers to individuals who represent employees in their relations with the employers. The judgment is

Reversed and remanded.

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

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[7] Examples are, § 1, "designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment," § 7, "to bargain collectively through representatives of their own choosing," § 8 (b) (4) (B) and (C), "a labor organization as the representative of his employees," § 8 (b) (4) (D), "bargaining representative for employees."

COMMISSIONER OF INTERNAL REVENUE *v.* SOUTHWEST EXPLORATION CO.

NO. 286. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued January 23–24, 1956.—Decided February 27, 1956.

A drilling company contracted to develop certain oil deposits lying off the coast of California by slant drilling from sites located on the property of adjacent upland owners. State law permitted such offshore oil to be extracted only by drilling from upland drill sites or filled lands, and no filled lands were available. The drilling company agreed to pay the upland owners 24½% of the net profits for the use of their land. *Held:* Under the Internal Revenue Code of 1939, the upland owners, not the drilling company, were entitled to take the statutory depletion allowance on this share of the profits. Pp. 309–317.

(a) The right to depletion is determined by whether or not the taxpayer has an economic interest, *i. e.*, an interest in the oil in place and income derived solely from production. Pp. 313–315.

(b) Since the uplands were essential to any production from the offshore oil deposits, agreement of the upland owners to let their land be used for drilling in return for a share of the net profits gave them the requisite economic interest. Pp. 315–316.

(c) Their income was dependent entirely on production, and the value of their interest decreased with each barrel of oil produced. P. 316.

(d) Where, as here, a party essential to the drilling for and extraction of oil has made an indispensable contribution of the use of real property adjacent to the oil deposits in return for a share in the net profits from the production of oil, that party has an economic interest which entitles him to depletion on the income thus received. Pp. 316–317.

220 F. 2d 58, reversed.
132 Ct. Cl. 427, 132 F. Supp. 718, affirmed.

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*Together with No. 287, *United States* v. *Huntington Beach Co.*, on certiorari to the United States Court of Claims, argued January 24, 1956.

Hilbert P. Zarky argued the causes for petitioners. With him on the briefs were *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Ellis N. Slack.*

Melvin D. Wilson argued the cause and filed a brief for respondent in No. 286. *Joseph D. Peeler* entered an appearance for respondent.

Harry R. Horrow argued the cause for respondent in No. 287. With him on the brief was *Francis R. Kirkham.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The Southwest Exploration Co., respondent in No. 286, contracted to develop certain oil deposits lying off the coast of California by whipstock drilling from sites located on the property of adjacent upland owners. Southwest agreed to pay to such owners 24½% of the net profits for the use of their land. Both Southwest and the upland owners sought to take the statutory depletion allowance of 27½% on this share of the profits. The Tax Court decided that Southwest was entitled to the depletion allowance, 18 T. C. 961, and the Ninth Circuit affirmed, 220 F. 2d 58. In the other case, the Court of Claims held that one of the upland owners, Huntington Beach Co., respondent in No. 287, was entitled to the depletion allowance on its share of the net income, 132 Ct. Cl. 427, 132 F. Supp. 718. We granted certiorari in both cases, 350 U. S. 818, because both the drilling company and the upland owners cannot be entitled to depletion on the same income. We agree with the Court of Claims.[1]

[1] In the courts below, the Commissioner took technically inconsistent positions, opposing the depletion allowance in both cases and losing in both. Before this Court the Commissioner urged that depletion be denied the drilling company and allowed to the upland owners on the latter's 24½% of net profits.

The California State Lands Act of 1938 provided that the State's offshore oil might be extracted only from wells drilled on filled lands or slant drilled from upland drill sites to the submerged oil deposits.[2] Other provisions of the same statute required that "derricks, machinery, and any and all other surface structures, equipment, and appliances" be located only on filled lands or uplands. It was further provided that the state commission might require each prospective bidder for such a state lease to furnish, as a condition precedent to consideration of his bid, satisfactory evidence of "present ability to furnish all necessary sites and rights of way for all operations contemplated under the provisions of the proposed lease." [3]

In 1938 California published notice of its intention to receive bids for the lease of certain oil lands pursuant to this statute. At the time Southwest—a corporation organized in 1933 but completely inactive until the transaction at issue here—did not own, lease, operate or control any of the uplands adjacent to the area of oil deposits. It is agreed that there were no filled lands available. Southwest entered into three agreements with the upland owners, and was granted the right of ingress to and egress from the designated uplands and the right to construct, use and maintain all equipment necessary for drilling on the same lands. The upland owners reserved to themselves the right to give easements or subsurface well crossings in the uplands, except that they would not allow such easements for the purpose of drilling into the offshore oil deposits while Southwest retained an interest granted to it by state easement. Southwest's rights were expressly subject to all rights previously granted by the upland owners. The agreements defined "net profits"

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[2] Cal. Stat. (Extra Session 1938), c. 5, § 87.

[3] *Id.*, § 89.

and provided that Southwest would pay a total of 24½% of its net profits from extraction and sale of oil to the upland owners.[4] It was also provided that the upland owners did not acquire a share in the lease or oil deposit by virtue of the last agreement and that it was not the intention of the parties to create a partnership relationship.

As a result of these agreements, the upland owners endorsed Southwest's bid for a lease submitted to the State of California. Southwest, as the only bidder, was granted "Easement No. 392" by the State in consideration of the "royalty to be paid, the covenants to be performed, and the conditions to be observed by the Grantee." One such condition was that set out in paragraph (1):

> "That each well drilled pursuant to the terms of this agreement shall be slant drilled from the uplands to and into the subsurface of the State lands. Derricks, machinery, and any and all other surface structures, equipment and appliances shall be located only upon the uplands and all surface operations shall be conducted therefrom."

The agreement further provided that, if Southwest should "default in the performance or observance of any of the terms, covenants and stipulations hereof," the State might re-enter, cancel the agreement or close down wells not being operated according to the agreement.

The wells drilled pursuant to this lease have produced oil continuously since 1939. In No. 286, *Southwest Exploration Co.*, the tax years 1939 through 1945 are involved. If Southwest may claim the depletion allow-

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[4] This share was the total of the following percentages of net profits to be paid to the three upland owners:

17.75% to Huntington Beach Company.
1.576% to Pacific Electric Railway Company.
5.174% to Pacific Electric Land Company.

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ance on the upland owner's share of the profits during this period, its tax liability is reduced by approximately $175,000. In No. 287, *Huntington Beach Co.*, the upland owner is claiming a tax refund of $135,000 for the year 1948 alone.[5]

An allowance for depletion has been recognized in our revenue laws since 1913. It is based on the theory that the extraction of minerals gradually exhausts the capital investment in the mineral deposit. Presently, the depletion allowance is a fixed percentage of gross income which Congress allows to be excluded; this exclusion is designed to permit a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired. The present allowance, however, bears little relationship to the capital investment, and the taxpayer is not limited to a recoupment of his original investment. The allowance continues so long as minerals are extracted, and even though no money was actually invested in the deposit. The depletion allowance in the Internal Revenue Code of 1939 is solely a matter of congressional grace; it is limited to 27½% of gross income from the property after excluding from gross income "any rents or royalties" paid by the taxpayer with respect to the property.[6]

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[5] For the tax years 1942 through 1946, Huntington Beach Company claimed and was allowed to deduct depletion on its share of the net profits. The United States is seeking recovery of this money in a suit now pending in the United States District Court for the Northern District of California, Southern Division. The amount at issue there is something over $500,000.

[6] Pertinent sections of the Internal Revenue Code of 1939 provide:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

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

. . . . . .

"(m) DEPLETION.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar

The complexities of oil operations and risks incident to prospecting have led to intricate, multiparty transactions, so that it is often difficult to determine which parties are entitled to a part of the allowance. The statute merely provides in § 23 (m) that in the case of leases the depletion allowance should be "equitably apportioned between the lessor and lessee."

In determining which parties are entitled to depletion on oil and gas income, this Court has relied on two interrelated concepts which were first formulated in *Palmer* v. *Bender*, 287 U. S. 551. There, the taxpayer, a lessee of certain oil and gas properties, had transferred his interest in these properties to two oil companies in return for a cash bonus, a future payment to be made "out of one-half of the first oil produced and saved," and an additional royalty of one-eighth of the oil produced and saved. In

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conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . . In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. . . .

"For percentage depletion allowable under this subsection, see section 114 (b), (3) and (4)." 53 Stat. 12, 14, 26 U. S. C. § 23.

"SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

. . . . . .

"(b) BASIS FOR DEPLETION.

. . . . . .

"(3) PERCENTAGE DEPLETION FOR OIL AND GAS WELLS. In the case of oil and gas wells the allowance for depletion under section 23 (m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23 (m) be less than it would be if computed without reference to this paragraph." 53 Stat. 45, 26 U. S. C. § 114.

upholding the taxpayer's right to depletion on all such income, the Court based its decision on the grounds that a taxpayer is entitled to depletion where he has: (1) "acquired, by investment, any interest in the oil in place," and (2) secured by legal relationship "income derived from the extraction of the oil, to which he must look for a return of his capital." 287 U. S., at 557.

These two factors, usually considered together, constitute the requirement of "an economic interest." This Court has found the requisite interest in the oil in place to have been retained by the assignor of an oil lease, *Thomas* v. *Perkins,* 301 U. S. 655, the lessor of oil properties for a share of net profits, *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599, and the grantor of oil lands considered as an assignor of drilling rights, *Burton-Sutton Oil Co.* v. *Commissioner,* 328 U. S. 25. The Court found no such interest in the case of a processor of natural gas who had only contracted to buy gas after extraction, *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, and in the case of a former stockholder who had traded his shares in a corporation which owned oil leases for a share of net income from production of the leased wells, *Helvering* v. *O'Donnell,* 303 U. S. 370.

The second factor has been interpreted to mean that the taxpayer must look *solely* to the extraction of oil or gas for a return of his capital, and depletion has been denied where the payments were not dependent on production, *Helvering* v. *Elbe Oil Land Co.,* 303 U. S. 372, or where payments might have been made from a sale of any part of the fee interest as well as from production. *Anderson* v. *Helvering,* 310 U. S. 404. It is not seriously disputed here that this requirement has been met. The problem revolves around the requirement of an interest in the oil in place.

It is to be noted that in each of the prior cases where the taxpayer has had a sufficient economic interest to

entitle him to depletion, he has once had at least a fee or leasehold in the oil-producing properties themselves. No prior depletion case decided by this Court has presented a situation analogous to that here, where a fee owner of adjoining lands necessary to the extraction of oil is claiming a depletion allowance.

Southwest contends that there can be no economic interest separate from the right to enter and drill for oil on the land itself. Since the upland owners did not themselves have the right to drill for offshore oil, it is argued that respondent—who has the sole right to drill—has the sole economic interest. It is true that the exclusive right to drill was granted to Southwest, and it is also true that the agreements expressly create no interest in the oil in the upland owners. But the tax law deals in economic realities, not legal abstractions, and upon closer analysis it becomes clear that these factors do not preclude an economic interest in the upland owners.

Southwest's right to drill was clearly a conditional rather than an absolute grant. Without the prior agreements with the upland owners, Southwest could not even have qualified as a bidder for a state lease. Permission to use the upland sites was the express condition precedent to the State's consideration of Southwest's bid, and it was one of the express conditions on which "Easement No. 392" was granted to Southwest. For a default in that condition the State retained the right to re-enter or to cancel the lease. Thus it is seen that the upland owners have played a vital role at each successive stage of the proceedings. Without their participation there could have been no bid, no lease, no wells and no production.

But Southwest contends that the upland owners here contributed merely property which was useful but not necessary to the drilling operation. The facts are to the contrary. State law required that the wells be drilled either on the uplands or on filled lands, and there were

no filled lands available. By hindsight Southwest now suggests that it might have constructed a drilling island which might have been considered as filled land under the statute. Then, too, perhaps the State itself might have changed the law or condemned the uplands under existing law. But none of these possibilities occurred. The fact is that the drilling arrangement was achieved and oil produced in the only way that it could have been, consistent with state law and the express requirements of the State's lease.

Recognizing that the law of depletion requires an economic rather than a legal interest in the oil in place, we may proceed to the question of whether the upland owners had such an economic interest here. We find that they did. Proximity to the offshore oil deposits and effect of the state law combined to make the upland owners essential parties to any drilling operations. This controlling position greatly enhanced the value of their land when extraction of oil from the State's offshore fields became a possibility. The owners might have realized this value by selling their interest for a stated sum and no problem of depletion would have been presented. But instead they chose to contribute the use of their land in return for rental based on a share of net profits. This contribution was an investment in the oil in place sufficient to establish their economic interest. Their income was dependent entirely on production, and the value of their interest decreased with each barrel of oil produced. No more is required by any of the earlier cases.

Southwest contends, finally, that if depletion is allowed to the upland owners in this case, it would be difficult to limit the principle in instances of strangers "disassociated from the lease" who may have contributed an essential facility to the drilling operation in return for a share of the net profits. But those problems are not before us in this case where the upland owners could hardly be said

to be "disassociated from the lease." We decide only that where, in the circumstances of this case, a party essential to the drilling for and extraction of oil has made an indispensable contribution of the use of real property adjacent to the oil deposits in return for a share in the net profits from the production of oil, that party has an economic interest which entitles him to depletion on the income thus received.

For the foregoing reasons the judgment in No. 286, as to Southwest Exploration Company, is reversed and that in No. 287, as to Huntington Beach Company, is affirmed.

No. 286, Reversed.
No. 287, Affirmed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

SHIELDS *v.* ATLANTIC COAST LINE RAILROAD CO.

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

No. 150. Argued January 19, 1956.—Decided February 27, 1956.

Petitioner, an independent contractor in the business of unloading gasoline, was instructed by the consignee to unload a tank car of gasoline which had been hauled by respondent railroad and which was located on a siding in its freight yards. While petitioner was standing on a board attached to the car near the dome, in order to unload the car by opening a valve inside the dome, the board broke and petitioner fell, sustaining injuries. The board, which was defective, was permanently fastened to the car near the dome and had been placed there for the purpose for which petitioner was using it. *Held:* The board was a safety appliance within the meaning of §§ 2 and 3 of the Safety Appliance Act of 1910, and the railroad was absolutely liable for damages resulting from petitioner's injuries. Pp. 319–325.

(a) The board here involved came within the meaning of the term "running boards" as used in § 2 of the Act, which provides that "all cars requiring . . . secure running boards shall be equipped with such . . . running boards." P. 321.

(b) The fact that the Interstate Commerce Commission in its 1911 regulations under § 3 has not specified uniform standards for such running boards is not a binding administrative determination that they are not "running boards" for the purposes of § 2. Pp. 321–322.

(c) Failure of the Commission to specify uniform standards for such running boards under § 3 need not mean that the tank car was not a car "requiring" such a running board within the meaning of § 2. Pp. 322–323.

(d) If such a running board is provided by a railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by § 2. Pp. 323–324.

(e) Section 2 is not limited to such running boards as are required only in the movement of the train. Pp. 324–325.

(f) There is no merit in the railroad's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. P. 325.

220 F. 2d 242, reversed.

Truman M. Hobbs argued the cause for petitioner. With him on the brief was *M. R. Nachman, Jr.*

Norman C. Shepard argued the cause and filed a brief for respondent.

Robert W. Ginnane and *C. H. Johns* filed a brief for the Interstate Commerce Commission, as *amicus curiae,* supporting respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

Petitioner, an independent contractor in the business of unloading gasoline, was instructed by the consignee to unload a tank car of gasoline which had been hauled by respondent Atlantic Coast Line and which was located at the time on a siding in respondent's freight yards. In order to release the gasoline through a hose attached to the bottom of the car, it was necessary to go to the dome on top of the car, remove the dome cap, and open a valve inside the dome. While petitioner and his helper were engaged in opening the valve, the board on which they were standing broke and petitioner fell, sustaining injuries. There is no dispute that the board was defective. It was a wooden board over seven feet long attached to the side of the tank near the top just below the dome by means of two triangular steel braces extending from the side of the tank at either end of the board.

The question presented here is whether this device, which for convenience we shall call a dome running board, is a safety appliance within the meaning of §§ 2 and 3 of the Safety Appliance Act of 1910. Act of April 14, 1910, c. 160, §§ 2 and 3, 36 Stat. 298, 45 U. S. C. §§ 11 and 12.

Petitioner brought suit in the District Court, alleging in one count of his amended complaint absolute liability for a violation of the Act and in a second count common-law negligence. The jury returned a general verdict in his

favor. The Court of Appeals reversed and remanded for a new trial on the negligence count alone, holding that the trial court erred in instructing that the dome running board was a safety appliance. 220 F. 2d 242.[1] We granted certiorari because of the importance of the questions raised as to the proper interpretation of the Safety Appliance Act. 350 U. S. 819.

Section 2 of the Safety Appliance Act of 1910 provides in part:

> ". . . all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards . . . ."

Section 3 provides:

> "That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two . . . and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission . . . and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act . . . ." [2]

Under the authority of § 3, the Commission in 1911 promulgated regulations still in force providing in detail for

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[1] The action against Southern Railway Co., a co-defendant, as delivering carrier of the car was dismissed.

[2] Section 3 as it appears in the United States Code omits, presumably as executed, the language containing the statutory command to the Commission to make its original standardization regulations. 45 U. S. C. § 12.

one running board running around the perimeter, or at least the full length of the sides, of tank cars.[3] Such a board enables a trainman to walk the length of a tank car between cars adjoining it on either end. The regulations make no mention whatever by any name of dome running boards. Petitioner nevertheless contends that the dome running board is a required running board affording him protection under § 2.

The obvious purpose of a dome running board is to provide a secure flooring for those who must perform operations in connection with the tank car dome. Clearly, the dome running board has major importance in loading and unloading operations. But a railroad man of over twenty-five years' experience testified that it also may be used to stand on in order to pass hand signals or repair minor troubles occurring while the train is en route. The dome running board is an integrated part of the exterior equipment of a tank car;[4] it functions as a permanently attached outside "floor" near the dome of the car. The testimony showed that railroad men, including respondent's employees, often refer to the dome running board as a running board. We hold that it comes within the meaning of the term "running boards" as used in § 2.

The fact that the Commission in its 1911 regulations under § 3 has not specified uniform standards for dome running boards is not a binding administrative determination that they are not running boards for the purposes of § 2. The reason for the omission is apparently the Commission's view that only appliances affording safety while the train is moving need be standardized. But

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[3] 49 CFR §§ 131.8 (b), 131.9 (c). 49 CFR § 131.7 covers "Tank cars with side platforms" and contains no provision for "running boards." The car in question here does not come within § 131.7.

[4] See Car Builders' Cyclopedia (18th ed. 1949–1951), 249–254, especially the diagrams, at 252–253, of a tank car with a dome running board, there called a "dome platform," similar to the present car.

there is no showing that the regulations purport to exhaust by implication each category of statutory appliances listed in § 2. Omission of dome running boards of itself shows no more than that the Commission has not standardized all possible running boards within § 2. *Davis* v. *Manry,* 266 U. S. 401, is consistent with our view. There the Court itself interpreted the language in § 2 requiring grab irons "on their roofs" of "cars having ladders" to apply only to cars having roofs. It then pointed to the Commission's failure to standardize a grab iron over a standardized ladder on a tender without a roof only as a supporting "practical construction" of the section. Moreover, the Commission in that case, having standardized the ladder, had no alternative but to interpret the statutory word "roofs" by either standardizing a grab iron or not standardizing it. Here no such practical construction is implied by the failure to standardize.

Even if the dome running board be properly characterized as a running board, respondent contends that, since § 2 refers to "cars requiring . . . secure running boards," the Commission's failure to standardize dome running boards under § 3 constitutes an administrative determination that they are not required within the meaning of § 2. The purpose of § 3 was to provide uniformity in the location and characteristics of those appliances upon which railroad men, working "always in haste, and often in darkness and storm," must "instinctively" rely in the hazards of their employment. *Illinois Central R. Co.* v. *Williams,* 242 U. S. 462, 466.[5] Effectuation of such a purpose would require standardization of running boards which extend the length of train cars. But considerations of administrative expertise relevant to § 3 are not equally applicable to the effectuation of the purpose of § 2. The

[5] See also H. R. Rep. No. 37, 61st Cong., 2d Sess.; S. Rep. No. 250, 61st Cong., 2d Sess. 3.

purpose of the latter section was "to convert the general legal duty of exercising ordinary care to provide" safety appliances on cars "requiring [them] for their proper use" into a "statutory, an absolute and imperative duty, of making them 'secure.'" *Illinois Central R. Co.* v. *Williams, supra.* The purpose of § 3 is to standardize the appliances required by § 2. But it does not follow that appliances necessary and furnished for the safe use of the car, although not standardized under § 3, are not within the sweep of § 2. Clearly, those who work on train cars may necessarily have to rely on the security of a dome running board, although the purposes of that appliance may not require any unhesitating reliance on its uniform characteristics.

In the *Williams* case, *supra,* this Court held that the Commission's statutory power to postpone the effective date of its standardization regulations under § 3 did not suspend the railroad's duty under § 2 to make appliances secure. There was no question that the appliance in *Williams* was required, but the teaching of the case is that Commission action under § 3 does not exhaust the commands of § 2. See also *Southern Pac. Co.* v. *Carson,* 169 F. 2d 734, holding a railroad liable under § 2 for defects in an independent wooden club used to help turn a brake wheel where the wheel itself complied with the Commission's regulations, which made no mention of the club. We conclude that failure of the Commission to standardize the dome running board need not mean that it was not a required running board under § 2. To hold otherwise would relieve railroads from the absolute duty under § 2 to make safety appliances secure whenever new appliances are adopted which have not yet been standardized by the Commission.

Both the respondent and the manufacturer of the tank car considered that the dome running board was required for the proper use of the car. The railroad industry

itself has recognized that tank cars require secure dome running boards. The Association of American Railroads safety appliance standards, largely identical to the Interstate Commerce Commission regulations, contain detailed uniform specifications for dome running boards,[6] and compliance with those safety standards is required for interchange of cars between lines.[7] Petitioner used the dome running board, not simply because it happened to be there, but also because it had to be there for him to perform his duties safely, and performance of his duties was essential to the operation of the tank car. At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by § 2. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 37.

The Commission, in a brief filed here, contends that only appliances designed to insure safety while the train is in movement are within § 2, and, therefore, a dome running board cannot be a statutory running board. No case is cited to support this construction. Nothing in the language of § 2 itself or in its legislative history indicates that it should be read so narrowly. Whether or not an appliance is designed to afford protection while the train is moving may provide the Commission with an appropriate guide for deciding which appliances should be standardized under § 3. But there is no reason to import such a distinction into § 2 in order to deny the

[6] A. A. R. Safety Appliances for Tank Cars Built after May 1, 1917, Car Builders' Cyclopedia (19th ed. 1953), 938, 939–942.

[7] A. A. R. Code of Rules for the Interchange of Traffic (1952 ed.), Rules 3 (s)(1), 3 (r)(7).

humane benefits of the Act to those who perform dangerous work on train cars that are not moving. Section 2 is not limited to such running boards as are required only in the movement of the train. The dome running board here was required for the use of the car. Section 2 required it to be safe, although regulations pursuant to § 3 had not standardized it.

There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. *Coray* v. *Southern Pacific Co.*, 335 U. S. 520; *Brady* v. *Terminal Railroad Assn.*, 303 U. S. 10; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589; *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617. The judgment below must be reversed and the judgment of the District Court reinstated.

Reversed.

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

MR. JUSTICE REED, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON join, dissenting.

The ultimate question presented by this case is whether the defective dome platform [1] which caused petitioner's injury is a safety appliance within the meaning of § 2 of the Act of April 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. § 11. The Court holds that the dome platform is a

[1] The device involved in this case is denominated a dome platform in the Car Builders' Cyclopedia (18th ed. 1949–1951) 253.

"running board" within the meaning of § 2, and that the tank car involved here was a car "requiring" the platform.

First, it can hardly be said that the dome platform is a running board as that term is used in § 2 of the Act. It appears that every device regulated by the Safety Appliance Act is principally designed for use by, and for the protection of, trainmen while railroad cars are in motion. Certainly there is no indication that this legislation was meant to regulate all devices and appliances employed on railroad cars; and there is nothing in the legislative history upon which to base a belief that equipment designed principally for loading and unloading cars, such as a dome platform, was to be covered by the statute. Moreover, while a dome platform might be loosely spoken of as a running board, it does not appear that it falls within the technical definition of that term as used in the trade. A running board is a "plane surface, made of boards or special metal structure, for trainmen to walk or run on." [2] The platform involved here is used principally to stand on to give convenient access to the top of the dome.

However, the principal ground upon which I dissent is aside from the question whether a dome platform is a "running board" under § 2. Assuming that it is, it does not follow that the respondent violated the Act. Pursuant to such an assumption, I will read § 2 of the statute as though the words "dome platforms" appear in the place of "running boards." But even then not every

[2] Car Builders' Cyclopedia (19th ed. 1953) 51. Substantially the same definition of the term appears in each of the other eighteen editions of this volume, the first of which was published in 1879 as "The Car-Builder's Dictionary." That edition was published so as to alleviate the "inconvenience, confusion, and delay . . . caused . . . by want of common names for the different parts of [railroad] cars." Preface, The Car-Builders' Dictionary (1879). See also note 1, *supra*.

defective dome platform is prohibited by the statute. So far as pertinent here, § 2 provides that "all cars requiring . . . secure running boards [*viz.*, dome platforms] shall be equipped with such . . . ." The congressional mandate then is merely that railroad carriers shall provide secure dome platforms on cars "requiring" them. No other dome platforms would be safety appliances under this Act. Therefore, the inquiry here narrows to whether this tank car "required" a dome platform.

Section 2 does not itself indicate any means for determining which cars require running boards (dome platforms), and thus does not specify which dome platforms, if any, are safety appliances.[3] However, § 3 of the Act provides that within six months "the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act . . ." [4] and that those designations are to remain as railroad equipment standards unless changed by the Commission.[5] It seems inescapable, just as a matter of

[3] Section 2 does, however, specify which cars require sill steps and handbrakes. "*All* cars must be equipped with secure sill steps and efficient hand brakes . . . ." (Italics supplied.) Assuming that "sill steps" and "hand brakes" include all devices falling within those terms when used generically, it would seem that all such devices are safety appliances and must meet the statutory standard of "secure" or "efficient." Cf. *Southern Pac. Co.* v. *Carson,* 169 F. 2d 734.

[4] The quoted phrase does not appear in 45 U. S. C. § 12, the Code section corresponding to § 3 of the Act. The phrase evidently was omitted from the Code as being fully executed at the time the Code was compiled.

[5] The Act became law on April 14, 1910. Thus, the Commission had until October 13, 1910, within which to adopt its standardizing regulations. Such regulations were adopted on October 13, 1910, by Commission order. Subsequently, on March 13, 1911, the Commission adopted another order superseding the order of October 13, 1910. 49 CFR § 131.1 *et seq.* However, the effective date of the mandate

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logic, that since § 3 gave to the Commission the duty to determine, among other things, how many of the "required" § 2 appliances shall be used and where they shall be placed, the Commission was thereby meant to determine which are cars "requiring" running boards (dome platforms), and therefore which dome platforms, if any, are safety appliances. Moreover, if it be assumed that the statute is ambiguous in this matter, the other alternative is to leave to the courts the determination of which types of cars require dome platforms, or any other § 2 equipment except sill steps and handbrakes, to be revealed *ad hoc*. The creation of such uncertainties is not to be favored. But in view of the existence of the Interstate Commerce Commission, an administrative expert in the safety requirements of the railroad industry, coupled with the explicit delegation to the Commission by § 3 of the authority to designate the number and location of the appliances required by § 2, it would seem difficult to conclude anything but that Congress made railroads responsible as insurers only for such running boards as the Commission, not the courts, might determine are required. This purpose of Congress is even more clear from the words of the Act itself than it is from the Code sections, codified long after the regulations were issued.

This leads me to examine the regulations promulgated by the Interstate Commerce Commission pursuant to § 3 of the Act. As previously noted, that section required the Commission to prescribe the uniform standards applicable to the safety appliances set forth in § 2. Nowhere in the regulations (49 CFR § 131.1 *et seq.*) does the Commission prescribe dome platform equipment for tank

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of § 2 was, by its terms, not until July 1, 1911, over three months after the final promulgation of the Commission regulations. There was thus no time lag, either actual or contemplated, between the effective date of § 2 and the I. C. C. determinations.

cars.[6] It follows that tank cars are not cars "requiring" dome platforms. Therefore, the absence of such equipment on tank cars, or the presence of such equipment in a defective condition, should not constitute a violation of the Act. Of course, this would not mean that railroads could with impunity employ insecure dome platforms on their tank cars, or for that matter, any defective equipment not covered by the Safety Appliance Act. That Act does not supplant the basic law of negligence, and this petitioner has preserved his right of recovery for any negligence.

The fact that the Association of American Railroads prescribes dome platforms for tank cars in its safety appliance standards [7] does not suggest a different result. The Association is not entrusted with the enforcement of this statute or with its reach; and while it is commendable that it has adopted standards in this instance which require equipment beyond that which may be covered by the Safety Appliance Act, if I am correct as to the duties of the Commission, the action of the Association cannot supplant the determinations of the Commission.

This Court has never before held that railroad car equipment not specifically required by statute or regulation can be treated as governed by the Safety Appliance Act. That issue has been ruled upon in accordance with this dissent in *Central Vermont R. Co.* v. *Perry*, 10 F. 2d 132. There the trial court had instructed the jury affirmatively on the application of the Safety Appliance

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[6] 49 CFR §§ 131.8 (b) and 131.9 (c) are the only regulations relating to running boards on tank cars, and it is clear, as well as conceded, that those subsections do not require a running board of any sort at or near the dome of these cars.

[7] A. A. R. Safety Appliances for Tank Cars Built after May 1, 1917, Car Builders' Cyclopedia (19th ed. 1953) 939–942; A. A. R. Code of Rules for the Interchange of Traffic (1952 ed.), Rules 3 (s)(1), 3 (r)(7).

Act with respect to the absence of a footboard across the rear of a tender. Without deciding whether the footboard was a running board within the meaning of § 2 of the 1910 Act, and evidently upon the assumption that it was, the court said:

> "As the Safety Appliance Act and its supplements do not require a footboard at the rear end of the tender of a shifting engine and the regulations of the Interstate Commerce Commission do not require one, . . . we are of the opinion that the court erred in its instruction to the jury." *Id.*, at 137.

The position herein expressed is not contrary to *Illinois Central R. Co.* v. *Williams,* 242 U. S. 462. That case involved a defective handhold at the top of a ladder on a boxcar. Section 2 of the Act provides for secure ladders on all cars "requiring" them, and, on "all cars having ladders," it provides for secure handholds at the top of the ladders. The Court commented that "A box car could not properly be used without a secure ladder and . . . all cars having ladders must be equipped with secure hand holds . . . ." *Id.*, at 464. But I do not understand this to have been a holding by the Court that, apart from any Interstate Commerce Commission determination, boxcars require secure ladders. At most the comment was a dictum, since it was clearly not necessary to decide whether the car involved required a secure ladder. The car had a ladder, and all cars "having ladders shall also be equipped with secure hand holds or grab irons on their roofs . . . ." Moreover, as later appears in that case, the Commission had previously issued an order designating the number, dimensions, location, and manner of application of ladders on boxcars. While that order granted an extension of time of five years within which to comply with the standards therein prescribed, it nonetheless constituted a Commission determination that box-

cars require secure ladders within the meaning of § 2. For similar reasons *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, is not contrary to this dissent. See *Atchison, T. & S. F. R. Co.* v. *Scarlett,* 300 U. S. 471.

Finally, continuing to assume that a dome platform is a running board under § 2, and now upon the further assumption that the courts were meant to decide which cars require them, a dissent is still indicated. In these circumstances, consistent with the normal rule, great respect should be given to the interpretation of an act by the administrative agency designated to administer it.[8] As has been observed, the regulations of the Interstate Commerce Commission prescribing the uniform standards applicable to § 2 safety appliances omit to mention dome platform equipment for tank cars. Thus the Commission does not understand dome platforms to be "required" for tank cars under § 2. If it had so understood, it is reasonable to believe it would have provided standards for such equipment in its regulations. Moreover, at the request of the Court, the Commission advised by brief in this case that the dome platform was not even a running board, much less a required running board. Following this Court's ruling in *Davis* v. *Manry,* 266 U. S. 401, this "construction by the Commission—the tribunal to which the application of § 2 is entrusted and which would be solicitous to enforce it—" should be followed. *Id.,* at 404–405.

For these reasons the judgment should be affirmed.

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[8] *United States* v. *American Trucking Assns.,* 310 U. S. 534, 549.

UNITED GAS PIPE LINE CO. *v.* MOBILE GAS SERVICE CORP. ET AL.

NO. 17. ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued November 7–8, 1955.—Decided February 27, 1956.

Under the Natural Gas Act, a regulated natural gas company furnishing gas to a distributing company under a long-term contract filed with the Federal Power Commission may not, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Commission under § 4 (d) of the Act. Pp. 333–347.

(a) Unlike the Interstate Commerce Act, which requires uniform rates, the Natural Gas Act expressly recognizes that rates to particular customers may be set initially by individual contracts filed with the Commission. Pp. 338–339.

(b) Authority for natural gas companies to change their contract rates unilaterally is not conferred by § 4 (d) of the Act, which provides that "no change shall be made by any natural-gas company in any such [filed] rate . . . or contract . . . except after thirty days' notice to the Commission," given by filing new schedules showing the changes and the time they are to go into effect. Pp. 339–340.

(c) The Act neither grants nor defines the initial rate-setting powers of natural gas companies; it merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers. Pp. 340–343.

(d) There is nothing in the structure or purpose of the Act from which can be inferred any right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts. Pp. 343–344.

(e) The conclusion here reached fully promotes the purposes of the Act. Pp. 344–345.

(f) *Armour Packing Co.* v. *United States*, 209 U. S. 56, and *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, distinguished. Pp. 345–346.

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*Together with No. 31, *Federal Power Commission* v. *Mobile Gas Service Corp.*, also on certiorari to the same court.

(g) The new schedule filed by the natural gas company in this case was a nullity insofar as it purported to change the rate set by its contract, and the contract rate remained the only lawful rate. P. 347.

(h) Under its general power to issue orders "necessary or appropriate to carry out the provisions of this Act," the Commission had authority to reject the unauthorized filing of a new schedule of rates by the natural gas company; and the Commission's failure to do so and its order "permitting" the new rates to become effective were in error. P. 347.

(i) Any amounts paid by the distributing company in excess of the contract rates were unlawfully collected, and the natural gas company is obligated to make restitution of the excess payments. P. 347.

215 F. 2d 883, affirmed.

Thomas Fletcher argued the cause for petitioner in No. 17. With him on the brief was *C. Huffman Lewis.*

Howard E. Wahrenbrock argued the cause for the Federal Power Commission, petitioner in No. 31 and respondent in No. 17. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger, Acting Assistant Attorney General Leonard, Melvin Richter, Lionel Kestenbaum, Willard W. Gatchell, William J. Grove, Louis C. Kaplan* and *Drexel D. Journey.*

William C. Chanler argued the cause for the Mobile Gas Service Corporation, respondent. With him on the brief was *Samuel M. Johnston.*

Troy Smith, Thomas B. Ramey and *Bryce Rea, Jr.* filed a brief for the City of Tyler, Texas, et al., as *amici curiae,* in support of the Mobile Gas Service Corporation.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question presented in this case is whether under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, a regulated natural gas company furnishing gas

to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission. The pertinent provisions of the Act are set forth in the margin.[1]

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[1] "SEC. 4. . . . (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect [June 21, 1938]) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such

Respondent Mobile Gas Service Corporation (Mobile), a distributor of natural gas to domestic and industrial users in Mobile, Alabama, acquires its gas from petitioner United Gas Pipe Line Company (United), a "natural-gas

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schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." 52 Stat. 822–823, 15 U. S. C. § 717c.

"SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, 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 reason-

company" subject to regulation under the Act. In 1946 the Ideal Cement Company (Ideal), planning to construct a cement plant in the city provided it could be assured a supply of gas at a sufficiently low rate, obtained from Mobile an agreement to furnish gas for a 10-year term at 12 cents per MCF (thousand cubic feet). Mobile, in turn, before entering into a contract with Ideal, obtained from United a 10-year contract to supply gas for resale to Ideal at the equivalent of 10.7 cents per MCF, a rate substantially lower than that for other gas furnished by United. This contract was filed with the Federal Power Commission as an amendment to the general supply contracts between Mobile and United, and, with the approval of the Commission, became a part of United's filed schedules of rates and contracts.

In June 1953 United, without the consent of Mobile, filed new schedules with the Commission which purported to increase the rate on gas for resale to Ideal to 14.5 cents per MCF, a rate more closely approximating that for other gas furnished to Mobile by United. Claiming that United could not thus unilaterally change the contract rate, Mobile petitioned the Commission to reject United's filing. The Commission denied the petition, holding that under § 4 (d) of the Act the new rate, being a non-suspendible industrial rate, automatically became effective 30 days after filing and would remain in effect unless and until the Commission should, after investigation

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able rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 52 Stat. 823–824, 15 U. S. C. § 717d.

under § 4 (e), determine the new rate to be unlawful. Mobile paid the new rate until April 15, 1955, when United, with Commission approval, accepted an assignment to it of Mobile's contract with Ideal.[2] This assignment made the pending investigation into the lawfulness of the new rate moot, since in the Commission's view its determination on that matter would have no retroactive effect. Thus the only question before us is whether United properly collected from Mobile the difference between the old 10.7-cent rate and the new 14.5-cent rate during the period from July 25, 1953 (when the new rate purportedly went into effect), to April 15, 1955 (when United took over the Ideal contract)—a sum aggregating approximately $240,000. On Mobile's petition for review, the Court of Appeals for the Third Circuit (Hastie, J., dissenting) reversed the Commission's order, directed it to reject United's filing of the new schedule insofar as it purported to increase the rate in question, and held Mobile entitled to a return of the amounts paid in excess of the contract rate. 215 F. 2d 883. Both the Commission and United, which had intervened in the Court of Appeals, petitioned for certiorari, which we granted because of the importance of this question in the administration of the Natural Gas Act. 348 U. S. 950. For the reasons discussed below, we hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action.

The question presented is solely one of the proper interpretation of the Natural Gas Act, there being no claim that the statute, if interpreted to permit a natural gas company unilaterally to change its contracts, would be

[2] United agreed to pay Mobile 2 cents per MCF for transporting the gas to Ideal. Since under the assigned contract United received only 12 cents per MCF from Ideal, its net return after the assignment was only 10 cents per MCF, less than the 10.7 cents it had received under its earlier contract with Mobile.

unconstitutional. Cf. *Midland Realty Co.* v. *Kansas City P. & L. Co.*, 300 U. S. 109. The Act [3] requires natural gas companies to file all rates and contracts with the Commission (§ 4 (c)) and authorizes the Commission to modify any rate or contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential" (§ 5 (a)). Changes in previously filed rates or contracts must be filed with the Commission at least 30 days before they are to go into effect (§ 4 (d)), and, except in the case of industrial rates, the Commission may suspend the operation of the new rate pending a determination of its reasonableness (§ 4 (e)). If a decision has not been reached before the period of suspension expires, a maximum of five months, the filed rate must be allowed to go into effect, but the Commission's order may be made retroactive to that date.

In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. See *Armour Packing Co.* v. *United States*, 209 U. S. 56. The Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it. The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all

[3] See note 1, pp. 334–336, *supra*.

shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

The provision of the Natural Gas Act directly in issue here is § 4 (d), which provides that "no change shall be made by any natural-gas company in any such [filed] rate . . . or contract . . . except after thirty days' notice to the Commission," which notice is to be given by filing new schedules showing the changes and the time they are to go into effect. It is argued that this provision authorizes a natural gas company to change its rate contracts simply by filing a new schedule of rates, to go into effect in no less than thirty days. On its face, however, § 4 (d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4 (c) purports to define what constitutes a "contract" that may be filed with the Commission. The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, and we find no basis in the language of § 4 (d) for inferring that the mere imposition of a filing-and-notice requirement was intended to make effective action which would otherwise be of no effect at all. In short, § 4 (d) on its face indicates no more than that otherwise valid changes cannot be put into effect

without giving the required notice to the Commission. To find in the section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably to be implied.

It is argued, however, that a different conclusion is compelled when § 4 (d) is read with the other provisions of the Act. Petitioners attempt to characterize the Act as setting up two separate and distinct "procedures" for changing rates: (1) the "hearing and order" procedure of § 5 (a) under which the Commission may determine *existing* rates to be unreasonable and order changes to be made; and (2) the "filed-rate" procedure of § 4 (d) and (e) under which the natural gas company may initiate changes, in which event the Commission's only concern is with the reasonableness of the *new* rate. These are said to be complementary and mutually exclusive procedures, the choice between which—since both expressly relate to changes in "contracts" as well as other rates—depends solely on who is seeking the change and not on whether the rate sought to be changed is embodied in a contract. From this characterization of the procedures, petitioners conclude that when a natural gas company initiates a rate change under § 4 (d) the proceedings are governed exclusively by § 4 (d) and (e), and hence the Commission's only power is that which it has under § 4 (e) to set aside the *new* rate if that is found to be unlawful.

The major defect of this argument is that it assumes the answer to the very question in issue—whether natural gas companies are empowered to "initiate" unilateral contract changes under § 4 (d). That the so-called "filed-rate" procedure is applicable to changes in contracts as well as other rates proves only that contracts may be changed, not that they may be changed unilaterally. Moreover, the very premise that §§ 4 (d) and (e) and 5 (a) are alternative rate-changing "procedures" is itself

based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.

The powers of the Commission are defined by §§ 4 (e) and 5 (a). The basic power of the Commission is that given it by § 5 (a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5 (a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4 (e). All that § 4 (e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except "industrial" rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful.

The limitations imposed on natural gas companies are set out in §§ 4 (c) and 4 (d). The basic duties are

the filing requirements: § 4 (c) requires schedules showing all rates and contracts in force to be filed with the Commission and § 4 (d) requires all changes in such schedules likewise to be filed. In addition, § 4 (d) imposes the further requirement that the changes be filed at least thirty days before they are to go into effect. It may readily be seen that these requirements are no more than are necessary to implement §§ 4 (e) and 5 (a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days' advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under § 4 (e).

The relationship of these sections thus affords no support to petitioners' characterization of § 4 (d) and (e) as establishing a rate-changing "procedure"—a "proceeding" before the Commission "initiated" by a natural gas company filing a "proposed" change. Section 4 (d) provides not for the filing of "proposals" but for notice to the Commission of any "change . . . made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a "proposed" rate than any other rate, all of which are equally subject to Commission review. Likewise, no "proceeding" is "initiated" by a § 4 (d) filing. A proceeding to review the new rate may be initiated under § 4 (e), but, if so, it is initiated by the Commission in the same manner as a proceeding under § 5 (a) to review any other rate, that is, upon complaint or its own motion.

The only difference is the interim suspension power given by § 4 (e), but that in no way affects the character of the proceeding, which remains, like a § 5 (a) proceeding, simply a review by the Commission of a rate established by the natural gas company. In short, the Act provides no "procedure" either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. No more is necessary to give full meaning to all the provisions of the Act: consistent with this, § 4 (d) means simply that *no* change—neither a unilateral change to an *ex parte* rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission. Hence there is nothing in the structure or purpose of the Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act,

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of natural gas companies unilaterally to change their contracts.

Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate. The history of the Ideal contract furnishes a case in point. On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

It may be noted also that this interpretation, while precluding natural gas companies from unilaterally changing their contracts simply because it is in their private interests to do so, does not deprive them of an avenue of relief when their interests coincide with the public interest. Section 5 (a) authorizes the Commission to investigate rates not only "upon complaint of any State, municipality, State commission, or gas distributing company" but also "upon its own motion." Thus, while natural gas companies are understandably not given the same explicit standing to complain of their own contracts

as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing to the Commission any relevant information and requesting it to initiate an investigation on its own motion.[4] And if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5 (a) authorize the natural gas company to file a schedule increasing the rate.

The prior decisions of this Court cited by petitioners as requiring an opposite result are readily distinguishable. In *Armour Packing Co.* v. *United States,* 209 U. S. 56, a rate contract between a railroad and a shipper at the filed rates in effect at the time the contract was made was held not to justify payment at the contract rate for shipments made after the filed rates for shipments of that character had been increased by the railroad. The very basis for that decision, however, was the requirement of the Interstate Commerce Act that rates to all shippers be uniform and comply with the single tariff filed with the Commission, there being no provision under that Act for the filing of individual contracts. That is, the Interstate Commerce Act by its own force precluded contracts for rates different from those applicable to other shippers. The Natural Gas Act, on the other hand, recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. No contention is made here that the fact that the Mobile contract was at a rate different from that to other customers in itself made the contract illegal or that—as held in *Armour*—United could not lawfully have complied with the contract had it wanted to. In *Midland*

[4] See § 14 (a) of the Act, providing in part: "The Commission may permit any person to file with it a statement in writing . . . as to any or all facts and circumstances concerning a matter which may be the subject of investigation." 52 Stat. 828, 15 U. S. C. § 717m.

Realty Co. v. *Kansas City P. & L. Co.*, 300 U. S. 109, the Court held only that a statute interpreted by the state court as authorizing unilateral contract changes by a public utility was not unconstitutional. On the other hand, in *Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48, this Court interpreted a Kansas statute, not yet fully construed by the state court, as not giving such a power to a public utility, and to the extent that that decision rested upon an original interpretation of similar statutory language it affords strong support for our interpretation of the Natural Gas Act.

The only two Courts of Appeals that have squarely ruled on this question, those for the District of Columbia and Third Circuits, have concluded that neither the Natural Gas Act,[5] nor the virtually identical provisions of the Federal Power Act [6] authorize unilateral contract changes.[7] The Court of Appeals for the Fifth Circuit, however, although distinguishing its decision on a procedural ground, has indicated a contrary conclusion.[8] The parties have also referred us to numerous state court decisions construing state statutes of varying degrees of similarity to the Natural Gas Act, some holding that unilateral contract changes were authorized [9] and others

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[5] *Mobile Gas Service Corp.* v. *F. P. C.*, 215 F. 2d 883 (C. A. 3d Cir.), the decision below.

[6] *Sierra Pacific Power Co.* v. *F. P. C.*, 96 U. S. App. D. C. 140, 223 F. 2d 605, affirmed, *post*, p. 348.

[7] See also *Colorado Interstate Gas Co.* v. *F. P. C.*, 142 F. 2d 943, 954 (C. A. 10th Cir.), affirmed, 324 U. S. 581.

[8] *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73.

[9] *E. g.*, *City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 248 P. 1009; *Kansas City L. & P. Co.* v. *Midland Realty Co.*, 338 Mo. 1141, 93 S. W. 2d 954, affirmed, 300 U. S. 109; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243, 110 A. 778; *North Coast Power Co.* v. *Public Service Comm'n*, 114 Wash. 102, 194 P. 587.

holding that they were not.[10] Taken as a whole, the state decisions prove little more than that the question is an open one and afford little guidance to the proper interpretation of the Federal Act.

From our conclusion that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate. There can be no doubt of the authority of the Commission to reject the unauthorized filing under its general powers to issue orders "necessary or appropriate to carry out the provisions of this Act," § 16, and its failure to do so and its order "permitting" the new rates to become effective were in error. Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments. Cf. *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781.

Affirmed.

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[10] *E. g., Rutland R. L. & P. Co.* v. *Burditt Bros.,* 94 Vt. 421, 111 A. 582; *Commonwealth ex rel. Page Milling Co.* v. *Shenandoah River L. & P. Corp.,* 135 Va. 47, 68–73, 115 S. E. 695, 701–703; *In re Searsport Water Co.,* 118 Me. 382, 392–393, 108 A. 452, 457–458; see also *Attleboro Steam & Elec. Co.* v. *Narragansett Elec. Lighting Co.,* 295 F. 895 (D. R. I.).

FEDERAL POWER COMMISSION *v.* SIERRA PACIFIC POWER CO.

NO. 51. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued November 8, 1955.—Decided February 27, 1956.

A supplier of electric power which is a "public utility" subject to regulation under Part II of the Federal Power Act entered into a contract, duly filed with the Federal Power Commission, to supply electric power to a distributor at a special low rate for 15 years. Before expiration of the contract and without the consent of the distributor, the supplier filed with the Commission under § 205 (d) of the Act a schedule purporting to increase its rate to the distributor. Acting under § 205 (e), the Commission conducted proceedings to determine the reasonableness of the new rate, denied the distributor's motion to reject the filing on the ground that the supplier could not thus unilaterally change the contract, and held the new rate not to be "unjust, unreasonable, unduly discriminatory, or preferential." *Held:*

1. These proceedings were not effective to supersede the supplier's contract with the distributor. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., ante,* p. 332. Pp. 352–353.

2. The requirements of § 206 (a), which provides that, if the Commission finds an existing rate to be "unjust, unreasonable, unduly discriminatory or preferential," it may determine a "just and reasonable rate" and fix the same by order, were not satisfied by the Commission's statement that, "if a finding on the lawfulness of the [existing] contract rate were necessary or appropriate, on the record before us that finding would have to be that the [existing] rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum [the supplier] is willing to accept." Pp. 353–355.

(a) Under § 206 (a), the Commission has undoubted power to prescribe a change in contract rates whenever it determines

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*Together with No. 53, *Pacific Gas & Electric Co.* v. *Sierra Pacific Power Co.*, also on certiorari to the same court.

them to be unlawful; but its power is limited to prescribing the rate "to be thereafter observed," and it can effect no change prior to the date of the order. P. 353.

(b) If the proceedings here satisfied in substance the requirements of § 206 (a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate. P. 353.

(c) The purpose of the power given the Commission under § 206 (a) is the protection of the public interest, as distinguished from the private interest of the utilities, and a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility. Pp. 354–355.

3. The order of the Court of Appeals setting aside the Commission's approval of the new rate and remanding the case to the Commission is affirmed with instructions to remand the case to the Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable. P. 355.

96 U. S. App. D. C. 140, 223 F. 2d 605, affirmed.

Howard E. Wahrenbrock argued the cause for petitioner in No. 51. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter, Lionel Kestenbaum, Willard W. Gatchell, William J. Grove* and *Drexel D. Journey.*

F. T. Searls argued the cause for petitioner in No. 53. With him on the brief were *Robert H. Gerdes, Robert E. May* and *John C. Morrissey.*

William C. Chanler argued the cause and filed a brief for respondent.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents questions under Title II of the Federal Power Act, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, which are in part similar to those we have decided today under the Natural Gas Act in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., ante,* p. 332.

The pertinent provisions of the Federal Power Act, set forth in the margin,[1] are §§ 205 (c), (d), and (e), and 206 (a), which are substantially identical to §§ 4 (c),

[1] "SEC. 205. . . . (c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded

(d), and (e), and 5 (a), respectively, of the Natural Gas Act.[2]

Respondent Sierra Pacific Power Company (Sierra) distributes electricity to consumers in northern Nevada and eastern California. For many years, it has purchased the major part of its electric power from petitioner Pacific Gas and Electric Company (PG&E), a "public utility" subject to regulation under Part II of the Federal Power Act. In 1947 Sierra, faced with increased postwar demands and consumer agitation for cheaper power, began

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and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." 49 Stat. 851–852, 16 U. S. C. § 824d.

"SEC. 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 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." 49 Stat. 852, 16 U. S. C. § 824e.

[2] Set forth as footnote 1 to the opinion in the *Mobile* case, *ante*, p. 334.

negotiating for power from other sources, including the Federal Bureau of Reclamation, which at the time had unused capacity at Shasta Dam. To forestall the potential competition, PG&E offered Sierra a 15-year contract for power at a special low rate, which offer Sierra finally accepted in June 1948. The contract was duly filed with the Federal Power Commission.

Early in 1953, when power from Shasta Dam was no longer available to Sierra, PG&E, without the consent of Sierra, filed with the Commission under § 205 (d) of the Federal Power Act a schedule purporting to increase its rate to Sierra by approximately 28%. The Commission, acting under § 205 (e), suspended the effective date of the new rate until September 6, 1953, and initiated a proceeding to determine its reasonableness. Sierra was permitted to intervene in the proceeding but its motion to reject the filing on the ground that PG&E could not thus unilaterally change the contract was denied. After completion of the hearings, the Commission, by order dated June 17, 1954, reaffirmed its refusal to reject the filing and held the new rate not to be "unjust, unreasonable, unduly discriminatory, or preferential." 7 P. U. R. 3d 256. On Sierra's petition for review, the Court of Appeals for the District of Columbia, holding that the contract rate could be changed only upon a finding by the Commission that it was unreasonable, set aside the Commission's order and remanded the case with instructions to the Commission to dismiss the § 205 (e) proceeding, but without prejudice to its instituting a new proceeding under § 206 (a) to determine the reasonableness of the contract rate. 96 U. S. App. D. C. 140, 223 F. 2d 605. We brought the case here because of the importance of the questions involved in the administration of the Federal Power Act. 349 U. S. 937.

The first question before us is whether PG&E's unilateral filing of the new rate under § 205 (d), and the

approval of the new rate by the Commission under § 205 (e), were effective to supersede PG&E's contract with Sierra. We think not. As the parties concede, the provisions of the Federal Power Act relevant to this question are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* decided today, we construed the Natural Gas Act as not authorizing unilateral contract changes, and that interpretation is equally applicable to the Federal Power Act. Accordingly, for the reasons there given, we conclude that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra.

This case, however, raises a further question not present in the *Mobile* case. The Commission has undoubted power under § 206 (a) to prescribe a change in contract rates whenever it determines such rates to be unlawful. While this power is limited to prescribing the rate "to be thereafter observed" and thus can effect no change prior to the date of the order, the Commission's order here, if based on the necessary findings, could have been effective to prescribe the proposed rate as the rate to be in effect prospectively from the date of the order, June 17, 1954. If the proceedings here satisfied in substance the requirements of § 206 (a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate rather than the existing contract rate.

The condition precedent to the Commission's exercise of its power under § 206 (a) is a finding that the existing rate is "unjust, unreasonable, unduly discriminatory or preferential." Petitioners contend that the Commission did in fact make such a finding. It was stipulated in the proceedings before the Commission that 5.5% was normally a reasonable rate of return for PG&E's operations,

that the contract rate would produce a 2.6% rate of return, and that the proposed rate would produce a 4.75% rate of return. The Commission concluded that the proposed rate was not unreasonably high because it provided no more than a fair return and was not unreasonably low because the 0.75% deficiency of its yield from the stipulated reasonable rate of return was not being made up on other sales and was justified in order to retain business the loss of which by PG&E would result in idle facilities. It also concluded that the proposed rate was not unduly discriminatory or preferential, despite substantial differences between it and the rates being charged other customers. While no further findings were necessary in view of the Commission's interpretation of the Act as permitting unilateral contract changes, the Commission went on to say:

> "However, we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum PG&E is willing to accept."

It is contended that by this statement the Commission in substance found that the existing contract rate was "unreasonable" and fixed the proposed rate as "the just and reasonable rate," thereby satisfying the requirements of § 206 (a).

But even accepting this statement as a finding of unreasonableness of the contract rate, the Commission's conclusion appears on its face to be based on an erroneous standard. In short, the Commission holds that the

contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. *Arkansas Natural Gas Co.* v. *Railroad Comm'n,* 261 U. S. 379. In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § 206 (a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed "is necessary in the public interest." When § 206 (a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility.

Whether under the facts of this case the contract rate is so low as to have an adverse effect on the public interest is of course a question to be determined in the first instance by the Commission. We shall therefore affirm the order of the Court of Appeals, with instructions to remand the case to the Federal Power Commission for such further proceedings, not inconsistent with this opinion, as the Commission may deem desirable.

It is so ordered.

GIBSON *v.* LOCKHEED AIRCRAFT SERVICE, INC.

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

No. 42. Argued December 5–6, 1955.—Decided February 27, 1956.

1. In this case, in which petitioner recovered a judgment against respondent in a personal-injuries action in a Federal District Court, the instructions given to the jury by the trial court were complete and correct, and there was no error in refusing the additional instructions requested by respondent. Pp. 356–357.
2. In the exercise of the supervisory powers of this Court over the lower federal courts, the judgment of the Court of Appeals, reversing the judgment of the District Court and remanding the case for a new trial, is reversed in the interest of justice, and the judgment of the District Court is reinstated. P. 357.

217 F. 2d 730, reversed.

G. C. Spillers, Jr. argued the cause for petitioner. With him on the brief were *G. C. Spillers* and *Edward C. Fritz.*

Emory A. Cantey argued the cause for respondent. With him on the brief were *R. K. Hanger* and *David O. Belew, Jr.*

PER CURIAM.

Petitioner Gibson recovered judgment in a personal injuries action against the Lockheed Company in a United States District Court. The Court of Appeals for the Fifth Circuit reversed and remanded for a new trial on the ground that four instructions requested by Lockheed and refused by the trial court should have been given. 217 F. 2d 730. We granted certiorari, 349 U. S. 943, to consider the following questions:

(1) Whether Lockheed's objection to the trial court's refusal to give its requested instructions com-

plied with Rule 51 of the Federal Rules of Civil Procedure.

(2) Whether the refusal of the trial court to charge as requested by respondent Lockheed was prejudicial error requiring reversal.

A thorough consideration of the record convinces us that the charge as given by the trial court was both complete and correct. Cf. *District of Columbia* v. *Woodbury*, 136 U. S. 450, 466. There was no error in refusing the requested instructions. We consider this to be a case where, in the exercise of our supervisory powers over the lower federal courts, the judgment of the Court of Appeals should be reversed in the interests of justice, and that of the District Court reinstated. Accordingly, we find it unnecessary to consider the question presented as to Rule 51.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

The controlling claim on which petitioner sought certiorari was that the decision of the Court of Appeals for the Fifth Circuit disclosed conflict and confusion among the circuits in the application of Rule 51 of the Federal Rules of Civil Procedure. We granted the petition. A critical examination of the 118 decisions on which the petitioner relied in his claim regarding Rule 51 convinces me that there was no such conflict and confusion. Therefore, for the reasons set forth by Mr. Chief Justice Taft on behalf of the Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, the writ should be dismissed as improvidently granted even though full argument has been had. But my brethren find that certain rulings of the Court of Appeals involving ordinary questions in the law of negligence, which by themselves never would have warranted the granting of a writ, are

so obviously and injuriously erroneous, "as to call for an exercise of this court's power of supervision." This is of course one of the considerations within our Rule governing review on certiorari. Rule 19 (1)(b). I accept their reading of the record and therefore join in the judgment of the Court.

COSTELLO *v.* UNITED STATES.

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

No. 72. Argued January 16–17, 1956.—Decided March 5, 1956.

A defendant in a criminal case in a federal court may be required to stand trial and his conviction may be sustained where only hearsay evidence was presented to the grand jury which indicted him. Pp. 359–364.

(a) An indictment based solely on hearsay evidence does not violate the provision of the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." Pp. 361–363.

(b) In the exercise of its power to supervise the administration of justice in the federal courts, this Court declines to establish a rule permitting defendants in criminal cases to challenge indictments on the ground that they are not supported by adequate or competent evidence. Pp. 363–364.

221 F. 2d 668, affirmed.

Osmond K. Fraenkel and *Morris Shilensky* argued the cause for petitioner. With them on the brief were *Joseph Leary Delaney* and *George Wolf*.

Marvin E. Frankel argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Holland* and *Joseph M. Howard*.

MR. JUSTICE BLACK delivered the opinion of the Court.

We granted certiorari in this case to consider a single question: "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?" 350 U. S. 819.

Petitioner, Frank Costello, was indicted for wilfully attempting to evade payment of income taxes due the

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United States for the years 1947, 1948 and 1949.[1] The charge was that petitioner falsely and fraudulently reported less income than he and his wife actually received during the taxable years in question. Petitioner promptly filed a motion for inspection of the minutes of the grand jury and for a dismissal of the indictment. His motion was based on an affidavit stating that he was firmly convinced there could have been no legal or competent evidence before the grand jury which indicted him since he had reported all his income and paid all taxes due. The motion was denied. At the trial which followed the Government offered evidence designed to show increases in Costello's net worth in an attempt to prove that he had received more income during the years in question than he had reported.[2] To establish its case the Government called and examined 144 witnesses and introduced 368 exhibits. All of the testimony and documents related to business transactions and expenditures by petitioner and his wife. The prosecution concluded its case by calling three government agents. Their investigations had produced the evidence used against petitioner at the trial. They were allowed to summarize the vast amount of evidence already heard and to introduce computations showing, if correct, that petitioner and his wife had received far greater income than they had reported. We have held such summarizations admissible in a "net worth" case like this. *United States* v. *Johnson,* 319 U. S. 503.

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[1] The indictment was based on § 145 (b) of the Internal Revenue Code of 1939. 53 Stat. 63. There was also a count in the indictment for the year 1946 but petitioner was found not guilty of this charge.

[2] For discussions of the "net worth method," see *Holland* v. *United States,* 348 U. S. 121; *Friedberg* v. *United States,* 348 U. S. 142; *Smith* v. *United States,* 348 U. S. 147; and *United States* v. *Calderon,* 348 U. S. 160.

Counsel for petitioner asked each government witness at the trial whether he had appeared before the grand jury which returned the indictment. This cross-examination developed the fact that the three investigating officers had been the only witnesses before the grand jury. After the Government concluded its case, petitioner again moved to dismiss the indictment on the ground that the only evidence before the grand jury was "hearsay," since the three officers had no firsthand knowledge of the transactions upon which their computations were based. Nevertheless the trial court again refused to dismiss the indictment, and petitioner was convicted. The Court of Appeals affirmed,[3] holding that the indictment was valid even though the sole evidence before the grand jury was hearsay.[4] Petitioner here urges: (1) that an indictment based solely on hearsay evidence violates that part of the Fifth Amendment providing that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." and (2) that if the Fifth Amendment does not invalidate an indictment based solely on hearsay we should now lay down such a rule for the guidance of federal courts. See *McNabb* v. *United States,* 318 U. S. 332, 340–341.

The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be

[3] 221 F. 2d 668. The Court of Appeals reversed petitioner's conviction on the 1947 count on grounds not material here.

[4] Varying views have been expressed concerning whether indictments may be challenged because based in whole or in part on incompetent evidence. See, *e. g., Chadwick* v. *United States,* 141 F. 225; *United States* v. *Violon,* 173 F. 501; *Nanfito* v. *United States,* 20 F. 2d 376, 378; *Brady* v. *United States,* 24 F. 2d 405; *Banks* v. *United States,* 204 F. 2d 666; *Zacher* v. *United States,* 227 F. 2d 219. See also cases collected in 62 Harv. L. Rev. 111; 38 Yale L. J. 680; 71 Cent. L. J. 9; Joyce, Indictments (2d ed., Blakemore, 1924), 166–168; Note, 24 A. L. R. 1432.

instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so.[5] And in 1852 Mr. Justice Nelson on circuit could say "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of

[5] 1 Holdsworth, History of English Law (1927), 323.

determining whether or not the finding was founded upon sufficient proof . . . ." *United States* v. *Reed,* 27 Fed. Cas. 727, 738.[6]

In *Holt* v. *United States,* 218 U. S. 245, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence "there was very little evidence against the accused." The Court refused to hold that such an indictment should be quashed, pointing out that "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground." 218 U. S., at 248. The same thing is true where as here all the evidence before the grand jury was in the nature of "hearsay." If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury,[7] like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Petitioner urges that this Court should exercise its power to supervise the administration of justice in fed-

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[6] As to the development of the grand jury as an institution here and in England, see *Hale* v. *Henkel,* 201 U. S. 43, 59; *Blair* v. *United States,* 250 U. S. 273, 282; *McGrain* v. *Daugherty,* 273 U. S. 135, 157; *United States* v. *Johnson,* 319 U. S. 503; 4 Blackstone Commentaries 301 *et seq.;* 1 Pollock and Maitland, History of English Law (1895), 130; 1 Holdsworth, History of English Law (1927), 312–323; Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 101, 217, 295.

[7] See, *e. g., Pierre* v. *Louisiana,* 306 U. S. 354.

eral courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

Affirmed.

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

MR. JUSTICE BURTON, concurring.

I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declarations made by the Court. I assume that this Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen.

Here, as in *Holt* v. *United States,* 218 U. S. 245, substantial and rationally persuasive evidence apparently was presented to the grand jury. We may fairly assume that the evidence before that jury included much of the

testimony later given at the trial by the three government agents who said that they had testified before the grand jury. At the trial, they summarized financial transactions of the accused about which they were not qualified to testify of their own knowledge. To use Justice Holmes' phrase in the *Holt* case, such testimony, standing alone, was "incompetent by circumstances" (*supra,* at 248), and yet it was rationally persuasive of the crime charged and provided a substantial basis for the indictment. At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained.

To sustain this indictment under the above circumstances is well enough, but I agree with Judge Learned Hand that "if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." 221 F. 2d 668, 677. Accordingly, I concur in this judgment, but do so for the reasons stated in the opinion of the Court of Appeals and subject to the limitations there expressed. See also, Notes, 62 Harv. L. Rev. 111; 65 Yale L. J. 390.

GREENWOOD *v.* UNITED STATES.

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

No. 460. Argued January 25, 1956.—Decided March 5, 1956.

Acting under 18 U. S. C. §§ 4244–4248, a Federal District Court held a hearing on the sanity of petitioner, who had been indicted for robbery of a post office and felonious assault on a postal employee and had been found by authorities of a medical center for federal prisoners to be insane and unlikely to recover in the near future. After considering conflicting testimony and reports of psychiatrists, the Court found that petitioner was insane and so mentally incompetent that he could not stand trial; that, if released, he probably would endanger the safety of the officers, property, or other interests of the United States; and that no suitable arrangements for his custody and care, other than commitment to the custody of the Attorney General, were available. The Court, therefore, committed petitioner to the custody of the Attorney General until his sanity should be restored, or his mental condition so improved that, if released, he would not endanger the safety of the officers, property, or other interests of the United States, or until suitable arrangements could be made for his custody and care by the State of his residence. *Held:* The District Court's action is sustained. Pp. 367–376.

(a) The statute deals not only with problems of temporary mental disorder but also with mental disability which seems more than temporary. Pp. 373–374.

(b) As here construed, the statute is within the power of Congress under the Necessary and Proper Clause, Art. I, § 8, cl. 18. Pp. 375–376.

219 F. 2d 376, affirmed.

William J. Burrell, acting under appointment by the Court, 350 U. S. 945, argued the cause and filed a brief for petitioner.

Solicitor General Sobeloff argued the cause for the United States. With him on the brief were *Assistant Attorney General Olney, Charles F. Barber, Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case involves the construction and constitutional validity of the Act of September 7, 1949, 63 Stat. 686, now codified in 18 U. S. C. §§ 4244–4248, "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes."

Section 4244 provides a procedure for determining mental incompetency during the period "after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation." [1] Section 4245 sets up a similar procedure for persons in prison believed to have been mentally incompetent at the time of their trial when the issue was not raised or determined before or during trial. Section 4246 states that whenever the trial court shall determine, under §§ 4244 and 4245, that an accused

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[1] SEC. 4244: "Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. . . ."

is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General until the accused is mentally competent to stand trial or until the pending charges against him are disposed of according to law. Section 4246 further provides that if the court, after hearing as provided in the preceding §§ 4244 and 4245, finds that the conditions specified in § 4247 exist, the commitment shall be governed by § 4248.[2] Section 4247 states that when a prisoner's sentence is about to expire and the prison board of examiners finds him insane and a probable danger to the officers, property, or other interests of the United States, then the court shall hold a hearing and, if it determines that those conditions exist, it may commit the prisoner to the custody of the Attorney General.[3] Under § 4248 the

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[2] SEC. 4246: "Whenever the trial court shall determine in accordance with sections 4244 and 4245 . . . that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided."

[3] SEC. 4247: "Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in . . . section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. . . . If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative."

commitment shall run until sanity is restored, or until the prisoner's condition is so improved that he will not endanger the officers, property, or other interests of the United States, or until suitable arrangements are made for the care of the prisoner by his State of residence—reserving to the prisoner his right to establish his eligibility to release by writ of habeas corpus.[4]

Petitioner, a resident of Cleveland, Ohio, was indicted on November 20, 1952, by a grand jury of the Western District of Missouri on two counts, for robbery from a United States Post Office in Kansas City, Missouri, and for felonious assault there on a postal employee. Under Rule 20 of the Federal Rules of Criminal Procedure petitioner signed a waiver of trial in the Western District of Missouri and was transferred to the Eastern Division of the Northern District of Ohio. Acting on the suggestion of appointed counsel, the district judge ordered petitioner examined by a psychiatrist. After a hearing in which the examining psychiatrist testified that it was doubtful that petitioner, because of his mental condition, could have fully understood the significance of the waiver he signed, the District Court, on February 2, 1953, remanded

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[4] SEC. 4248: "Whenever a person shall be committed pursuant to section 4247 . . . his commitment shall run until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur. . . . *Provided, however,* That nothing herein contained shall preclude a prisoner committed under the authority of section 4247 hereof from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus. The Attorney General or his authorized representative shall have authority at any time to transfer a prisoner committed to his custody under the authority of section 4246 or section 4247 hereof to the proper authorities of the State of his residence."

the case to the District Court for the Western District of Missouri for disposition.

That court ordered the accused delivered to the United States Medical Center for Federal Prisoners at Springfield, Missouri, for the purpose of ascertaining his mental condition. On April 15, 1953, the Chief of the Psychiatric Service at the Medical Center filed his report concluding that the accused was legally insane, in that he was unable to choose between right and wrong and could not, by reason of his mental condition adequately cooperate with counsel in his own defense.

Petitioner was then transferred to jail; but, on November 16, 1953, the District Court entered an order returning him to the Medical Center for determination whether he was acutely or chronically insane. The report of the Neuropsychiatric Staff of the Medical Center, filed February 1, 1954, indicated that petitioner was "psychotic and incompetent," that "it is unlikely that this subject will regain his sanity in the near future," and recommended that "consideration be given to transferring this subject to a state hospital in his state of residence." The District Court, on the following day, ordered a further hearing under § 4246 to "resolve the power to commit defendant as mentally defective under the conditions specified in Section 4247. . . ." and for that purpose requested the Director and Board of Examiners of the Medical Center to certify whether in their judgment the defendant, if released, would "probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the (defendant) are not otherwise available." The report of the Board, dated February 4, 1954, concluded that the accused remained "psychotic and incompetent," and stated that "at the present time there appears to be little likelihood of his recovering to the extent that he might be considered competent in the

near future." In reply to the request of the District Court, "[t]he Board agreed that this subject might be considered potentially dangerous to the extent that if released he might conceivably persist in criminal activities of the type with which he is presently charged. In considering this man's mental illness the Board finds that he does not hold any fixed delusions concerning wanting to harm any person or group of persons, either officials of the government or otherwise, so that in this respect he probably would not constitute a danger to the safety of officers, property, or other interests of the United States. . . . The Board further recommends that this subject be considered a suitable candidate for state hospital care if suitable arrangements can be made." In May 1954 petitioner was transferred to the custody of the State of Ohio where he was again examined by the psychiatrist who had made the examination when petitioner was transferred to the District Court for the Northern District of Ohio in 1952. This time the psychiatrist found that petitioner "is now in a state of remission equivalent to a recovery. He is not now insane in the legal sense." Petitioner was then released by the Ohio authorities.

Petitioner was rearrested in Ohio under the original indictment, which was still pending, and on June 16, 1954, removed to the Western District of Missouri. On June 18, counsel appointed for petitioner moved the court to appoint at least one qualified psychiatrist to inquire into petitioner's mental competency and to hold a hearing for that purpose. Two psychiatrists were appointed and were directed to report to the court. Petitioner was also recommitted to the United States Medical Center for Federal Prisoners at Springfield, Missouri, for further examination.

The hearing on petitioner's sanity was held on July 15. The two psychiatrists appointed by the court testified

that in their belief petitioner was sane. The first three reports of the Medical Center were received in evidence, along with a fourth, a report of the Neuropsychiatric Staff of the Medical Center at Springfield, dated July 8, 1954. This latest report concluded "that the subject remains legally insane by reason of a major mental disorder which would prevent him from having a proper understanding of the proceeding pending against him and which also impairs his ability to properly assist in his own defense." The staff further concluded "that this subject's prognosis for recovery appears to be poor and that he will probably require indefinite hospitalization to insure his own safety and that of society. The staff does not consider the subject to be potentially dangerous except to the extent that if released, he might persist in engaging in criminal activities similar to those with which he is presently charged." The Chief of the Psychiatric Service at the Medical Center testified at this hearing to the same effect.

The District Court, in its order of July 30, found that the accused was insane and so mentally incompetent that he could not stand trial, that, if released, he would probably endanger the safety of the officers, property, or other interests of the United States, and that no suitable arrangements for custody and care, other than commitment to the custody of the Attorney General, were available. Petitioner was therefore committed to the custody of the Attorney General until his sanity should be restored, or his mental condition so improved that, if released, he would not endanger the safety of the officers, property, or other interests of the United States, or until suitable arrangements could be made for the custody and care of defendant by Ohio, the State of his residence. 125 F. Supp. 777, 778. Petitioner appealed from this judgment and the Court of Appeals for the Eighth Circuit, its seven circuit judges sitting *en banc,* affirmed, one judge dis-

senting. 219 F. 2d 376. Because of the important issue of federal power raised by the case and because of conflicting views in the Courts of Appeals, compare *Higgins* v. *United States,* 205 F. 2d 650, and *Wells* v. *Attorney General,* 201 F. 2d 556, with the decision of the Court of Appeals for the Eighth Circuit in this case, we granted certiorari. 350 U. S. 821.

A detailed history of the legislation is set forth in the opinion of the Court of Appeals. 219 F. 2d, at 380–384. It is sufficient to note here that the bill was proposed by the Judicial Conference of the United States after long study by a conspicuously able committee, followed by consultation with federal district and circuit judges.

The statute deals comprehensively with those persons charged with federal crime who are insane or mentally incompetent to stand trial. It provides a procedure for determination of such insanity or mental incompetence, and further provides for commitment of those found to be insane or mentally incompetent. Petitioner's assertion that the statute deals only with the problem of temporary mental disorder is not supported by the language of the statute, and the report of the Committee of the Judicial Conference clearly indicates that the statute was designed to deal with mental disability which seems more than temporary:

> "If the accused's mental disability appears not to be a transitory condition, but in all likelihood he will, because of his insanity, never be brought to trial, it would seem that as a general rule the federal government should not assume responsibility for his hospitalization merely because he has been accused (but not convicted) of a federal crime. Normally such a person should be turned over to the state of his domicile to be confined in a state mental hospital if hospitalization is called for.

> "But there may be cases where the accused's domicile cannot be satisfactorily established and where no state will assume responsibility for his care. The federal government may then be faced with the practical situation that it has lawful custody of a person whom it is not safe to let at large. In a recent case in the District of Massachusetts, *United States* v. *Torrez* [unreported], a Filipino was brought into the district and indicted for murder on the high seas. After notice of hearing at which alienists for the government and for the defendant testified, the judge found that the defendant was at present insane and unable rationally to aid in the conduct of his defense. Obviously in such case there should be authority in the court to cause the confinement of the accused in a mental hospital."

The District Court pursued the appropriate procedure in holding a hearing to determine the existence of the conditions specified in § 4247, once it determined that the accused's mental incompetence seemed more than temporary. Although the language of the statute and the report of the Committee of the Judicial Conference demonstrate that the statute deals generally with the situations both of temporary and more than temporary insanity, one could infer from the reports on the bill by the Committee, by the Judicial Conference itself, and by the committees of both Houses of Congress that the specific commitment under § 4248 was designed only for prisoners whose sentences are about to expire. But this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute. The second sentence of § 4246 clearly makes commitment under § 4248 applicable to persons found mentally incompetent under § 4244 who meet the conditions specified in § 4247.

We reach then the narrow constitutional issue raised by the order of commitment in the circumstances of this case. The petitioner came legally into the custody of the United States. The power that put him into such custody—the power to prosecute for federal offenses—is not exhausted. Its assertion in the form of the pending indictment persists. The District Court has found that the accused is mentally incompetent to stand trial at the present time and that, if released, he would probably endanger the officers, property, or other interests of the United States—and these findings are adequately supported. In these circumstances the District Court has entered an order retaining and restraining petitioner, while in his present condition, with habeas corpus always available when circumstances warrant. This commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable national power. As such it is plainly within congressional power under the Necessary and Proper Clause. Art. I, § 8, cl. 18.

The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner. We cannot say that federal authority to prosecute has now been irretrievably frustrated. The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment, even about a situation as unpromising as petitioner's, at least as indicated by the report of the United States Medical Center at Springfield.

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Certainly, denial of constitutional power of commitment to Congress in dealing with a situation like this ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues.

We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us. The judgment of the Court of Appeals is

Affirmed.

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

REMMER *v.* UNITED STATES.

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

No. 156. Argued January 18, 1956.—Decided March 5, 1956.

During petitioner's trial in a Federal District Court, which resulted in his conviction of a federal offense, one of the jurors was approached by an outsider, who suggested that he could make some money by making a deal with petitioner. The juror refused to discuss the case with the outsider and reported the incident to the trial judge. Without informing petitioner or his counsel, the judge related the incident to the district attorney, and it was referred to the Federal Bureau of Investigation. During a recess in the trial, an F. B. I. agent interrogated the juror about the matter, and the juror did not know the purpose or result of this investigation until a month after the end of the trial. Immediately after the trial, the juror told another juror that he "had been under a terrific pressure." *Held:* On the record in this case, it cannot be said that the juror was not affected in his freedom of action as a juror; and petitioner is entitled to a new trial. Pp. 377–382.

222 F. 2d 720, judgment vacated and case remanded for new trial.

Leslie C. Gillen argued the cause for petitioner. With him on the brief were *John R. Golden* and *Spurgeon Avakian.*

John R. Benney argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard.*

MR. JUSTICE MINTON delivered the opinion of the Court.

This case is here for the third time. Petitioner was convicted on four counts of wilfully attempting to evade and defeat federal income taxes. When this case was first here we knew nothing about the facts concerning the phase of the case now before us. It was alleged

in the petitioner's motion and affidavits supporting his motion for a new trial that during the trial one juror, Smith, had been approached by one Satterly, an outsider, with a suggestion that the juror could make some easy money if he would make a deal with petitioner Remmer. It was further alleged by the petitioner that the juror reported the matter to the trial judge, who in turn reported it to the district attorney, who, with the judge's approval, called in the Federal Bureau of Investigation—all of which was unknown to the petitioner until he read about it in the newspaper after the jury had returned its verdict finding him guilty. The Government did not deny these allegations. We sent the case back to the District Court with directions to hold a hearing, with the petitioner and counsel present, to determine from the facts whether or not communication with the juror by the outsider and the events that followed were prejudicial and, therefore, harmful to the petitioner, and, if so, to grant a new trial. 347 U. S. 227. On remand, the District Court held a hearing and found the incidents to be free of harm. 122 F. Supp. 673. Thereafter, this Court remanded the entire record to the Court of Appeals for the Ninth Circuit to consider the whole case in the light of our recent net-worth decisions. 348 U. S. 904. The Court of Appeals reviewed the whole record and affirmed the petitioner's conviction in a *per curiam* opinion. 222 F. 2d 720.

The case is here again on certiorari, limited to the question of the effect of the extraneous communications with the juror upon the petitioner's right to a fair trial. 350 U. S. 820. The District Court read our opinion and mandate to mean that "the incident complained of" to be inquired into at the hearing was the purpose and effect of the F. B. I. investigation. The District Court found that the purpose of the F. B. I. investigation was not to examine Smith's conduct, but rather to determine whether

Satterly had committed an offense. The court further found that the F. B. I. agent's discussion with Smith had "no effect whatever upon the judgment, or the integrity or state of mind" of Smith, whom the court found to be a "forthright and honest man." On the basis of these two findings, the court concluded:

> "Consequently, the court finds that 'the incident complained of' was entirely harmless so far as the petitioner was concerned and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any of the members of the jury. Thus any presumption of prejudice is conclusively dispelled. . . ."

The District Court's limit of our mandate, it seems to us, is hardly warranted by the language of the opinion, even though the language might well have been more explicit. It was our intention that the entire picture should be explored and the incident complained of and to be examined included Satterly's communication with the juror and the impact thereof upon him then, immediately thereafter, and during the trial, taken together with the fact that the F. B. I. was investigating a circumstance involving the juror and the fact that the juror never knew all during the balance of the trial what the outcome of that investigation was. Thus we stated: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court . . . with full knowledge of the parties." 347 U. S., at 229. We also pointed out that the record we had before us did not reflect what in fact transpired, "or whether the incidents that may have occurred were harmful or harmless." *Ibid.* It was the paucity of information relating to the entire situation

coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing. Nevertheless, there is sufficient evidence in the record relating to the total situation, including both the Satterly and the F. B. I. contacts, which makes it unnecessary to remand the case for further consideration. We will consider the evidence free from what we think are the unduly narrow limits of the question as viewed by the District Court.

The evidence shows that three weeks after the trial started, juror Smith, who is a real estate and insurance broker, was visited in his home by Satterly and his wife about an insurance policy. Satterly had been employed in a gambling house in Nevada as a dealer of craps. The petitioner was or had been engaged in the operation of gambling houses in Nevada. The Satterlys had met the Smiths socially at a hunting lodge. Smith and Satterly seated themselves in one end of a large room and their wives were seated in the other end of the room, a convenient arrangement if an approach was to be made. Satterly made substantially the following remark: "I know Bones Remmer very well. He sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why don't you make a deal with him?" Smith vigorously reminded Satterly that he was on the jury and that he could not talk about the case. Nothing more was said. Smith was disturbed. As he later testified, "I always felt, whether Mr. Satterly said it in so many words or not, I always felt that money was involved; otherwise why would any question be put to me." So disturbed was Smith that he told the trial judge about it. The judge's reaction, at least as he manifested it to Smith, was that the Satterly conversation should be regarded as a joke. But the judge related the incident to the district attorney and they decided to refer the matter to the Federal Bureau of Investigation. Shortly there-

after, during a recess, an F. B. I. agent called on Smith at his place of business. Smith testified that the agent explained the purpose of this visit as follows: "He told me that he had been instructed to come and interview me relative to this conversation I had with Mr. Satterly. . . . To check and see whether there was anything to this or not." On direct examination the agent testified: "I told him I had been requested to conduct an investigation relating to his talk with Mr. Satterly and the possibility of improper approach." In reply to questions put by the District Court, the agent testified that he had explained to Smith that the purpose of his investigation was to examine Satterly's conduct. Satterly was never interviewed by the F. B. I. during its investigation. It was not until a month after the trial had ended that the Government determined that further investigation or criminal prosecution was unwarranted.

Driving home after the trial with two other jurors, Smith mentioned that there was some question as to whether he had been approached during the trial and that he had reported the incident to the trial judge. He thanked one of the jurors on dropping her at her home, "because I have been under a terrific pressure . . . Sometime I will discuss it."

We think this evidence, covering the total picture, reveals such a state of facts that neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror. From Smith's testimony it is quite evident that he was a disturbed and troubled man from the date of the Satterly contact until after the trial. Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the F. B. I. agent's interview with Smith, whatever the Government may have understood its purpose to be, dispersed the cloud created by Satterly's communication. As he sat on the jury for the remainder of the long trial

and as he cast his ballot, Smith was never aware of the Government's interpretation of the events to which he, however unwillingly, had become a party. He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made.

The unduly restrictive interpretation of the question by the District Court had the effect of diluting the force of all the other facts and circumstances in the case that may have influenced and disturbed Smith in the untrammeled exercise of his judgment as a juror. We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, petitioner is entitled to a new trial.

The Court of Appeals' judgment is vacated and the case is remanded to the District Court with directions to grant a new trial.

It is so ordered.

MR. CHIEF JUSTICE WARREN and MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

UNITED STATES *v.* LESLIE SALT CO.

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

No. 74. Argued December 7, 1955.—Decided March 5, 1956.

In 1949, a corporation in need of funds to meet maturing bank loans and for working capital borrowed $3,000,000 from one insurance company and $1,000,000 from another for 15 years, giving each a single typewritten instrument entitled "3¼% Sinking Fund Promissory Note Due February 1, 1964." Each note was subject to the terms of an underlying agreement containing elaborate provisions for the protection of the note holders and a provision under which each insurance company could require the borrower to convert its note into a series of new notes in denominations of $1,000 or multiples thereof, "either in registered form without coupons or in coupon form, and in printed or in fully engraved form." This option had not been exercised by either note holder. *Held:* These two notes are not subject to the documentary stamp taxes laid under §§ 1800 and 1801 of the Internal Revenue Code of 1939 on "all bonds, debentures, or certificates of indebtedness issued by any corporation . . . ." Pp. 384–398.

(a) It is significant that the stamp tax which was levied on "promissory notes" for many years, but which has been repealed, was always carried in a separate section from that containing the tax on "bonds, debentures, or certificates of indebtedness" and was always at a lower rate than the tax on the latter instruments. P. 388.

(b) That these notes are for large amounts and of long maturity and are secured by an elaborate underlying agreement does not prevent them from being promissory notes, nor does anything in the earlier legislation or its history indicate that this type of note would not have been taxable at the lower rate provided in the promissory-note section of the former statute. P. 389.

(c) Even if these notes could not fairly be called "promissory notes," it does not follow that they must be regarded as "debentures" or "certificates of indebtedness." P. 389.

(d) The administrative history of the statute establishes that, until 1947, when *General Motors Acceptance Corp.* v. *Higgins*, 161 F. 2d 593, was decided, the Treasury considered no instruments

subject to the "debenture" tax except those which were issued (1) in series, (2) under trust indentures, and (3) in registered form or with coupons attached. Pp. 389–393.

(e) Since 1920, the Treasury has considered "certificates of indebtedness" as akin to bonds and debentures and as including "only instruments having the general character of investment securities," which these notes do not have. Pp. 393–395.

(f) The stamp taxes on "debentures" and "certificates of indebtedness" are based upon the character of the instruments employed, not upon the nature of the transactions involved; and an instrument which is neither a "debenture" nor a "certificate of indebtedness" does not become such merely because it evidences a long-term debt obligation supported by elaborate protective covenants. Pp. 395–396.

(g) In view of the Treasury's prior long-standing and consistent administrative interpretation of the terms "debentures" and "certificates of indebtedness" and the fact that Congress has let that administrative interpretation remain undisturbed for many years, the Treasury's present *ad hoc* contention that those terms should now be construed as including the notes here involved cannot stand. Pp. 396–397.

(h) The fact that the agreement underlying these notes provides for the substitution of instruments which might qualify as "debentures" does not render these notes taxable as "debentures." P. 398.

218 F. 2d 91, affirmed.

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman.*

Bruce M. Casey, Jr. argued the cause for respondent. With him on the brief was *Walter C. Fox, Jr.*

Chester Rohrlich filed a brief for Rayonier Incorporated, as *amicus curiae,* urging affirmance.

Mr. Justice Harlan delivered the opinion of the Court.

On February 1, 1949, Leslie Salt Company, being in need of funds to meet maturing bank loans and for work-

ing capital, borrowed $3,000,000 from the Mutual Life Insurance Company of New York and $1,000,000 from the Pacific Mutual Life Insurance Company. As evidence of the indebtedness Leslie Salt delivered to each insurance company its "3¼% Sinking Fund Promissory Note Due February 1, 1964" in these amounts. The question presented is whether these instruments are subject to the documentary stamp taxes laid on "all bonds, debentures, or certificates of indebtedness issued by any corporation . . . ." under §§ 1800 and 1801 of the Internal Revenue Code of 1939.[1]

The Commissioner of Internal Revenue held the tax applicable, considering the two instruments to be "debentures" within the meaning of § 1801. However, in a tax recovery suit instituted by Leslie Salt, following payment of the tax under protest and the Commissioner's denial of a refund, the District Court [2] and the Court of Appeals [3] held the instruments not to be "debentures" or otherwise subject to stamp taxes. We brought the case here, 349 U. S. 951, to resolve the uncertainty left by lower court

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[1] SEC. 1800. "There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections." 53 Stat. 195, 26 U. S. C. § 1800.

SEC. 1801. "On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 11 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue . . . ." 53 Stat. 195–196, 26 U. S. C. § 1801.

[2] 110 F. Supp. 680.

[3] 218 F. 2d 91.

decisions as to whether § 1801 applies to corporate notes of this type.[4]

Except as to amounts and payees, the two instruments in question were in identical terms, having these principal features: (1) each instrument carried the promissory note description already indicated; (2) each had a maturity of 15 years; (3) each carried interest of 3¼% payable August 1 and February 1 of each year on the unpaid balance; and (4) each was subject to the terms of an underlying agreement containing elaborate provisions for the protection of the note holders. Among those provisions was one under which each insurance company could re-

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[4] Decisions in the Courts of Appeals pointing toward the taxpayer's view are *Curtis Publishing Co.* v. *Smith,* 220 F. 2d 748 (C. A. 3d Cir.); *Niles-Bement-Pond Co.* v. *Fitzpatrick,* 213 F. 2d 305 (C. A. 2d Cir.); *United States* v. *Ely & Walker Dry Goods Co.,* 201 F. 2d 584 (C. A. 8th Cir.); *Allen* v. *Atlanta Metallic Casket Co.,* 197 F. 2d 460 (C. A. 5th Cir.); *Belden Mfg. Co.* v. *Jarecki,* 192 F. 2d 211 (C. A. 7th Cir.), and in the District Courts are *Bijou Theatrical Enterprise Co.* v. *Menninger,* 127 F. Supp. 16 (D. C. E. D. Mich.); *Knudsen Creamery Co. of California* v. *United States,* 121 F. Supp. 860 (D. C. S. D. Calif.); *Shamrock Oil & Gas Co.* v. *Campbell,* 107 F. Supp. 764 (D. C. N. D. Tex.); *Follansbee Steel Corp.* v. *United States,* 4 P–H 1955 Fed. Tax Serv. ¶72,715 (D. C. W. D. Pa.); *United Air Lines, Inc.* v. *United States,* 4 P–H 1955 Fed. Tax Serv. ¶72,567 (D. C. N. D. Ill.); *Motor Finance Corp.* v. *United States,* 4 P–H 1954 Fed. Tax Serv. ¶72,706 (D. C. D. N. J.). Decisions in the Courts of Appeals pointing the other way are *General Motors Acceptance Corp.* v. *Higgins,* 161 F. 2d 593 (C. A. 2d Cir.), and *Commercial Credit Co.* v. *Hofferbert,* 188 F. 2d 574 (C. A. 4th Cir.), and in the District Courts are *S. S. Pierce Co.* v. *United States,* 127 F. Supp. 396 (D. C. D. Mass.); *H. Kobacker & Sons Co.* v. *United States,* 124 F. Supp. 211 (D. C. N. D. Ohio); *General Motors Acceptance Corp.* v. *Higgins,* 120 F. Supp. 737 (D. C. S. D. N. Y.); *United States* v. *General Shoe Corp.,* 117 F. Supp. 668 (D. C. M. D. Tenn.); *Gamble-Skogmo, Inc.* v. *Kelm,* 112 F. Supp. 872 (D. C. D. Minn.); *Sharon Steel Corp.* v. *United States,* 4 P–H 1955 Fed. Tax Serv. ¶72,716 (D. C. W. D. Pa.); and *Stuyvesant Town Corp.* v. *United States,* 124 Ct. Cl. 686, 111 F. Supp. 243 (Ct. Cl.).

quire Leslie Salt to convert its note, which was typewritten on ordinary white paper, into a series of new notes in denominations of $1,000 or multiples thereof, "either in registered form without coupons or in coupon form, and in printed or in fully engraved form." [5] This option has not been exercised by either note holder.

These transactions with the two insurance companies constituted a variety of "private placement," a method of corporate financing which, because of its economies and conveniences, has become popular since the enactment of the Securities Act of 1933. The Government claims that these notes are taxable under § 1801 either as "debentures" or "certificates of indebtedness." The taxpayer, on the other hand, contends that these terms, undefined in the statute, do not include notes of the type

[5] Other provisions of these agreements may be summarized as follows: (1) The basic terms under which the insurance companies agreed to "purchase" the Leslie Salt notes. (2) Representations by Leslie Salt that financial statements and lists of property holdings submitted by it were complete and accurate. (3) Various conditions precedent to the purchase of the notes, including: opinion by counsel that the transaction was authorized under the applicable state law; that the balance of the $4,000,000 loan was subscribed; and that the loan documents would be in form satisfactory to counsel. (4) A representation by the lender that it was not acquiring the note for the purpose of sale. (5) A provision for prepayment by Leslie Salt of $285,000 principal amount for each year, without premium, and of an additional $285,000 annually at the option of Leslie Salt, also without premium, as long as the prepayment came from earnings or liquidation of assets. Leslie Salt had the right to make further prepayments, but subject to a premium of 3%, which after the first three years of the note descended in amount at the rate of ¼% each year. (6) Leslie Salt promised to pay all its taxes, keep its property in repair, keep accurate records, insure its properties, and make regular financial statements to the holders of the notes. (7) Leslie Salt promised not to become indebted, not to pay dividends or retire stock, except as provided in the agreement, and not to change the nature of its business or let its working capital decline beneath a specified amount.

here in issue. Taking the statute in light of its legislative and administrative history, we agree with the taxpayer's contention.

"Debentures" and "certificates of indebtedness," along with other kinds of corporate securities, have been subject to stamp taxes since 1898, except for the period between 1902 and 1914.[6] "Promissory notes" were also subject to stamp duties from 1898 to 1901 and from 1914 until 1924, when the tax was repealed;[7] it has never been re-enacted. The tax on "promissory notes," however, was always carried in a section separate from that containing the tax on "bonds, debentures, or certificates of indebtedness," and was always at a rate lower than the tax on those instruments. Since promissory notes, debentures, and certificates of indebtedness all serve the same basic purpose—that is, as evidence of a debt—this former legislative distinction between promissory notes and the other instruments assumes significance in determining whether the present notes are taxable. For unless the earlier statutes were intended to impose two taxes on the same instrument, which we should not assume, or the present tax on debentures and certificates of indebtedness is broader in scope than that in effect in 1924, of which there is no indication, it would seem to follow that these notes should not now be taxed if they can be said to fall within the class of "promissory notes" on which the tax was repealed.

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[6] Act of June 13, 1898, 30 Stat. 448, 451, 458; Act of March 2, 1901, 31 Stat. 938, 940, 942; repealed by the Act of April 12, 1902, 32 Stat. 96, 97; re-enacted in the Act of October 22, 1914, 38 Stat. 745, 753, 759, and carried forward in subsequent Revenue Acts.

[7] Act of June 13, 1898, 30 Stat. 448, 451, 459; repealed by the Act of March 2, 1901, 31 Stat. 942; re-enacted in the Act of October 22, 1914, 38 Stat. 745, 753, 760; carried over in the Revenue Acts of 1917, 1918, and 1921, 40 Stat. 300, 319, 323; 40 Stat. 1057, 1133, 1137; 42 Stat. 227, 301, 305, and repealed by the Revenue Act of 1924, 43 Stat. 253, 352.

The Government argues that the repealed promissory note provision related only to ordinary short-term paper customarily used in day-to-day commercial transactions, and that it did not embrace notes, like those here involved, of large amounts, long maturity, and secured by an elaborate underlying agreement. See *General Motors Acceptance Corp.* v. *Higgins,* 161 F. 2d 593, 595. The existence of these features, however, does not render either of the Leslie Salt instruments any the less a promissory note, as each was captioned. Nor do we find anything in the earlier legislation or in its history which satisfies us that this type of note would not have been taxable at the lower rate provided in the promissory note section of the former statute. See *Niles-Bement-Pond Co.* v. *Fitzpatrick,* 213 F. 2d 305, 308–310. Moreover, the administrative interpretations of the Treasury, discussed below, affirmatively indicate that they would have been considered taxable under that section.

But even assuming that these notes could not fairly be called "promissory notes," it does not follow that they must therefore be regarded as "debentures" or "certificates of indebtedness." That depends upon the meaning of those terms in the statute, and upon whether these notes, regardless of their descriptive caption, have the essential characteristics of "debentures" or "certificates of indebtedness," as those terms are used in the statute. *General Motors Acceptance Corp.* v. *Higgins, supra; Niles-Bement-Pond Co.* v. *Fitzpatrick, supra.* And in determining the scope of the statute, which has remained substantially unchanged since its first enactment, the Treasury's interpretations of it are entitled to great weight. *White* v. *Winchester Club,* 315 U. S. 32, 41.

The administrative history of the statute establishes that until 1947, when the *General Motors* case, *supra,* was decided, only those instruments were considered subject to the "debenture" tax which were issued (1) in series,

(2) under a trust indenture, and (3) in registered form or with coupons attached. In other words, that tax was considered to apply only to marketable corporate securities, as that term is generally understood. Conversely, corporate promissory notes lacking any of those features, such as those issued by respondent, were taxed at the lower promissory note rate until that tax was repealed in 1924, and were not taxed thereafter until the Government's success in the *General Motors* case in 1947.

As early as 1918 the Treasury, in distinguishing instruments taxable at the "bond" and "debenture" rate from those taxable at the lower "promissory note" rate, then still in force, drew the line as follows:

> "(3) Instruments containing the essential features of a promissory note, but issued by corporations in numbers under a trust indenture, either in registered form or with coupons attached, embodying provisions for acceleration of maturity in the event of any default by the obligor, for optional registration in the case of bearer bonds, for authentication by the trustee, and sometimes for redemption before maturity, or similar provisions, are bonds within the meaning of the statute, whether called bonds, debentures, or notes. However, a short-term instrument, although issued by a corporation under a trust indenture, may be regarded as a note if every instrument of such issue both (*a*) is payable to bearer and incapable of registration and (*b*) lacks interest coupons and so requires presentation upon each payment of interest." T. D. 2713, May 14, 1918, 20 Treas. Dec. Int. Rev. 358 (1918).[8]

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[8] In this same Treasury Decision "promissory note" was defined as "An instrument not under seal containing a simple promise to pay a sum of money at a specified time, *such as is common in everyday commercial use,* is a promissory note within the meaning of the

When Congress in 1918 amended the existing statute by adding the language "and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities . . . ," still found in § 1801, the Treasury recognized that this was in effect an enactment of its prior restrictive interpretation.[9] The regulations which followed the repeal in 1924 of the tax on promissory notes did not purport to enlarge the scope of the tax on "bonds" or "debentures"; the Treasury adhered to the same interpretation issued under the previous statute.[10] The regu-

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statute." It should be noted that the qualification which we have italicized was omitted from the definition of "promissory note" in the Regulations promulgated one year later. See note 10, *infra*.

[9] The then Solicitor of Internal Revenue, Mr. Robert N. Miller, expressed this view:

"The words 'all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities,' were clearly added in recognition of the varied forms in which corporate securities are issued, and to defeat any attempt by a corporation to avoid the tax by issuing instruments of the general character of bonds, debentures, or certificates of indebtedness under a different name." Sales Tax Rulings, L. O. 909, December 1920, ST. 1–20–85.

[10] "ART. 8. Instruments issued in numbers, under a trust indenture, are bonds.—Instruments containing the essential features of a promissory note, but issued in series, secured by a trust indenture, either in registered form or with coupons attached, embodying provisions for acceleration of maturity in the event of any default by the obligor, for optional registration in the case of bearer bonds, for authentication by the trustee, and in some instances for redemption before maturity, or similar provisions, are bonds within the meaning of the statute, whether called bonds, debentures, or notes." Treasury Regulations 55, September 13, 1924.

The regulations preceding the repeal of the tax on promissory notes provided:

"ART. 8. Instruments issued by corporations in numbers, under a trust indenture, are bonds.—Instruments containing the essential

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lations were amended in 1941 to the less specific, but not inconsistent, form under which the present notes were taxed.[11] Finally, explicit recognition that the attempt to tax notes not having the features of marketable cor-

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features of a promissory note, but issued by corporations in series, secured by a trust indenture, either in registered form or with coupons attached, embodying provisions for acceleration of maturity in the event of any default by the obligor, for optional registration in the case of bearer bonds, for authentication by the trustee, and in some instances for redemption before maturity, or similar provisions, are bonds within the meaning of the statute, whether called bonds, debentures, or notes.

. . . . . .

"ART. 48. 'Promissory note' defined.—A promissory note is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to such other person or to order or to bearer, free from restrictions as to registration or transfer and usually without coupons." Treasury Regulations 55, June 11, 1919.

The 1920 revision of Regulations 55 was substantially identical, as were the Regulations issued under the Revenue Act of 1921 (Regulations 55, Articles 8 and 35).

[11] SEC. 113.50. "*Scope of tax.* Section 1801 imposes a tax upon the issue by any corporation of bonds, debentures, certificates of indebtedness, and all instruments, however termed, with interest coupons or in registered form and known generally as corporate securities. Every renewal of the above described instruments is taxable as a new issue."

SEC. 113.55. "*Issues subject to tax.* Ordinarily, a corporate instrument styled a bond, debenture, or certificate of indebtedness is subject to the tax. However, the taxability of an instrument is not determined by the name alone but depends upon all the circumstances, such as the name, form, and terms of the instrument, etc. Hence, an instrument, however designated, having all the essential characteristics of a bond, debenture, or certificate of indebtedness is taxable as such. Similarly, an instrument issued with interest coupons, or with provision for registration, and coming within the class known generally as corporate securities will be held subject to the tax regardless of the name by which it may be called." 26 CFR, 1944 Cum. Supp., §§ 113.50, 113.55.

porate securities was a departure from prior Treasury practice is found in a ruling by the Commissioner of Internal Revenue that *General Motors* would not be applied retroactively:

> "The Bureau has for a considerable period of time held that an instrument termed 'note,' not in registered form and issued without interest coupons, is not subject to the stamp tax upon issuance or transfer. Because of this long and uniform holding of the Bureau and the consequent reliance of corporations on these rulings, it has been concluded that, under the authority contained in section 3791 (b) of the Internal Revenue Code, the decision in *General Motors Acceptance Corporation* v. *Higgins, supra,* will not be applied retroactively, except that any tax which has been paid on the issuance or transfer of instruments falling within the scope of the decision will not be refunded." Cum. Bull. 1948–2, M. T. 32, p. 160.

The term "certificate of indebtedness" has a similar administrative background. Since 1920 the Treasury has considered certificates of indebtedness as akin to bonds and debentures, including "only instruments having the general character of investment securities, as distinguished from instruments evidencing debts arising in ordinary transaction between individuals . . . ." Sales Tax Rulings, L. O. 909, December 1920, ST. 1–20–85; Regs. 55 (Art. 14), October 26, 1920, 22 T. D. Int. Rev. 502 (1920).[12] The essence of an "investment security"

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[12] The ruling by the Solicitor of Internal Revenue said:
"The Century Dictionary defines 'debenture' as 'A writing acknowledging a debt; specifically, an instrument, generally under seal, for the repayment of money lent; usually, if not exclusively, used as obligations of corporations or large moneyed copartnerships, issued in a form convenient to be bought and sold as investments.' This

is, of course, marketability, and this basic feature the Leslie Salt notes did not have. The Treasury itself has acknowledged that promissory notes lacking this quality have never been taxed as "certificates of indebtedness,"

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definition was adopted by the court in Barton Nat. Bank *v.* Atkins, 72 Vt. 55; 47 Atl. 176, 180. The term 'certificates of indebtedness' has also come to have in commercial use a similar meaning. In Denver *v.* Home Savings Bank, 236 U. S. 101, 105, the court said:

" 'What is true about bonds is true about certificates of indebtedness. Indeed it is difficult to see any distinction between them as they are commonly known to the business world. The essence of each is that they contain a promise under seal of the corporation to pay a certain sum to order or bearer.'

"If the term 'certificates of indebtedness' standing by itself be susceptible of a broader meaning than that given to it above, its association here with bonds and debentures excludes such broader meaning. The maxim *noscitur a sociis* applies.

"A consideration of Title XI as a whole supports the conclusion above arrived at. Three classes of paper issued by individuals, partnerships, and corporations are subject thereunder to stamp tax: Bonds of indebtedness (subdivision 1), certificates of stock (subdivision 3), and drafts or checks and promissory notes (subdivision 6); i. e., instruments possessing to a greater or less extent the attributes of commercial paper.

"The premises lead inevitably to the conclusion that it was not the intention of Congress to tax under subdivision 1 of the said Schedule A every evidence of indebtedness other than those included under the heads of shares or certificates of stock, promissory notes, or bills of exchange, but only those evidences of indebtedness which have the general character of investment securities and which may properly be included under the term 'bonds of indebtedness.' The definition of 'certificate of indebtedness' as 'primarily any instrument acknowledging liability for the payment of money, not in the recognized form of a promissory note or bill of exchange,' contained in T. D. 2713, is too inclusive and does not sufficiently delimit the instruments included in the term.

"It is therefore held that the term 'certificate of indebtedness' as used in subdivision 1 of Schedule A, Title XI, Revenue Act of 1918, includes only instruments having the general character of in-

Cum. Bull. 1948–2, M. T. 32, p. 160 (*supra,* p. 393), and none of the lower court cases, including *General Motors, supra,* have regarded instruments such as the Leslie Salt notes as being certificates of indebtedness. Moreover, it may be observed that in the stamp tax sections of the Internal Revenue Code of 1954 the words "certificates of indebtedness," consistently with this administrative history, have been eliminated as a separate taxable category of corporate instruments, and are employed simply as a term of art embracing all the instruments taxed, that is, "bonds," "debentures" and other instruments in registered form or with coupons. Internal Revenue Code of 1954, §§ 4311, 4381, 68A Stat. 514, 523, 26 U. S. C. §§ 4311, 4381.

In contrast to the position it had consistently taken throughout the many years preceding the decision in the *General Motors* case, the Treasury now argues "that Congress intended in Section 1801 to cover all long-term debt obligations supported by elaborate protective covenants and that this is so regardless of the details of the papers used, the language by which the transaction was consummated or the nature of the purchaser's business." This contention seems to stem from the belief that had the "private placement" method of financing been as widely known in 1924 as it is now, Congress would not have repealed the promissory note tax in its entirety, as it did. But if that be so it is nevertheless for Congress, not the courts, to change the statute. We must deal with the statute as we find it, and if these instruments are neither

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vestment securities, as distinguished from instruments evidencing debts arising in ordinary transaction between individuals; and that conditional bills of sale are not certificates of indebtedness.

"T. D. 2713 should be modified to conform with this holding.

"ROBERT N. MILLER,
"Solicitor of Internal Revenue."

"debentures" nor "certificates of indebtedness" they may not be taxed under the present statute. These taxes are based not upon the nature of the transaction involved, but upon the character of the instruments employed. As long ago as 1873, this Court said: "The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself." *United States* v. *Isham,* 17 Wall. 496, 504.

There are persuasive reasons for construing "debentures" and "certificates of indebtedness" in accordance with the Treasury's original interpretation of those terms in this statute's altogether comparable predecessors. In *Norwegian Nitrogen Prod. Co.* v. *United States,* 288 U. S. 294, 315, Mr. Justice Cardozo said:

> "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627; *Brewster* v. *Gage,* 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Interstate Commerce Commn.* v. *N. Y., N. H. & H. R. Co.,* 287 U. S. 178. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Against the Treasury's prior longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence,

through the 1918 amendment to the statute (*supra*, p. 391), which has ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years. See *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 53; *Norwegian Nitrogen Prod. Co.* v. *United States*, *supra*, at p. 313.[13] Still further, it is an interpretation which is in accord with the generally understood meaning of the term "debentures." Cf. *First Nat. Bank* v. *Flershem*, 290 U. S. 504, 508.[14] "The words of the statute [a stamp tax statute] are to be taken in the sense in which they will be understood by that public in which they are to take effect." *United States* v. *Isham*, *supra*, at p. 504.

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[13] It should be said that the administrative practice, which we consider as crucial here, was not brought to the attention of the Court of Appeals in *Niles-Bement-Pond Co.* v. *Fitzpatrick*, *supra*. Nor do *General Motors Acceptance Corp.* v. *Higgins*, *supra*, or any of the cases cited in note 4, *supra*, advert to that practice.

[14] As long ago as 1916, no less an authority on corporate finance than the late Mr. F. L. Stetson described debentures in the following terms:

"In the United States, as already mentioned, the term 'debenture' is understood to mean serial obligations of a corporation not secured by a specific mortgage, pledge or assignment of property. Of course a series of debentures may be issued without the execution of any indenture relating thereto. Prior to 1900 the few issues that had been made of such debentures were not accompanied by a trust agreement. In such case the rights and privileges given to bondholders were set forth at length in the obligation, thus making a somewhat lengthy instrument. Since an issue of debentures under trust agreements by the Lake Shore R. R. Co. and by the New York Central, the custom of adopting such agreements has become general. Originally in 1893 the General Electric Company made a large issue of debentures without an agreement, but at the time of the refunding in 1912 a trust agreement was executed." "Preparation of Corporate Bonds, Mortgages, Collateral Trusts and Debenture Indentures," in Some Legal Phases of Corporate Financing, Reorganization and Regulation, p. 66 (Assn. of the Bar of the City of New York, 1917).

Construing the statute as we have, we conclude that the Leslie Salt notes are neither "debentures" nor "certificates of indebtedness" within its meaning. The fact that the agreement underlying these notes provides for the substitution of instruments which might qualify as debentures does not render these notes taxable, for until debentures are in existence the "debenture" tax cannot be imposed.

We hold these notes are not subject to stamp taxes under the statute.

Affirmed.

CAMMER *v.* UNITED STATES.

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

No. 110. Argued January 24, 1956.—Decided March 12, 1956.

A lawyer is not the kind of "officer" who can be tried summarily for contempt under 18 U. S. C. § 401 (2), which empowers a court of the United States to punish as contempt "Misbehavior of any of its officers in their official transactions." Pp. 399–408.

(a) This section derives from the Contempt Act of March 2, 1831, 4 Stat. 487, and should be narrowly construed because its legislative history shows that Congress intended drastically to limit the contempt power of federal courts and because the exercise of any broader contempt power would permit too great inroads on the procedural safeguards of the Bill of Rights. Pp. 403–404.

(b) The term "officers," as used in 18 U. S. C. § 401 (2), should not be expanded beyond the group of persons—such as marshals, bailiffs, court clerks and judges—who serve as conventional court officers and are regularly treated as such in the laws. P. 405.

(c) The legislative history of the 1831 Act is completely inconsistent with a purpose to treat lawyers as "officers of the court" subject to summary punishment. Pp. 405–408.

—— U. S. App. D. C. ——, 223 F. 2d 322, reversed.

Charles E. Ford argued the cause and filed a brief for petitioner.

Gray Thoron argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard.*

MR. JUSTICE BLACK delivered the opinion of the Court.

18 U. S. C. § 401 (2) empowers a court of the United States to punish as contempt "Misbehavior of any of its

officers in their official transactions . . . ." [1] Petitioner, a lawyer, sent a questionnaire to a District of Columbia grand jury. For this, the District Court found petitioner guilty of contempt and fined him $100. 122 F. Supp. 388. In so doing the court held that within the meaning of the statute petitioner was one "of its officers" and that sending the questionnaire was "misbehavior" in an "official transaction." The Court of Appeals affirmed, Circuit Judge Fahy dissenting. 96 U. S. App. D. C. 30, 223 F. 2d 322. The construction of the statute raised such important questions that we granted certiorari. 350 U. S. 817. A rather detailed statement of the facts, which are not in dispute, will point up the broad scope given the statute in sustaining this conviction.

A District of Columbia grand jury returned an indictment against Ben Gold, charging him with having filed a false non-Communist affidavit in violation of 18 U. S. C. § 1001. Petitioner promptly appeared as his attorney. Shortly thereafter the same grand jury summoned two of Mr. Gold's associates, commanding them to appear and produce documents. Petitioner appeared for them and moved to quash and vacate the subpoenas. On the same day or the next, petitioner mailed from New York identical letters and questionnaires to all members of the grand jury who were employees of the Federal Government. In the letters petitioner told the grand jurors that as Mr.

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[1] Section 401 in its entirety provides:

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

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

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

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

Gold's attorney he was trying to learn the effect of the Government's loyalty program on federal employee jurors. Explaining that he wanted no information concerning proceedings or deliberations of the grand jury, he asked the jurors to answer his questions on the ground that it was their duty as citizens "to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case." All of the questions were directed toward learning whether the government employee jurors might be influenced by bias or fear to indict persons charged with having had some association with the Communist Party. On the basis of these facts, the District Court ordered petitioner to appear and show cause why he should not be adjudged guilty of contempt under 18 U. S. C. § 401 (2).

Petitioner appeared and answered the charges. He admitted the facts just stated but denied that his conduct constituted contempt within the meaning of the statute. His answer set out the following additional facts which are not disputed:

Prior to the return of the indictment against Mr. Gold in the District of Columbia, two federal grand juries in New York had investigated this same alleged offense but returned no indictment. Immediately after Mr. Gold was arraigned in the District of Columbia Court, petitioner learned from a roster of the grand jury obtained from the clerk that 13 members of the grand jury—a majority—were government employees. Petitioner decided to make a motion challenging the legal qualifications of the government employee jurors. He concluded that this could be done under Rule 6 (b) of the Federal Rules of Criminal Procedure, relying in part on this Court's statement in *Dennis* v. *United States,* 339 U. S. 162, 171–172, that "Preservation of the opportunity to

prove actual bias is a guarantee of a defendant's right to an impartial jury."

Petitioner was also led to believe that it would be necessary to obtain statements from the grand jurors because of the Government's brief and the court's holding in *Emspak* v. *United States,* 91 U. S. App. D. C. 378, 203 F. 2d 54. There the Government successfully contested Emspak's efforts to show that federal employee grand jurors were biased and should not have served by arguing that "there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons." The Government also argued there that it was the defendant's duty to make his own investigation of bias instead of calling on the court to make it for him. The petitioner was also influenced by what had taken place in connection with an investigation of bias of government employees in another case in the District of Columbia. There a district judge had held that the defendant Weinberg was not entitled to a hearing as to bias of government employees as grand jurors unless the defendant had himself first undertaken to contact the jurors to ascertain from them the existence of bias. The district judge had stated that there was "nothing to prevent counsel, if he sees fit, contacting those 15 members [of the grand jury] and inquiring only of one subject, whether or not they had any personal bias toward" the defendant. After this statement counsel for Weinberg had sent a letter and questionnaire to all the government employee members of the grand jury. Petitioner consulted with Weinberg's lawyers who told him they had sent the letters and questionnaires without the prior knowledge or authority of the district judge, that their action was later made known to him, and that no suggestion of criticism was made either by the judge or by the Government. Petitioner then mailed substantially the

same letter and questionnaire sent by Weinberg's counsel to the government employees on the grand jury that had indicted his client, Gold.

On the basis of the foregoing undisputed facts the district judge found petitioner guilty of contempt. He concluded that petitioner's act in sending the questionnaires was an impropriety but went on to say: "There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not." 122 F. Supp., at 389.

The contempt section here relied on derives from the Contempt Act of March 2, 1831. 4 Stat. 487. In *Nye* v. *United States,* 313 U. S. 33, we reviewed the history of the 1831 Act and found that its purpose was greatly to limit the contempt power of federal courts.[2] For this reason we gave the provision of the Contempt Act then under consideration a narrow construction. Even though we recognized that Nye was guilty of "highly reprehensible" conduct, we held that he could not be punished summarily for contempt but must be "afforded the normal safeguards surrounding criminal prosecutions." *Id.,* at 52, 53. Some time after the *Nye* case we considered *In re Michael,* 326 U. S. 224. There a trustee in bankruptcy had been adjudged guilty of contempt. The Gov-

[2] For a discussion of the 1831 Act and the narrow limits of the contempt power in general, see Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010; Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525. See also Stansbury, Report of the Trial of James H. Peck (1833).

ernment argued that he was guilty of misbehavior as an officer of the court in an official transaction under the same section involved here. Again we pointed out that the 1831 Act "represented a deliberate Congressional purpose drastically to curtail the range of conduct which courts could punish as contempt." We there construed the Act as embodying a congressional plan to limit the contempt power to *"the least possible power adequate to the end proposed."* See *Anderson* v. *Dunn,* 6 Wheat. 204, 231. We added, "The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury. It is in this Constitutional setting that we must resolve the issues here raised." 326 U. S., at 227. We consider the judicial power here in that same setting. Cf. *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 15–16.

Petitioner contends that his conduct was not "misbehavior" within the meaning of the Act, but was a good faith attempt to discharge his duties as counsel for a defendant in a criminal case. We find it unnecessary to decide this but it is not out of place to say that no statute or rule of court specifically prohibits conduct such as petitioner's. Petitioner also contends that sending the questionnaire was not an "official transaction" within the meaning of the Act. However, if we assumed that a lawyer in ordinary practice is an "official" or "officer" of the court it would be hard to draw any line between "official" and "unofficial" transactions. Indeed there is plausibility in the implication of the Court of Appeals that if lawyers are covered by this section of the Act they are engaged in official transactions whenever engaged in the "practice of the profession." But we find it unnecessary to decide when a lawyer is engaged in an "official

transaction" for we hold that a lawyer is not a court "officer" within the meaning of § 401 (2).

It has been stated many times that lawyers are "officers of the court." One of the most frequently repeated statements to this effect appears in *Ex parte Garland,* 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an "officer" within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.[3] Cf. *Labor Board* v. *Coca-Cola Bottling Co.,* 350 U. S. 264. We see no reason why the category of "officers" subject to summary jurisdiction of a court under § 401 (2) should be expanded beyond the group of persons who serve as conventional court officers and are regularly treated as such in the laws. See 28 U. S. C. §§ 601–963.

There are strong reasons why attorneys should not be considered "officers" under § 401 (2). As we pointed out in the *Nye* case, the 1831 Act was promptly passed by the Congress after the impeachment proceedings against

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[3] Illustrations of the confusion and difficulty of courts in explaining what is meant when a lawyer is called an officer of the court may be found in the following cases: *Langen* v. *Borkowski,* 188 Wis. 277, 301, 206 N. W. 181, 190; *In re Galusha,* 184 Cal. 697, 698, 195 P. 406; *Sowers* v. *Wells,* 150 Kan. 630, 635, 95 P. 2d 281, 284–285; *Bergeron, Petitioner,* 220 Mass. 472, 476, 107 N. E. 1007, 1008.

Judge Peck failed by a senatorial vote of 22 to 21. Judge Peck had sent a lawyer to jail and had taken away his right to practice as punishment for an alleged contempt. The contempt consisted of published criticism of Judge Peck's opinion in a case in which the convicted lawyer had appeared as counsel; he was also counsel in other pending cases involving similar issues. Those directing the impeachment proceedings, who later brought about the passage of the 1831 Act, expressed deep concern lest lawyers continue to be subjected to summary trials by judges without the safeguards of juries and regular court procedure. Congressman James Buchanan who made the last argument against Judge Peck stated:

> "But what is the process in the case of contempts? Without either an information or an indictment, but merely on a simple rule to show cause, drawn up in any form the judge may think proper, a man is put upon his trial for an infamous offence, involving in its punishment the loss both of liberty and property. He is deprived both of petit jury and grand jury, and is tried by an angry adversary prepared to sacrifice him and his rights on the altar of his own vengeance.
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> . . . . . .
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> "I may be wrong, but I hold it to be the imperative duty of an attorney to protect the interests of his client out of court as well as in court." [4]

Again Mr. Buchanan said:

> "I believe that I have as good a right to the exercise of my profession, as the mechanic has to follow his

[4] Stansbury, Report of the Trial of James H. Peck (1833), 445, 455.

> trade, or the merchant to engage in the pursuits of commerce. . . . The public have almost as deep an interest in the independence of the bar as of the bench." [5]

Such statements by the same man who reported the 1831 Act to the House of Representatives almost immediately after Judge Peck's acquittal are completely inconsistent with a purpose to treat lawyers as "officers of the court" subject to summary punishment. We cannot hold that lawyers are subject to the precise kind of summary contempt power that the Act was designedly drawn to bar judges from exercising. Section 2 of that Act made ample provision for punishing corrupt efforts to influence, intimidate or impede juries.[6] And Congress expressly provided that prosecution therefor be by indictment. Substantially the same provision has been a part of our law ever since. 18 U. S. C. § 1503. See also Fed. Rules Crim. Proc. 7 (a). Of course it does not cover this case because there is no charge that petitioner attempted improperly to influence the jury or violate § 1503 in any other way. Had there been such a charge petitioner would have been entitled to a trial by jury after indictment by grand jury. We hold that a lawyer is not the

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[5] *Id.*, at 450.

[6] "*And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence." 4 Stat. 488.

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kind of "officer" who can be summarily tried for contempt under 18 U. S. C. § 401 (2).[7] The judgment of the Court of Appeals must therefore be reversed.

Reversed.

MR. JUSTICE REED concurs in the judgment solely on the ground that the circumstances leading to the enactment of this statute dictate the Court's otherwise unique reading of the term "officers of the court."

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

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[7] *Ex parte Bradley*, 7 Wall. 364, requires no different result. The Court there held that an attorney could not be disbarred solely on a showing of a contempt committed before another court. The Court did use broad language there as to the power of courts to punish attorneys as officers of courts for misbehavior in the practice of the profession. The statements in *Ex parte Bradley* went so far as to say that lawyers became subject to the summary jurisdiction of courts "for the commission of any other act of official or personal dishonesty and oppression." *Id.*, at 374. However questionable those statements may be, they were not made, as the Court pointed out, with respect to a court's power to punish contempts. The Court was referring to the generally exercised powers of courts in that day to discipline attorneys. As said by the Court later in *Ex parte Robinson*, 19 Wall. 505, 512, "The power to disbar an attorney proceeds upon very different grounds" from those which support a court's power to punish for contempt.

UNITED STATES ET AL. *v.* CONTRACT STEEL CARRIERS, INC.

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

No. 102. Argued February 29, 1956.—Decided March 12, 1956.

1. If a requirement that the services of a "contract carrier by motor vehicle," within the meaning of 49 U. S. C. § 303 (a)(15), must be individual and specialized is to be read into this section by its legislative history, the requirement was satisfied in this case, since this carrier hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area. P. 411.
2. The fact that this contract carrier has actively solicited business within the bounds of its license does not support a finding by the Interstate Commerce Commission that the carrier was "holding itself out to the general public" as a common carrier. Pp. 411–412.

128 F. Supp. 25, affirmed.

Charles F. Barber argued the cause for appellants. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, William J. Lamont* and *Robert W. Ginnane.*

Robert N. Burchmore argued the cause for appellee. With him on the brief was *John S. Burchmore.*

PER CURIAM.

The Interstate Commerce Commission brings an appeal from a three-judge district court, 49 U. S. C. § 305 (g), that reversed an order of the ICC, 62 M. C. C. 413, directing appellee Contract Steel Carriers to cease operations as a common carrier by motor vehicle. 128 F. Supp. 25.

Appellee holds licenses covering different areas surrounding Chicago, Houston, and St. Louis. As these are substantially in the same form, a single illustration will suffice. It covers contract carriage of

> "*Steel articles,* and such materials as are used or useful in highway construction projects, except cement, rock, sand, and gravel, over irregular routes, in connection with said carrier's presently authorized operations,
>
> "From points and places in the CHICAGO, ILL. COMMERCIAL ZONE, as defined by the Commission in 1 M. C. C. 673, to points and places in Arkansas, Iowa, Kansas, Missouri, Oklahoma, and Texas, and return with no transportation for compensation." No. MC 96505 SUB 6.

The facts are fully set out in the reports referred to above. In essence they show that appellee, by active solicitation from 1951 to 1954 in the areas mentioned, had secured 69 contracts to serve shippers. These had been filed with the Commission and there is no charge of any violation of the restrictions of the license or the requirements of individual contracts except that the appellee has held itself out by its actions to be a common carrier.[1]

The Commission found this holding-out from an advertisement, run without legal advice and since discontinued, offering its transportation service without mentioning whether it was contract or common carriage.

It was also charged that

> ". . . the great increase in the number of contracts held by it are attributable in large degree to aggressive sales activities and affirmative precontract traffic solicitation, which amounts to a public offer or holding out. In this connection, it is also asserted

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[1] A common carrier is one "which holds itself out to the general public to engage in the transportation by motor vehicle . . . of passengers or property." A contract carrier is any "person which, under individual contracts or agreements, engages in" such transportation. 49 U. S. C. § 303 (a)(14), (15).

> that defendant maintained an employee in Des Moines, Iowa, whose duties included the active solicitation of traffic. . . . There is evidence that business has been lost by interveners after a representative of defendant called upon receivers of steel in Iowa, leaving a copy of defendant's schedule of minimum rates and charges, and a copy of a blank contract to be executed by such shippers." 62 M. C. C. 413, 414–415.

It was concluded by the Commission:

> "Although the facts here are meager in some respects, they reveal a pattern of extraordinary expansion in a period of approximately 8 months and an easy turnover of contracts thereafter. We believe that there is ample evidence to show that this expansion was brought about, to some extent at least, by indiscriminate solicitation and advertising, among other things." *Id.*, at 421.

In *Craig Contract Carrier Application,* 31 M. C. C. 705, 712, the ICC stated that the services of a contract carrier must be individual and specialized. A requirement of specialization is supported by respectable legislative history. See, *e. g.,* 79 Cong. Rec. 5651. In this case the ICC found that appellee had not sufficiently specialized its operation. However, we conclude that if specialization is to be read into 49 U. S. C. § 303 (a)(15) by the legislative history, it is satisfied here since appellee hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area.

We hold also that the fact that appellee has actively solicited business within the bounds of his license does

not support a finding that it was "holding itself out to the general public." A contract carrier is free to aggressively search for new business within the limits of his license.[2] Because the ICC's order is not supported by evidence in the record and is contrary to the definitions of contract and common carriers in § 303 (14) and (15), we affirm the District Court.

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, dissenting.

The Motor Carrier Act, 49 Stat. 543, 544, 49 U. S. C. § 303 (a)(14), gives to the term "common carrier by motor vehicle" the classic meaning that "common carrier" had acquired and maintained during the course of centuries. In short, the test of what is a "common carrier" under this Act is what legal history has established as the test, and we do not find that the Interstate Commerce Commission has departed from this test. We cannot believe that if the evidence, as disclosed by the record, which need not be recited, had appeared in a common-law action against the respondent, a court would be justified in taking the case from the jury, and that if the jury had found against the respondent, its verdict would not be allowed to stand. The finding by the Interstate Commerce Commission that the respondent was a "common carrier," and therefore subject to the regulatory provisions of the Act, ought not to have less weight than a jury's verdict. Accordingly, other issues raised in the case are not reached, and we would reverse the judgment below.

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[2] "*Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require." 49 U. S. C. § 309 (b).

FLORIDA EX REL. HAWKINS *v.* BOARD OF CONTROL OF FLORIDA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 624. Decided March 12, 1956.

A Negro is entitled to prompt admission to a graduate professional school of a State, under the rules and regulations applicable to other qualified candidates. P. 414.

83 So. 2d 20, certiorari denied.

60 So. 2d 162, judgment vacated and case remanded.

Robert L. Carter and *Thurgood Marshall* for petitioner.

Richard W. Ervin, Attorney General of Florida, *Ralph E. Odum,* Assistant Attorney General, and *John J. Blair,* Special Assistant Attorney General, for respondents.

PER CURIAM.

The petition for certiorari is denied.

On May 24, 1954, we issued a mandate in this case to the Supreme Court of Florida. 347 U. S. 971. We directed that the case be reconsidered in light of our decision in the Segregation Cases decided May 17, 1954, *Brown* v. *Board of Education,* 347 U. S. 483. In doing so, we did not imply that decrees involving graduate study present the problems of public elementary and secondary schools. We had theretofore, in three cases, ordered the admission of Negro applicants to graduate schools without discrimination because of color. *Sweatt* v. *Painter,* 339 U. S. 629; *Sipuel* v. *Board of Regents of the University of Oklahoma,* 332 U. S. 631; cf. *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U. S. 637. Thus, our second decision in the *Brown* case, 349 U. S. 294, which implemented the earlier one, had no application to a case involving a Negro applying for

admission to a state law school. Accordingly, the mandate of May 24, 1954, is recalled and is vacated. In lieu thereof, the following order is entered:

PER CURIAM: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded on the authority of the Segregation Cases decided May 17, 1954, *Brown* v. *Board of Education,* 347 U. S. 483. As this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates. *Sweatt* v. *Painter,* 339 U. S. 629; *Sipuel* v. *Board of Regents of the University of Oklahoma,* 332 U. S. 631; cf. *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U. S. 637.

UNITED STATES *v.* GREEN ET AL.

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

No. 54. Argued February 27, 1956.—Decided March 26, 1956.

Obstruction of interstate commerce or an attempt to do so through the wrongful use by a labor union or its agents of actual or threatened force, violence or fear, in an attempt to compel an employer to pay "wages" to members of the union for imposed, unwanted, superfluous and fictitious "services," is a violation of the Hobbs Act, 18 U. S. C. § 1951. Pp. 416–421.

(a) The coverage of 18 U. S. C. § 1951 is not confined to attempts to obtain money or other property for the extortioner's personal advantage; it applies also to attempts by a union or its agents to get jobs and pay for its members by threats and violence. Pp. 418–420.

(b) The legislative history of the Act shows that it was intended to cover the employer-employee relationship. Pp. 418–419.

(c) A different result is not required by the provision of Title II of the Hobbs Act that it should not affect the Clayton Act, the Norris-LaGuardia Act, the Railway Labor Act or the National Labor Relations Act, since there is nothing in those Acts indicating any protection for unions or their officials in attempts to get personal property through threats of force or violence. Pp. 419–420.

(d) Since this legislation is directed at the protection of interstate commerce against injury from extortion, it is within the power of Congress. Pp. 420–421.

135 F. Supp. 162, reversed.

Oscar H. Davis argued the cause for the United States. On the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay.*

Arthur M. Fitzgerald argued the cause for appellees. With him on the brief were *Schaeffer O'Neill* and *William P. Roberts.*

MR. JUSTICE REED delivered the opinion of the Court.

An indictment was found in the Southern District of Illinois against appellees Green and a local union. The jury adjudged them guilty under counts one and two thereof. The court sustained their separate motions in arrest of judgment, setting out in its order that its action was "solely" on the following grounds:

> "2. This court is without jurisdiction of the offense.
>
> "(b) The facts alleged in the Indictment failed to set forth an offense against the United States such as to give this Court jurisdiction.
>
> "(c) A proper construction of the statute in question clearly indicates that it does not cover the type of activity charged in this indictment; to interpret the Act in question as covering the type of activity charged in this Indictment is to extend the jurisdiction of this Court and the power of Congress beyond their Constitutional limits."

Appeal was taken by the United States directly to this Court under 18 U. S. C. § 3731.[1] We noted probable jurisdiction. 350 U. S. 813.

The two counts in question were based upon alleged violations of 18 U. S. C. § 1951, popularly known as the Hobbs Act. The pertinent statutory provisions are subsections (a) and (b)(2) thereof, reading as follows:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any

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[1] "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

. . . . . .

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

> article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) . . .
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

Each of the two counts charged appellees with acts of extortion under § 1951 directed against a different employer. The extortions alleged consisted of attempts to obtain from the particular employer

> "his money, in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services of laborers commonly known as swampers, in connection with the operation of machinery and equipment then being used and operated by said [employer] in the execution of his said contract for maintenance work on said levee, the attempted obtaining of said property from said [employer] as aforesaid being then intended to be accomplished and accomplished with the consent of said [employer], induced and obtained by the wrongful use, to wit, the use for the purposes aforesaid, of actual and threatened force, violence and fear made to said [employer], and his employees and agents then and there being; in violation of Section 1951 of Title 18, United States Code."

Appellees each filed motions for acquittal or in the alternative for a new trial. These the trial court specifically denied. The opinion of the trial court, 135 F.

Supp. 162, says nothing as to failure of evidence to support the allegations of the indictment, or as to trial errors. Instead the court relied upon the absence of criminality in the acts charged, and it was therefore logical for the trial court to deny acquittal and new trial.[2] The court thought persuasive our recent cases which held union efforts to secure "made work" for their members were not unfair labor practices.[3] From its view that extortion as defined in the Hobbs Act covers only the taking of property from another for the extortioner's personal advantage, the necessity to arrest the judgment followed. Rule 34, Fed. Rules Crim. Proc.

We do not agree with that interpretation of the section. The Hobbs Act was passed after this Court had construed § 2 of the Federal Anti-Racketeering Act of 1934, 48 Stat. 979, in *United States* v. *Local 807,* 315 U. S. 521. Subsection (a) of § 2 barred, with respect to interstate commerce, exaction of valuable considerations by force, violence or coercion, "not including, however, the payment

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[2] The opinion states:

"It is now contended that the Indictment does not state a cause of action within the meaning of the above section. In the usual extortion case, the extorter is obtaining money or property of another for his own benefit. . . . In the case at hand, I conclude that Green's original activity in 'attempting to obtain from Arthur W. Terry, Jr., his money in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services of laborers' which said charge was seriously controverted, was of itself not a violation of this statute, and within his rights and responsibilities as a Union representative, which was not prohibited by this statute.

. . . . . .

". . . I conclude that the trouble in this Community and on this particular job was caused by a disagreement between the contractor and labor, and was in no wise an attempt to extort for the use of either the Union or the Defendant Green, any money or property of the contractor." 135 F. Supp., at 163, 164.

[3] See *American Newspaper Publishers Association* v. *Labor Board,* 345 U. S. 100; *Labor Board* v. *Gamble Enterprises,* 345 U. S. 117.

of wages by a bona-fide employer to a bona-fide employee." We held in *Local 807* that this exception covered members of a city truck drivers' union offering superfluous services to drive arriving trucks to their city destination with intent, if the truck owners refused their offer, to exact the wages by violence.[4] In the Hobbs Act, 60 Stat. 420, carried forward as 18 U. S. C. § 1951, which amended the Anti-Racketeering Act, the exclusion clause involved in the *Local 807* decision was dropped. The legislative history makes clear that the new Act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship.[5] The words were defined to avoid any misunderstanding.

Title II of the Hobbs Act provides that the provisions of the Act shall not affect the Clayton Act, §§ 6 and 20,

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[4] The exception was held also to permeate the entire Act. P. 527, n. 2.

[5] Beginning soon after our decision in the *Local 807* case, a series of bills was introduced in Congress looking toward an amendment to the Anti-Racketeering Act of 1934. S. 2347, 77th Cong., 2d Sess.; H. R. 6872, 77th Cong., 2d Sess.; H. R. 7067, 77th Cong., 2d Sess.; H. R. 653, 78th Cong., 1st Sess.; H. R. 32, 79th Cong., 1st Sess. The last of these bills, H. R. 32, *supra*, was enacted and became the Hobbs Act, 62 Stat. 793. The House Committee on the Judiciary, in its report on H. R. 32, stated:

"It is not the intention of the committee that title III [enacted as title II] be interpreted as authorizing any unlawful acts, particularly those amounting to robbery or extortion. The need for the legislation was emphasized by the opinion of the Supreme Court in the case of *United States* v. *Local 807* (315 U. S. 521)." H. R. Rep. No. 238, 79th Cong., 1st Sess., p. 10. See also S. Rep. No. 1516, 79th Cong., 2d Sess.

Each of the prior bills had the same purpose—amending the Anti-Racketeering Act so as to change the terms which brought about the result reached in the *Local 807* case. See H. R. Rep. No. 2176, 77th Cong., 2d Sess.; H. R. Rep. No. 66, 78th Cong., 1st Sess. And see 91 Cong. Rec. 11842, 11843, 11909, 11911, 11919, 11920.

38 Stat. 731, 738; the Norris-LaGuardia Act, 47 Stat. 70; the Railway Labor Act, 44 Stat. 577; or the National Labor Relations Act, 49 Stat. 449.[6] There is nothing in any of those Acts, however, that indicates any protection for unions or their officials in attempts to get personal property through threats of force or violence. Those are not legitimate means for improving labor conditions.[7] If the trial court intended by its references to the Norris-LaGuardia and Wagner Acts to indicate any such labor exception, which we doubt, it was in error. Apparently what the court meant is more clearly expressed by its statement, set out in the last paragraph of note 2 above, that the charged acts would be criminal only if they were used to obtain property for the personal benefit of the union or its agent, in this case Green. This latter holding is also erroneous. The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out-of-state truckers by threats and violence. The Hobbs Act was meant to stop just such conduct. And extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property.

It is also stated in the opinion below that to interpret the Act as covering the activity charged would "extend the jurisdiction of the Court, and the power of Congress beyond their Constitutional limits." 135 F. Supp., at 162. The same language is in the order. Since in our view the legislation is directed at the protection of interstate commerce against injury from extortion, the court's holding is clearly wrong. We said in the *Local 807* case

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[6] The Hobbs Act was enacted prior to the Labor Management Relations Act of 1947.

[7] Cf. *United States* v. *Ryan,* 350 U. S. 299; *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656; *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740; *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240; *United States* v. *Kemble,* 198 F. 2d 889.

that racketeering affecting interstate commerce was within federal legislative control. 315 U. S., at 536. Cf. *Cleveland* v. *United States,* 329 U. S. 14, 19; *Mitchell* v. *Vollmer & Co.,* 349 U. S. 427.

On this appeal the record does not contain the evidence upon which the court acted. The indictment charges interference with commerce by extortion in the words of the Act's definition of that crime. We rule only on the allegations of the indictment and hold that the acts charged against appellees fall within the terms of the Act. The order in arrest of judgment is reversed and the cause remanded to the District Court.

It is so ordered.

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

The Government has no right to a direct appeal to this Court under 18 U. S. C. § 3731 if the District Court judgment "was not placed *solely* upon the invalidity or construction of the statute." *United States* v. *Wayne Pump Co.,* 317 U. S. 200, 208. (Italics added.) The presence of any additional and independent ground for the District Court's order is fatal to direct review here. I am convinced that there is such an independent ground for the District Court's judgment in this case. It is evident from the district judge's memorandum opinion (135 F. Supp. 162) that his order granting the motions in arrest of judgment rested at least in part upon the insufficiency of the evidence to support the conviction. He considered facts not alleged in the indictment, *e. g.,* that contractors in the community had customarily agreed to the employment of labor which allegedly was demanded by appellees, and that the trouble on the particular job was caused by a disagreement between the contractor and labor, not by an attempt to extort. I would therefore dismiss the Government's appeal.

ULLMANN *v.* UNITED STATES.

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

No. 58. Argued December 6, 1955.—Decided March 26, 1956.

Pursuant to subpoena, petitioner appeared before a federal grand jury which was investigating attempts to endanger the national security by espionage and conspiracy to commit espionage. Invoking the privilege against self-incrimination, he refused to answer questions relating to his knowledge of such activities, to his and other persons' participation in such activities, and to his and other persons' membership in the Communist Party. Under the Immunity Act of 1954, 18 U. S. C. § 2486 (c), the United States Attorney, with the approval of the Attorney General, applied to a Federal District Court for an order requiring petitioner to testify before the grand jury. The Court issued such an order; petitioner persisted in his refusal to testify; and he was convicted of contempt and sentenced to imprisonment. *Held:* The Act is constitutional and the conviction is sustained. Pp. 423–439.

1. The Act does not violate the Fifth Amendment, because the immunity which it provides against prosecutions, penalties and forfeitures is sufficiently broad to displace the protection afforded by the privilege against self-incrimination. Pp. 429–431.

2. Assuming that the statutory requirements are met, subsection (c) does not give a Federal District Court discretion to deny an application for an order requiring a witness to answer relevant questions put by a grand jury, and therefore it does not impose on the Court a non-judicial function. Pp. 431–434.

3. The Act provides immunity from state prosecution for crime; and, in doing so, it does not exceed the constitutional power of Congress. Pp. 434–436.

4. *Brown* v. *Walker,* 161 U. S. 591, reaffirmed and followed. Pp. 436–439.

221 F. 2d 760, affirmed.

Leonard B. Boudin argued the cause for petitioner. With him on the brief was *Victor Rabinowitz.*

Charles F. Barber argued the cause for the United States. On the brief were *Solicitor General Sobeloff,*

Assistant Attorney General Tompkins, Oscar H. Davis, Harold D. Koffsky, B. Franklin Taylor, Jr. and *John H. Davitt.*

Osmond K. Fraenkel filed a brief for the National Lawyers Guild, as *amicus curiae,* supporting petitioner.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On November 10, 1954, the United States Attorney for the Southern District of New York filed an application under the Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. (Supp. II) § 3486, for an order requiring petitioner to testify before a grand jury. The Immunity Act, in its pertinent portions, provides:

> "(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212 (a)(27), (28), (29) or 241 (a)(6), (7) or 313 (a) of the Immigration and Nationality Act (66 Stat. 182–186; 204–206; 240–241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the pro-

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visions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

"(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

In his application the United States Attorney alleged the following facts. On November 3, 1954, petitioner, pursuant to subpoena, appeared before a duly constituted grand jury of the Southern District of New York which was investigating matters concerned with attempts to endanger the national security by espionage and conspiracy to commit espionage. The grand jury asked him a series of questions relating to his knowledge of such activities, to his and other persons' participation in such activities, and to his and other persons' membership in the Communist Party. Petitioner, invoking the privilege against self-incrimination, refused to answer the questions. The United States Attorney also asserted that he deemed the testimony necessary to the public interest of the United States, and annexed a letter from the Attorney General of the United States approving the applica-

tion. The United States Attorney, in compliance with a request of the district judge, filed an affidavit asserting his own good faith in filing the application.

Petitioner, contesting the application, attacked the constitutionality of the Act and urged that, if the immunity statute be held constitutional, the District Court should, in the exercise of its discretion, deny the application. He filed an affidavit setting forth in detail experiences with agents of the Department of Justice and congressional investigating committees and other information in support of his plea for an exercise of discretion by the District Court. The Government in reply filed affidavits denying some of the allegations set forth in petitioner's affidavit.

On January 31, 1955, the District Court sustained the constitutionality of the statute. 128 F. Supp. 617. Its order, dated February 8, 1955, instructed petitioner "to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury . . . ." Petitioner appealed from this order, but the Court of Appeals for the Second Circuit dismissed the appeal on the authority of *Cobbledick* v. *United States,* 309 U. S. 323.

Petitioner again refused to answer the questions which the District Court had ordered him to answer. He was then brought before the District Court and, on stipulation that he had refused to obey the order of the court of February 8, he was convicted of contempt and sentenced to six months' imprisonment unless he should purge himself of the contempt. Petitioner appealed to the Court of Appeals for the Second Circuit which affirmed the judgment of the District Court. 221 F. 2d 760. The importance of the questions at issue, in view of the differences between the legislation sustained in *Brown* v. *Walker,* 161 U. S. 591, and the Act under review, led us to bring the case here. 349 U. S. 951.

Four major questions are raised by this appeal: Is the immunity provided by the Act sufficiently broad to displace the protection afforded by the privilege against self-incrimination? Assuming that the statutory requirements are met, does the Act give the district judge discretion to deny an application for an order requiring a witness to answer relevant questions put by the grand jury, and, if so, is the court thereby required to exercise a function that is not an exercise of "judicial Power"? Did Congress provide immunity from state prosecution for crime, and, if so, is it empowered to do so? Does the Fifth Amendment prohibit compulsion of what would otherwise be self-incriminating testimony no matter what the scope of the immunity statute?

It is relevant to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. This command of the Fifth Amendment ("nor shall any person . . . be compelled in any criminal case to be a witness against himself . . . .") registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." [1] Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.[2] Such a view does scant honor

[1] Griswold, The Fifth Amendment Today (1955), 7.

[2] Father John Fearon, O. P., has addressed himself to this misapprehension: "What is to be said of the opinion that an innocent man has an obligation in conscience not to have recourse to the Fifth Amendment? Since the natural law does not provide explicitly for this circumstance moral obligation has to be determined

to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naive or disregardful of the interests of justice. The difference between them and those who deem the privilege an obstruction to due inquiry has been appropriately indicated by Chief Judge Magruder:

> "Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day. See VIII Wigmore on Evidence (3d ed. 1940) § 2250 et seq.; Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949). They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application. Hoffman v. United States, . . . 341 U. S. 479, 486 . . . . If it be thought that the privilege is outmoded in the conditions of this modern

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by civil law. Actually the determination of civil law is quite clear: the innocent and guilty alike have a right of recourse to the Fifth Amendment. And if the innocent man has a clearly defined right to such recourse it is inconceivable that he could simultaneously have a duty not to have recourse, since rights and duties are correlative. Nor can it be urged that non-recourse is a duty of piety rather than justice. If such an opinion were binding and all innocent men waived their rights to the protection of the Fifth Amendment, the purpose of the law would be defeated and the common welfare of the nation would suffer rather than prosper." Congressional Investigations and Moral Theology, The Commonweal, Feb. 19, 1954, 497, 499.

> age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Maffie* v. *United States,* 209 F. 2d 225, 227.

Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.

No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.

As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restrictions of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor.[3] To view a particular

[3] "If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals—not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government, depends upon our fidelity to every one of those inter-dependent parts of that immortal charter of orderly freedom, the Constitution of the United States." Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Assn., 188, 216 (1920).

provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

It is in this spirit of strict, not lax, observance of the constitutional protection of the individual that we approach the claims made by petitioner in this case. The attack on the Immunity Act as violating the Fifth Amendment is not a new one. Sixty years ago this Court considered, in *Brown* v. *Walker,* 161 U. S. 591, the constitutionality of a similar Act, the Act of February 11, 1893, 27 Stat. 443.[4] In that case, Brown, auditor for a railroad company, had been subpoenaed to testify before a grand jury which was investigating charges that officers and agents of the company had violated the Interstate Commerce Act. Invoking the privilege against self-incrimination, he refused to answer certain questions concerning the operations and the rebate policy of the railroad. On an order to show cause before the United States District Court for the Western District of Pennsylvania, he was adjudged in contempt. His petition for a writ of habeas corpus to the Circuit Court for the Western Dis-

[4] ". . . no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission . . . or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce,' . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena . . . or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

trict of Pennsylvania was dismissed. Petitioner appealed to this Court, urging that the 1893 immunity statute was unconstitutional.

The Court considered and rejected petitioner's arguments, holding that a statute which compelled testimony but secured the witness against a criminal prosecution which might be aided directly or indirectly by his disclosures did not violate the Fifth Amendment's privilege against self-incrimination and that the 1893 statute did provide such immunity. "While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer . . . ." 161 U. S., at 610.[5]

Petitioner, however, attempts to distinguish *Brown* v. *Walker*. He argues that this case is different from *Brown* v. *Walker* because the impact of the disabilities imposed by federal and state authorities and the public in general—such as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium—is so oppressive that the statute does not give him true immunity. This, he alleges, is significantly different from the impact of testifying on the auditor in *Brown* v. *Walker,* who could the next day resume his job with reputation unaffected.[6] But, as this Court has often held,

[5] Shiras, J., joined by Gray and White, JJ., and Field, J., dissented.

[6] It is true that the Court in *Brown* v. *Walker* stated: ". . . it is entirely clear that he was not the chief or even a substantial offender against the law, and that his privilege was claimed for the purpose of shielding the railway or its officers from answering a charge of having violated its provisions. To say that, notwithstanding his immunity from punishment, he would incur personal odium and disgrace from answering these questions, seems too much like an abuse of language to be worthy of serious consideration." 161 U. S.,

the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege: "The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply." *Hale* v. *Henkel,* 201 U. S. 43, 67. Here, since the Immunity Act protects a witness who is compelled to answer to the extent of his constitutional immunity, he has of course, when a particular sanction is sought to be imposed against him, the right to claim that it is criminal in nature.

Again, the petitioner seeks to distinguish this case from *Brown* v. *Walker* by claiming that under the Immunity Act of 1954 the district judge to whom the United States Attorney must apply for an order instructing him to testify has discretion in granting the order and thus has discretion in granting the immunity which automatically follows from the order. Petitioner cites the language of the statute, the legislative history, and miscellaneous other authorities in support of his construction. The Government contends that the court has no discretion to determine whether the public interest would best be served by exchanging immunity from prosecution for testimony, that its only function is to order a witness to testify if it determines that the case is within the framework of the statute.

We are concerned here only with § (c) and therefore need not pass on this question with respect to §§ (a) and

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at 609–610. The Court, however, concluded: "But, even if this were true, under the authorities above cited, he would still be compelled to answer, if the facts sought to be elucidated were material to the issue." *Id.,* at 610. For a fuller exposition, see *id.,* at 605–606.

(b) of the Act.[7] A fair reading of § (c) does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not

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[7] "(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or .endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

"(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

"(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

"that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

"(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United

warrant it. We agree with District Judge Weinfeld's interpretation of this section: [8]

> "The most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires. Especially is this so where the construction contended for purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers. The Supreme Court has repeatedly warned '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.' [9] Indeed, the Court has stated that words may be strained 'in the candid service of avoiding a serious constitutional doubt.' [10] Here there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy [11] to avoid the constitutional question advanced by the witness. Indeed, to reach the constitutional issue would require straining of language. In such circumstances the court's duty is plainly to avoid the constitutional question." 128 F. Supp., at 627–628.

States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court."

[8] The footnotes in the district judge's opinion have been renumbered.

[9] "Crowell v. Benson, 285 U. S. 22, 62 . . . United States v. Rumely, 345 U. S. 41, 45 . . . United States v. C. I. O., 335 U. S. 106 . . . Brandeis, J. concurring in Ashwander v. T. V. A., 297 U. S. 288, 341, 348 . . . and cases cited."

[10] "United States v. Rumely, 345 U. S. 41, 47 . . . ."

[11] "Cf. Shapiro v. United States, 335 U. S. 1, 31 . . . ."

Since the Court's duty under § (c) is only to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney, and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of "judicial Power." *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447.

Petitioner further argues that the immunity is not constitutionally sufficient so long as a witness is subject to the very real possibility of state prosecution. He urges that the statute does not, and constitutionally could not, grant such immunity. The immunity portion of the statute contains two parts. The first prohibits prosecutions and is worded virtually in the terms of the 1893 Act. The second makes explicit that the compelled testimony shall not be used against the witness in any proceeding in any court. Such a clause was construed in *Adams* v. *Maryland,* 347 U. S. 179, to apply to state courts. In *Brown* v. *Walker,* it was urged that the prohibition against prosecution did not grant protection against prosecution in the state courts. First finding that Congress could constitutionally provide such immunity, the Court then interpreted the statute:

> "The act in question contains no suggestion that it is to be applied only to the Federal courts. It declares broadly that 'no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission . . . on the ground . . . that the testimony . . . required of him may tend to criminate him,' etc. 'But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify,' etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might

possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had." 161 U. S., at 607–608.

The Report of the Committee on the Judiciary of the House of Representatives supports the broad interpretation of the Act before us:

"Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill. The language of the amendment . . . is sufficiently broad to ban a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so. In addition, the amendment recommended provides the additional protection—as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.

"By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved." H. R. Rep. No. 2606, 83d Cong., 2d Sess. 7.

Petitioner questions the constitutional power of Congress to grant immunity from state prosecution. Congressional abolition of state power to punish crimes committed in violation of state law presents a more drastic exercise of congressional power than that which we considered in *Adams*. In that case, only the use of the compelled testimony, not prosecution itself, was pro-

hibited. Here the State is forbidden to prosecute. But it cannot be contested that Congress has power to provide for national defense and the complementary power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U. S. Const., Art. I, § 8, cl. 18. The Immunity Act is concerned with the national security. It reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution. We cannot say that Congress' paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of state power for the more effective exercise of conceded federal power. We have already, in the name of the Commerce Clause, upheld a similar restriction on state court jurisdiction, *Brown* v. *Walker,* 161 U. S., at 606–607, and we can find no distinction between the reach of congressional power with respect to commerce and its power with respect to national security. See also *Hines* v. *Davidowitz,* 312 U. S. 52.[12]

Petitioner also urges that if *Brown* v. *Walker* is found nondistinguishable and controlling, then that case should be reconsidered and overruled. He also urges upon us a "return" to a literal reading of the Fifth Amendment. *Brown* v. *Walker* was the second case to deal with an immunity statute. Four years previously, in *Counselman* v. *Hitchcock,* 142 U. S. 547, a unanimous Court had found

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[12] We need not consider at this time petitioner's claim that immunity is not complete and the statute unconstitutional because he can be prosecuted later for participation in a continuing conspiracy. Congress has the power to provide, and has provided, that immunity from prosecution which the Constitution requires. See *Heike* v. *United States,* 227 U. S. 131, 142.

constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony. It was with this background that the 1893 statute, providing complete immunity from prosecution, was passed and that *Brown* v. *Walker* was argued and decided. As in *Counselman,* appellant's numerous arguments were presented by James C. Carter, widely acknowledged as the leader of the American bar.[13] The Court was closely divided in upholding the statute, and the opinions reflect the thoroughness with which the issues were considered. Since that time the Court's holding in *Brown* v. *Walker* has never been challenged; the case and the doctrine it announced have consistently and

[13] He urged that the statute left the witness in a worse condition because it did not abrogate the crime for which he was given immunity; that the constitutional safeguard goes toward relieving the witness from the danger of an accusation being made against him while the statutory immunity forces him to supply evidence leading to an accusation and provides only a means for defense; that the statute puts a heavy burden on petitioner, if he is indicted, to prove that he had testified concerning the matter for which he was indicted; that a citizen is entitled to the very thing secured to him by the constitutional safeguards and not something which will probably answer the same purpose; that the statute subjects him to the infamy and disgrace from which he was protected by the constitutional safeguard; that the statute did not protect him from prosecution for a state crime; that even if it were so interpreted, Congress had no power to grant such protection; that the immunity granted was too narrow since it only extended to matters concerning which he was called to testify and not to all matters related to the testimony given; that to be able to claim the privilege the witness would virtually have to reveal his crime in order that the court could see that the statute failed to protect him; and finally that the statute was an attempt to exercise the power of pardon which was a power not delegated to Congress.

without question been treated as definitive by this Court, in opinions written, among others, by Holmes and Brandeis, JJ. See, *e. g., McCarthy* v. *Arndstein,* 266 U. S. 34, 42; *Heike* v. *United States,* 227 U. S. 131, 142. The 1893 statute has become part of our constitutional fabric and has been included "in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government." *Shapiro* v. *United States,* 335 U. S. 1, 6. For a partial list of these statutes, see, *id.,* at 6–7, n. 4. Moreover, the States, with one exception—a case decided prior to *Brown* v. *Walker*—have, under their own constitutions, enunciated the same doctrine, 8 Wigmore, Evidence (3d ed.), § 2281, and have passed numerous statutes compelling testimony in exchange for immunity in the form either of complete amnesty or of prohibition of the use of the compelled testimony. For a list of such statutes, see 8 Wigmore, Evidence (3d ed.), § 2281, n. 11 (pp. 478–501) and Pocket Supplement thereto, § 2281, n. 11 (pp. 147–157).

We are not dealing here with one of the vague, undefinable, admonitory provisions of the Constitution whose scope is inevitably addressed to changing circumstances. The privilege against self-incrimination is a specific provision of which it is peculiarly true that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349. For the history of the privilege establishes not only that it is not to be interpreted literally,[14] but also that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of "penalties

[14] ". . . the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States,* 233 U. S. 604, 610.

affixed to the criminal acts . . . ." *Boyd* v. *United States,* 116 U. S. 616, 634. We leave *Boyd* v. *United States* unqualified, as it was left unqualified in *Brown* v. *Walker.* Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases. We reaffirm *Brown* v. *Walker,* and in so doing we need not repeat the answers given by that case to the other points raised by petitioner.[15]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE REED concurs in the opinion and judgment of the Court except as to the statement that no consti-

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[15] We do not discuss petitioner's argument, relying on the First Amendment, that inquiry into his political membership and associations is unconstitutional. Petitioner contends that some of the questions which he was asked are objectionable because they require testimony that is protected by the implications of the First Amendment. But it is every man's duty to give testimony before a duly constituted tribunal unless he invokes some valid legal exemption in withholding it. Although petitioner made the First Amendment argument when the United States Attorney applied, under the Immunity Act, for an order requiring him to testify, when he was cited for contempt he urged only "all of the grounds we urged before Judge Weinfeld in opposition to the statute, in support of our contention that the statute was unconstitutional. We will rest on that and proceed on that basis in the Appellate Courts." Petitioner did not make any objection to the questions other than the assertion of the unconstitutionality of the Immunity Act. It should also be noted that when petitioner—who, the record shows, was an experienced witness, had been advised by counsel especially experienced in this field, and was desirous of making this a test case—refused to answer the questions propounded before the grand jury the second time, he did not claim any privilege under the First Amendment. His counsel, by way of dispensing with the reading of the minutes of what took place before the grand jury, stated that "the reason given for his refusal was that he feared the answers might incriminate him and he pleaded his privilege under the Fifth Amendment of the Constitution."

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tutional guarantee enjoys preference. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115; *Thomas* v. *Collins,* 323 U. S. 516, 530; cf. *Kovacs* v. *Cooper,* 336 U. S. 77, 88.

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

I would reverse the judgment of conviction. I would base the reversal on *Boyd* v. *United States,* 116 U. S. 616, or, in the alternative, I would overrule the five-to-four decision of *Brown* v. *Walker,* 161 U. S. 591, and adopt the view of the minority in that case that the right of silence created by the Fifth Amendment is beyond the reach of Congress.

First, as to the *Boyd* case. There are numerous disabilities created by federal law that attach to a person who is a Communist. These disabilities include ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment as a longshoreman—to mention only a few.[1] These disabilities imposed by federal law are forfeitures within the meaning of our cases and as much protected by the Fifth

[1] See 64 Stat. 992, 50 U. S. C. § 784, as amended, 68 Stat. 777, 50 U. S. C. (Supp. II) § 784 (prohibition of employment in the Federal Government and in defense facilities); 64 Stat. 993, 50 U. S. C. § 785 (ineligibility for a passport); 64 Stat. 1019, 50 U. S. C. §§ 811–826 (the possibility of internment); 40 Stat. 220, as amended, 64 Stat. 427, 50 U. S. C. § 191; 33 CFR, 1955 Cum. Supp., §§ 125.01, 125.29 (possibility of loss of employment as a longshoreman). And see 68 Stat. 776, 50 U. S. C. (Supp. II) § 843. Moreover, under the Subversive Activities Control Act, 64 Stat. 987, 50 U. S. C. § 781, discussed hereafter, it is a crime for a person who is a member of a Communist organization registered under the Act to engage in certain activity, *e. g.,* to hold office or employment with any labor organization, to work for the Government or have employment in any defense facility, § 5 (a)(1), or to apply for or use a passport § 6 (a).

Amendment as criminal prosecution itself. But there is no indication that the Immunity Act, 68 Stat. 745, 18 U. S. C. (Supp. II) § 3486, grants protection against those disabilities. The majority will not say that it does. I think, indeed, that it must be read as granting only partial, not complete, immunity for the matter disclosed under compulsion. Yet, as the Court held in *Counselman* v. *Hitchcock,* 142 U. S. 547, 586, an immunity statute to be valid must "supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . ."

Boyd v. *United States, supra,* involved a proceeding to establish a forfeiture of goods alleged to have been fraudulently imported without payment of duties. The claimants resisted an order requiring the production of an invoice to be used against them in the forfeiture proceedings. The Court in an opinion by Mr. Justice Bradley sustained the defense of the Fifth Amendment. The Court said, "A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture." 116 U. S., at 638. And see *Lees* v. *United States,* 150 U. S. 476. The contrary holding was deemed hostile to the spirit of our institutions:

> ". . . any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U. S., at 631–632.

The forfeiture of property on compelled testimony is no more abhorrent than the forfeiture of rights of citizenship. Any forfeiture of rights as a result of compelled testimony is at war with the Fifth Amendment.

The Court apparently distinguishes the *Boyd* case on the ground that the forfeiture of property was a penalty affixed to a criminal act. The loss of a job and the ineligibility for a passport are also penalties affixed to a criminal act. For the case of *Dennis* v. *United States,* 341 U. S. 494, makes plain that membership in the Communist Party is a crucial link of evidence for conviction under the Smith Act, 54 Stat. 671, as amended, 62 Stat. 808, 18 U. S. C. § 2385. And see *Blau* v. *United States,* 340 U. S. 159. When a man loses a job because he is a Communist, there is as much a penalty suffered as when an importer loses property because he is a tax evader. When a man loses his right to a passport because he is a Communist, there is as much a penalty suffered as when property is lost for violation of the revenue laws. If there was a penalty suffered in the *Boyd* case, there are penalties suffered here. Both are hitched to criminal acts. And the Constitution places the property rights involved in the *Boyd* case no higher than the rights of citizenship involved here.

The Court may mean that if disqualification for government employment or ineligibility for a passport is a forfeiture within the meaning of the *Boyd* case, Congress has lifted these disabilities in exchange for the witness' testimony. Congress, I think, will be surprised to hear this. There is nothing in the legislative history that would suggest that Congress was willing to pay any such price for the testimony. If the disabilities which attach under existing law are forfeitures, the Court should strike down the Act. If Congress chooses to enact a new Immunity Act broad enough to protect against all forfeitures, it is free to do so. The Court seems to commit

Congress to a policy that there is no indication Congress favors.

We should apply the principle of the *Boyd* case to the present one and hold that since there is no protection in the Immunity Act against loss of rights of citizenship, the immunity granted is less than the protection afforded by the Constitution. Certainly personal freedom has at least as much constitutional dignity as property.

Second, as to *Brown* v. *Walker*. The difficulty I have with that decision and with the majority of the Court in the present case is that they add an important qualification to the Fifth Amendment. The guarantee is that no person "shall be compelled in any criminal case to be a witness against himself." The majority does not enforce that guarantee as written but qualifies it; and the qualification apparently reads, "but only if criminal conviction might result." Wisely or not, the Fifth Amendment protects against the compulsory self-accusation of crime without exception or qualification. In *Counselman* v. *Hitchcock, supra,* at 562, Mr. Justice Blatchford said, "The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

The "mischief" to be prevented falls under at least three heads.

(1) One "mischief" is not only the risk of conviction but the risk of prosecution. Mr. Justice Shiras, one of the four dissenters in *Brown* v. *Walker*, alluded to this difficulty when he declared that the immunity statute involved in that case was unconstitutional:

> ". . . all that can be said is, that the witness is *not* protected, by the provision in question, from being *prosecuted,* but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition,

then, is that he has been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea." 161 U. S., at 621.

The risk of prosecution is not a risk which the wise take lightly. As experienced a judge as Learned Hand once said, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death." See Frank, Courts on Trial (1949), 40. A part of the dread in a case such as this is the chain of events that may be put in motion once disclosure is made. The truth is, I think, that there is no control left, once the right of secrecy is broken. For the statute protects the accused only on account of the "transaction, matter, or thing" concerning which he is compelled to testify and bars the use as evidence of the "testimony so compelled." The forced disclosure may open up vast new vistas for the prosecutor with leads to numerous accusations not within the purview of the question and answer. What related offenses may be disclosed by leads furnished by the confession? How remote need the offense be before the immunity ceases to protect it? How much litigation will it take to determine it? What will be the reaction of the highest court when the facts of the case reach it?

It is, for example, a crime for a person who is a member of a Communist organization registered under the Subversive Activities Control Act, 64 Stat. 987, 50 U. S. C. § 781, to be employed by the United States, to be employed in any defense facility, to hold office or employment with any labor organization, § 5 (a)(1), or to apply for a passport or to use a passport. § 6 (a). The crime under that Act is the application for a passport, the use of a passport, or employment by one of the named agencies, as the case may be. Are those crimes included within

the "transaction, matter, or thing" protected by the Immunity Act?

The Taft-Hartley Act, 61 Stat. 146, 29 U. S. C. § 159 (h), requires officers of labor organizations to file non-Communist affidavits as a condition to the exercise by the National Labor Relations Board of its power to make investigations or to issue complaints. A witness before a grand jury or congressional committee is compelled under the force of the Immunity Act to testify. He testifies that he is not a member of the Communist Party. He then files an affidavit under the Taft-Hartley Act to that effect. May he be prosecuted for filing a false affidavit?

These are real and dread uncertainties that the Immunity Act does not remove. They emphasize that one protective function of the Fifth Amendment is at once removed when the guarantee against self-incrimination is qualified in the manner it is today.

The Court leaves all those uncertainties to another day, saying that the immunity granted by Congress will extend to its constitutional limits and that those constitutional limits will be determined case by case in future litigation. That means that no one knows what the limits are. The Court will not say. Only litigation on a distant day can determine it.

The concession of the Court underlines my point. It shows that the privilege of silence is exchanged for a partial, undefined, vague immunity. It means that Congress has granted far less than it has taken away.

(2) The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The evil to be guarded against was partly self-accusation

under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved. So too was his right to freedom of expression guaranteed by the First Amendment.[2] The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself.

A long history and a deep sentiment lay behind this decision. Some of those who came to these shores were Puritans who had known the hated oath *ex officio* used both by the Star Chamber and the High Commission. See Maguire, Attack of the Common Lawyers on the Oath *Ex Officio* as Administered in the Ecclesiastical Courts in England, Essays in History and Political Theory (1936), c. VII. They had known the great rebellion of Lilburn, Cartwright and others against those instruments of oppression. Cartwright had refused to take the oath *ex officio* before the High Commission on the grounds that "hee thought he was not bound by the lawes of God so to doe." Pearson, Thomas Cartwright and Elizabethan Puritanism 1535–1603 (1925), 318. Lilburn marshalled many arguments against the oath *ex officio,* one of them being the sanctity of conscience and the dignity of man before God:

> "as for that Oath that was put upon me, I did refuse to take it as a sinful and unlawful oath, and by the strength of my God enabling me, I will never take it, though I be pulled in pieces by wild horses, as

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[2] The impact of public identification on First Amendment freedoms was acknowledged by Chief Justice Vinson in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402, where he said: "Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."

> the antient Christians were by the bloody tyrants in the Primitive Church; neither shall I think that man a faithful subject of Christ's kingdom, that shall at any time hereafter take it, seeing the wickedness of it hath been so apparently laid open by so many, for the refusal whereof many do suffer cruel persecution to this day." The Trial of Lilburn and Wharton, 3 How. St. Tr. 1315, 1332.

The literature of the Levellers, of whom Lilburn was a leader, abounds in this attitude. In 1648, there was published a Declaration in the form of a petition, item 12 of which reads:

> "That all Statutes for all kinds of Oaths, whether in Corporations, Cities, or other, which insnare conscientious people, as also other Statutes, injoyning all to hear the Book of Common Prayer, be forthwith repealed and nulled, and that nothing be imposed upon the consciences of any to compel them to sin against their own consciences." Haller & Davies, The Leveller Tracts 1647–1653 (1944), 112.

In 1653, Lilburn published The Just Defence in which he wrote:

> "Another fundamental right I then contended for, was, that no mans conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Haller & Davies, *id.*, at 454.

These are important declarations, as they throw light on the meaning of "compelled" as used in the Fifth Amendment.

The amending process that brought the Fifth Amendment into the Constitution is of little aid in our problem of interpretation. But there are indications in the debates on the Constitution that the evil to be remedied was the use of torture to exact confessions. See, *e. g.*,

Virginia Debates (2d ed. 1805), 221, 320–321; 2 Elliot's Debates (2d ed. 1876), 111. It was, indeed, the condemnation of torture to exact confessions that was written into the early law of the American Colonies. Article 45 of the Massachusetts Body of Liberties of 1641 provided in part, "No man shall be forced by Torture to confesse any Crime against himselfe nor any other . . . ." Connecticut adopted a similar provision. Laws of Connecticut Colony (1865 ed.), 65. Virginia soon followed suit: ". . . noe law can compell a man to sweare against himselfe in any matter wherein he is lyable to corporall punishment." Hening, Statutes at Large, Vol. II, 422.

The compulsion outlawed was moral compulsion as well as physical compulsion. An episode in the administration of Governor William Bradford of the Plymouth Plantation illustrates the point. He sought advice from his ministers asking, "How farr a magistrate may extracte a confession from a delinquente, to acuse him selfe of a capitall crime . . . ." The three ministers—Ralph Partrich, John Reynor, and Charles Chancy—were unanimous in concluding that the oath was against both the laws of God and the laws of man. Partrich's answer is typical:

> "[The magistrate] may not extracte a confession of a capitall crime from a suspected person by any violent means, whether it be by an oath imposed, or by any punishmente inflicted or threatened to be inflicted." Bradford, History of Plymouth Plantation, Mass. Hist. Soc. Coll. Ser. 4, Vol. III, 390–391.

And see Griswold, The Fifth Amendment Today (1955), 4; Morgan, The Privilege Against Self Incrimination, 34 Minn. L. Rev. 1, 22; Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763, 769.

The Court, by forgetting that history, robs the Fifth Amendment of one of the great purposes it was designed

to serve. To repeat, the Fifth Amendment was written in part to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will. The Fifth Amendment protects the conscience and the dignity of the individual, as well as his safety and security, against the compulsion of government.[3]

(3) This right of silence, this right of the accused to stand mute serves another high purpose. Mr. Justice Field, one of the four dissenters in *Brown* v. *Walker,* stated that it is the aim of the Fifth Amendment to protect the accused from all compulsory testimony "which would expose him to infamy and disgrace," as well as that which might lead to a criminal conviction. 161 U. S., at 631. One of the most powerful opinions in the books maintaining that thesis is by Judge Peter S. Grosscup in *United States* v. *James,* 60 F. 257, involving the same Immunity Act as the one involved in *Brown* v. *Walker.* Judge Grosscup reviewed the history of the reign of intolerance that once ruled England, the contests between Church and State, and the cruelties of the old legal procedures. Judge Grosscup said concerning the aim of the Framers in drafting the Fifth Amendment (*id.,* at 264):

> "Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties

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[3] Dean Erwin N. Griswold of Harvard recently wrote:

"Where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone." The Fifth Amendment Today, *supra,* 8–9.

> and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? Then, too, if the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure, that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecutor? I cannot think so."

Mr. Justice Field and Judge Grosscup were on strong historical ground. The Fifth Amendment was designed to protect the accused against infamy as well as against prosecution. A recent analysis by Professor Mitchell Franklin of Tulane illuminates the point. See The *Encyclopédiste* Origin and Meaning of the Fifth Amendment, 15 Lawyers Guild Rev. 41. He shows how the Italian jurist, Beccaria, and his French and English followers, influenced American thought in the critical years following our Revolution. The history of infamy as a punishment was notorious. Luther had inveighed against excommunication. The Massachusetts Body of Liberties of 1641 had provided in Article 60: "No church censure shall degrad or depose any man from any Civill

dignitie, office, or Authoritie he shall have in the Commonwealth." Loss of office, loss of dignity, loss of face were feudal forms of punishment. Infamy was historically considered to be punishment as effective as fine and imprisonment.[4]

The Beccarian attitude toward infamy was a part of the background of the Fifth Amendment. The concept of infamy was explicitly written into it. We need not guess as to that. For the first Clause of the Fifth Amendment contains the concept *in haec verba:* "No person shall be held to answer for a capital, or otherwise *infamous* crime,[5] unless on a presentment or indictment

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[4] Infamy as a sanction in Roman Law is traced in Tatarczuk, Infamy of Law, Canon Law Studies No. 357, The Catholic University of America (1954), 1–13. The penalties that Roman Law attached to infamy are familiar: exclusion from the army, from all public service, and from the exercise of certain public rights. *Id.*, at 10.

[5] The cases arising under the first Clause of the Fifth Amendment recognize that what may be considered an "infamous crime" within the meaning of that Clause may be affected by changes of public opinion from one age to another. See *Ex parte Wilson,* 114 U. S. 417, 427; *Mackin* v. *United States,* 117 U. S. 348, 351; *United States* v. *Moreland,* 258 U. S. 433, 441, 451 (dissenting opinion by Brandeis, J.). In *United States* v. *Waddell,* 112 U. S. 76, the Court refused to decide the "very important" question whether a crime was made "infamous" when upon conviction the defendant became "ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States." Justice Miller said: "When we bring this language, which is not the sentence of the court, but an indelible disgrace affixed to the party convicted, by the declaration of the law itself, into direct connection with the language of the fifth article of amendment of the Constitution . . . there does arise a very serious question whether *this* crime is not made an infamous one by the language of the statute, and cannot, therefore, be prosecuted by information." *Id.,* at 82. The Court did not decide the question because it had not been argued nor presented to the lower courts. And see *Ex parte Wilson, supra,* at 426.

The Fifth and Sixth Amendments place the grand and petit juries as barriers between the government and the individual. The provi-

of a Grand Jury . . . ." (Italics added.) And the third Clause, the one we are concerned with here—"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."—also reflects the revulsion of society at infamy imposed by the State. Beccaria, whose works were well known here [6] and who was particularly well known to Jefferson,[7] was the main voice against the use of infamy as punishment. The curse of infamy, he showed, results from public opinion. Oppression occurs when infamy is imposed on the citizen by the State. The French jurist, Brissot de Warville, wrote in support of Beccaria's position, "It is in the power of the mores rather than in the hands of the legislator that this terrible weapon of infamy rests, this type of civil excommunication, which deprives the victim of all consideration, which severs all the ties which bind him to his fellow citizens, which isolates him in the midst of

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sions for those two juries help emphasize the function played by the Bill of Attainder clauses of the Constitution. See Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. The guarantee of jury trial and the prohibition of Bills of Attainder place beyond the pale the imposition of infamy or outlawry by either the Executive or the Congress. The penalties proscribed as Bills of Attainder extend to disqualification for government employment and outlawry from the professions. See *United States* v. *Lovett*, 328 U. S. 303; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

[6] Beccaria seems to have been principally introduced to America by Voltaire. See Barr, Voltaire in America (1941), 23–24. Barr states, "Beccaria's *Essay on Crimes and Punishment* with its famous commentary by Voltaire was known in America immediately after its first appearance in France and was the first of Voltaire's works to be published in America. It was popular in lending libraries and as a quickly sold item in bookstores, because of general interest in the formation of a new social order. A separate monograph would be necessary to trace the influence of this epoch-making tract." *Id.*, at 119.

[7] See Chinard, The Commonplace Book of Thomas Jefferson (1926), 298 *et seq.*

society. The purer and more untouched the customs are, the greater the force of infamy." I Theorie des Loix Criminelles (1781) 188. As de Pastoret said, "Infamy, being a result of opinion, exists independently of the legislator; but he can employ it adroitly to make of it a salutary punishment." [8] Des Loix Pénales (1790), Pt. 2, 121.

It was in this tradition that Lord Chief Justice Treby ruled in 1696 that ". . . no man is bound to answer any questions that will subject him to a penalty, or to infamy." *Trial of Freind,* 13 How. St. Tr. 1, 17.

There is great infamy involved in the present case, apart from the loss of rights of citizenship under federal law which I have already mentioned. The disclosure that a person is a Communist practically excommunicates him from society. School boards will not hire him. See *Adler* v. *Board of Education,* 342 U. S. 485. A lawyer risks exclusion from the bar (*In re Anastaplo,* 3 Ill. 2d 471, 121 N. E. 2d 826); a doctor, the revocation of his license to practice (cf. *Barsky* v. *Board of Regents,* 347 U. S. 442). If an actor, he is on a black list. (See Horowitz, Loyalty Tests for Employment in the Motion Picture Industry, 6 Stan. L. Rev. 438.) And he will be able to find no employment in our society except at the

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[8] de Pastoret, *supra,* 125–126, wrote:

"Penalties which, in France, produce infamy in law are (in addition to corporal or afflictive penalties), *la claie,** the iron collar or the pillory, civil death, censure, condemnation of memory, condemnation to be led around on an ass wearing a straw hat, degredation from the order of nobility, fine in a criminal matter when a judgment confirms it . . . public confession and apology, forced alms in civil matters, permanent prohibition to hold office."

**Traîner sur la claie* was the means used to drag the condemned to execution. The same thing was done to the bodies of suicides. For a description of this, see Saint-Edme, *Dictionnaire De La Pénalité Dans Toutes Les Parties Du Monde Connu* (1825), Vol. 3, 242–244.

lowest level, if at all. These facts make most persuasive the words of Judge Grosscup in *United States* v. *James*, *supra*, at 264–265, written in 1894:

> "The battle for personal liberty seems to have been attained, but, in the absence of the din and clash, we cannot comprehend the meaning of all the safeguards employed. When we see the shield held before the briber, the liquor seller, the usury taker, the duelist, and the other violators of accepted law, we are moved to break or cast it aside, unmindful of the splendid purpose that first threw it forward. But, whatever its disadvantages now, it is a fixed privilege, until taken down by the same power that extended it. It is not certain, either, that it may not yet serve some useful purpose. The oppression of crowns and principalities is unquestionably over, but the more frightful oppression of selfish, ruthless, and merciless majorities may yet constitute one of the chapters of future history. In my opinion, the privilege of silence, against a criminal accusation, guarantied by the fifth amendment, was meant to extend to all the consequences of disclosure."

It is no answer to say that a witness who exercises his Fifth Amendment right of silence and stands mute may bring himself into disrepute. If so, that is the price he pays for exercising the right of silence granted by the Fifth Amendment. The critical point is that the Constitution places the right of silence *beyond the reach of government*. The Fifth Amendment stands between the citizen and his government. When public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.

Finally, it is said that we should not disturb *Brown* v. *Walker* because it is an old and established decision. But this Court has always been willing to re-examine and overrule constitutional precedents, even those old and established. In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, this Court overruled *Swift* v. *Tyson,* 16 Pet. 1, which had been a rule of decision for 95 years. *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, partly overruled *Paul* v. *Virginia,* 8 Wall. 168, which had been decided 75 years previously. In *Kilbourn* v. *Thompson,* 103 U. S. 168, the Court rejected some of the grounds of decision in *Anderson* v. *Dunn,* 6 Wheat. 204, which had been standing for 59 years. *Brown* v. *Walker,* decided by a bare majority of the Court and now 60 years old, has no greater claim to sanctity than the other venerable decisions which history showed had outlived their usefulness or were conceived in error. And a rejection of *Brown* v. *Walker* would certainly be far less disruptive of a system of law than was the overruling of *Swift* v. *Tyson,* which affected the trial of every diversity case in the federal courts.

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MILLINERY CENTER BUILDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 255. Argued March 1, 1956.—Decided March 26, 1956.

In April 1924, petitioner leased land in New York City for 21 years, with an option to renew the lease for two further 21-year periods. In accordance with the terms of the lease, it erected a 22-story loft building at a cost of $3,000,000. The lease, as amended in 1935, provided for an annual rental of $118,840. Title to the building was in petitioner, but at the eventual termination of the lease it would vest, without payment, in the lessor, at the lessor's option. During the first 21-year period of the lease, petitioner fully depreciated the entire $3,000,000 cost of the building. In April 1945, it exercised its option to renew the lease until April 1966. In May 1945, it purchased the fee and obtained release from the obligations of the renewed lease, at a price of $2,100,000. When purchased by petitioner, the value of the land, as unimproved, was $660,000. *Held:*

1. Under § 23 (a) (1) (A) of the Internal Revenue Code of 1939, the purchase price paid by petitioner represents the cost of acquiring the complete fee to the land and the building, both capital assets, and no deduction as an ordinary and necessary business expense can be taken. Pp. 457–460.

2. Petitioner is not entitled to amortize, over the remaining term of the extinguished lease, that portion of the excess of the payment of $2,100,000 above the determined land value of $660,000 which is allocable to the acquisition of rights in the building. Pp. 460–461.

3. The judgment of the Court of Appeals in this case is affirmed, leaving to the Tax Court the allocation still to be made. P. 461.

211 F. 2d 322, affirmed.

Bernard Weiss argued the cause and filed a brief for petitioner.

Hilbert P. Zarky argued the cause for respondent. On the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ralph S. Spritzer, A. F. Prescott* and *Louise Foster.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case involves an interpretation of § 23 (a)(1)(A) of the Internal Revenue Code of 1939, as amended, 26 U. S. C. § 23 (a)(1)(A), providing for the deduction from gross income, in computing net income, of all the "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business . . . ." The Commissioner determined a deficiency in petitioner's excess-profits tax for 1945; petitioner sought a redetermination of its liability in the Tax Court, which made the following findings of fact. In April 1924, petitioner leased land in New York City for 21 years, with an option to renew the lease for two further 21-year periods. In accordance with the terms of the lease, it erected a 22-story loft building at a cost of $3,000,000. The lease, as amended in 1935, provided for an annual rental of $118,840. Title to the building was in petitioner, but at the eventual termination of the lease it would vest, without payment, in the lessor, at the lessor's option. The lessor could also require petitioner to remove the building at that time. Petitioner had the obligation, in case of destruction of the building, to rebuild at its own cost. During the first 21-year period of the lease, petitioner fully depreciated the entire $3,000,000 cost of the building. In April 1945, it exercised its option to renew the lease until April 1966.

In May 1945, petitioner entered into an agreement with the owner whereby it purchased the fee and obtained release from the obligations of the renewed lease. The price paid was $2,100,000. The Tax Court also found that the value of the land, as unimproved, was $660,000 when purchased by petitioner in 1945.

The principal issues raised by petitioner relate to its attempt to deduct $1,440,000—the difference between the

purchase price under the May 1945 agreement and the 1945 value of the unimproved land—as an ordinary and necessary expense of doing business. The Tax Court held that the difference could not be so deducted, that the difference could not be amortized over the remaining term of the cancelled lease, and that no annual depreciation could be taken because the cost of the building had already been fully depreciated and the purchase price could not be separated into purchase price for building and purchase price for land. 21 T. C. 817. Six of the judges of the Tax Court dissented on the ground that "[s]ome part of the purchase price should be allocated to the additional rights in the building acquired in the purchase . . . ." 21 T. C., at 826.

On petition for review, the Court of Appeals for the Second Circuit reversed and remanded. It affirmed the refusal to permit a deduction under § 23 (a), but reversed the holding that no amount could be added to the asset value of the building for purposes of depreciation. Rejecting petitioner's argument that it should be allowed to amortize the $1,440,000 over the unexpired term of the cancelled lease, it accepted petitioner's alternative argument that depreciation over the remaining useful life of the building should be allowed. Stating that "[o]n the present state of the record we cannot determine how much of the $2,100,000 purchase price is properly to be allocated to the land and how much to the building," it remanded the case to the Tax Court to fix the respective values. 221 F. 2d 322, 324. Petitioner sought a writ of certiorari to review the disallowance of its claim for a deduction as a business expense or, alternatively, as amortization over the remaining period of the lease. The Government did not seek review of the allowance of depreciation of that portion of the purchase price allocable to the building over its remaining economic life. Because of the apparent conflict between the decision of the Court of Appeals for

the Second Circuit in this case and the decision of the Court of Appeals for the Sixth Circuit in *Cleveland Allerton Hotel, Inc.* v. *Commissioner of Internal Revenue,* 166 F. 2d 805, we granted certiorari, limited to the questions set forth in the margin.[1]

Under the terms of the lease, petitioner had a 21-year lease on the land, with an option to renew, and similar rights in the building which it had constructed. Petitioner introduced evidence to show that the rent it was paying under the lease was greatly in excess of the fair rental value of the land as vacant, unimproved land. Petitioner contends that it already owned the building and that therefore the purchase agreement was entered into for the purpose of avoiding the excessive rentals of the lease. This transaction, it asserts, involved a current business expenditure, and the $1,440,000 in excess of the vacant land value represents what it was willing to pay to avoid this onerous lease.

Petitioner's claim that it "owned" the building is based on a loose and misleading use of "owned." The only way petitioner could continue to use the building after termination of the initial period of the lease was by renewing the lease, and the lease also circumscribed its control over the building. It could make use of the building for the remainder of its economic life, but only

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[1] "1. Where a lessee, the owner of a valuable building on leased land, acquires the fee to the land to be relieved of what it considers to be the burdensome terms of a lease, may the lessee deduct the excess of the payment over the determined value of the land at the date of purchase as an ordinary expense of doing business under § 23 (a) of the United States Internal Revenue Code of 1939 or under § 23 (f) as a loss on a transaction entered into for profit and not compensated for by insurance or otherwise.

"2. In the alternative, may the lessee-petitioner consider the excess payment over the determined value of the land to be in the nature of a prepayment of rent for the remaining term of the extinguished lease and amortize such amount over 21 years?" 350 U. S. 820.

on payment of the stated rent. Petitioner's evidence with respect to the rental value of the land as unimproved is irrelevant. It was using the land as improved by the building; it was paying rent for the land as improved by the building. Petitioner tendered no evidence that it was paying excessive rent for what it was actually leasing. A complementary feature of the purchase of the lessor's interests in the land and building was the elimination of the obligation to pay rent on the improved land. The purchase price presumably reflected this situation. Whatever possible merit petitioner's contention might have were there proof of excessive purchase price can await such a case. The purchase price paid by petitioner represents the cost of acquiring the complete fee to the land and the building, and no deduction as an ordinary and necessary business expense can be taken.[2]

Petitioner claims that even if it cannot get a deduction as an ordinary and necessary business expense under § 23 (a) or as a loss under § 23 (f), it should be allowed to amortize the excess of the payment of $2,100,000 above the determined land value of $660,000 over the 21-year remaining term of the extinguished lease. What petitioner acquired in this transaction, however, were both rights with respect to the land and rights with respect to the building. The Tax Court has not yet fixed that amount of the purchase price which is allocable to the acquisition of rights in the land and that which is allocable to the acquisition of rights in the building. These rights are assets with useful lives having no reference to the term of the lease. Successive steps of securing or renew-

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[2] Petitioner asserted, but did not argue, the permissibility of the deduction of the $1,440,000 as a loss under § 23 (f). Such an assertion is apparently premised on the assumption that the $1,440,000 represents the sum paid for commutation of the rent payments under an onerous lease, and further discussion of this argument is unnecessary.

ing a lease and then purchasing the reversion should not result in amortization over the term of the lease when the purchase of the whole fee at one time would result in depreciation over the useful life of the asset, if the asset acquired were a wasting asset.

Under petitioner's contention, if the purchase had been consummated in 1944 before the first term of the lease had expired, the whole amount of the purchase price not allocable to the land would be amortized in one year. But it should make no difference whether the lease is about to expire or has just been renewed. In the one case, the value of the reversion is enhanced and the value of the right to receive the rent fixed by the lease is depressed because the lease is near an end. In the other case, the value of the reversion is depressed and the value of the right to receive the fixed rent is enhanced because the lease has many years to run. But although there might possibly be some difference in bargaining power between the two situations, the sum total of the rights purchased is the same in each case. Petitioner has acquired two assets—land and a building—whose use it will have for the remainder of their useful lives, and petitioner therefore cannot amortize the cost allocable to the acquisition of the wasting asset over the term of the extinguished lease.

Accordingly, we affirm the judgment of the Court of Appeals for the Second Circuit, leaving to the Tax Court the allocation still to be made.

Affirmed.

GENERAL STORES CORP. *v.* SHLENSKY ET AL.

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

No. 170. Argued January 18, 1956.—Decided March 26, 1956.

Petitioner instituted proceedings under Chapter XI of the Bankruptcy Act, alleging inability to pay its debts as they matured. It had been converted from an operating company to a holding company with the shares of the subsidiaries pledged to creditors; and it had heavy short-term loans. It had no publicly held debts, but had over 2,000,000 shares of common stock listed on the American Stock Exchange and held by over 7,000 shareholders. A shareholder owning 3,000 shares, and the Securities and Exchange Commission, moved that the proceedings be dismissed unless the petition be amended to comply with Chapter X of the Bankruptcy Act. *Held:* In deciding that proceedings under Chapter X rather than Chapter XI were appropriate, the discretion exercised by the District Court and the Court of Appeals did not transcend allowable bounds, and their judgment is affirmed. Pp. 463–468.

(a) In determining whether Chapter X or Chapter XI affords the appropriate remedy, the question is whether, on the facts of the case, the formulation of a plan under the auspices of disinterested trustees, as assured by Chapter X and the other protective provisions of that Chapter, would better serve the public and private interests concerned, including those of the debtor, than the simpler arrangement under Chapter XI. Pp. 465–466.

(b) The essential difference in the choice between Chapter X and Chapter XI is not between the small company and the large company nor in the nature of the capital structure but between the needs to be served. Pp. 466–467.

(c) The record in this case supports the view of the two lower courts that petitioner may need a more pervasive reorganization than is possible under Chapter XI. Pp. 467–468.

222 F. 2d 234, affirmed.

Aaron Rosen and *Frederic P. Houston* argued the cause for petitioner. With them on the brief was *Marks F. Paskes.*

William H. Timbers argued the cause for the Securities and Exchange Commission, respondent. With him on the brief were *Solicitor General Sobeloff, Thomas G. Meeker, David Ferber* and *Aaron Levy.*

A. Alan Reich argued the cause for Shlensky, respondent. With him on the brief was *Michael Gesas.*

Max Goldweber argued the cause for the Wage Claimants, respondents. With him on the brief was *Louis J. Weinshenker.*

Leon Singer argued the cause for the Creditors Committee, respondent. With him on the brief was *Samuel Blumberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner instituted proceedings under c. XI of the Bankruptcy Act (52 Stat. 905, as amended, 11 U. S. C. § 701 *et seq.*) alleging it was unable to pay its debts as they matured. It proposed an arrangement of its general unsecured trade and commercial debts, none of which is evidenced by any publicly held security. Petitioner has indeed no debts of any nature by way of bonds, mortgage certificates, notes, debentures, or obligations of like character, publicly held. It does, however, have over 2,000,000 shares of $1 par value common stock listed on the American Stock Exchange and held by over 7,000 shareholders. One of these—an owner of 3,000 shares—and the Securities and Exchange Commission moved that the proceedings be dismissed unless, within a time fixed by the court, the petition be amended to comply with the requirements of c. X of the Bankruptcy Act (52 Stat. 883, as amended, 11 U. S. C. § 501 *et seq.*) for a corporate reorganization. The District Court granted the motions. 129 F. Supp. 801. The Court of Appeals affirmed by a

divided vote. 222 F. 2d 234. The case is here on certiorari. 350 U. S. 809.

Petitioner, formerly known as D. A. Schulte, Inc., has operated for some years a chain of stores for the sale of tobacco and accessory products. Petitioner has also had a chain of difficulties. Its financial problems go back at least to 1936 when it filed a petition for reorganization under former § 77B of the Bankruptcy Act. After its reorganization was completed in 1940, it had a few years of prosperity followed by a postwar decline in volume of business, a rise in costs, and substantial losses. During these years $600,000 cash was raised by the sale of stock and a new management installed with a view to converting some existing stores into candy, food, and drink establishments. That idea was abandoned and the proceeds of the stock sale were used for general corporate purposes. It was then decided to liquidate the existing specialty stores and to have petitioner acquire the stock of two existing retail drugstore chains—Stineway Drug Company and Ford Hopkins Company. The Stineway stock was acquired for $1,220,320, petitioner borrowing $870,000 from Stineway for the purpose. Later petitioner borrowed an additional $440,000 from Stineway to help make the down payment on the Ford Hopkins stock, making a total indebtedness to Stineway of $1,310,000, represented by two non-interest-bearing notes. The Ford Hopkins stock was acquired for $2,800,000, the down payment being $735,000, the balance being payable in a yearly amount of $200,000 with 4 per cent interest and secured by the Stineway and Ford Hopkins stock.

While the two drug chains were being acquired, petitioner started the liquidation of its own stores, a process that was completed under c. XI of the Bankruptcy Act. The disposition of those stores involved the rejection of numerous leases and the creation of claims of landlords against petitioner.

The arrangement proposed by petitioner under c. XI would extend its unsecured obligations and provide for a 20 per cent payment on confirmation of the plan and 20 per cent annually for 4 years thereafter. The claims listed were the $1,310,000 debt to Stineway and $525,000 unsecured claims, exclusive of claims by landlords. We were advised on oral argument that during the course of the c. XI proceedings it was decided that this offer was not feasible and that the unsecured creditors are now offered the equivalent of 40 per cent of their claims in full satisfaction.

Much of the argument has been devoted to the meaning of *Securities and Exchange Commission* v. *United States Realty Co.*, 310 U. S. 434. In that case we held that relief was not properly sought under c. XI but that c. X offered the appropriate relief. That was a case of a debtor with publicly owned debentures, publicly owned mortgage certificates, and publicly owned stock. An arrangement was proposed that would leave the debentures and stock unaffected and extend the certificates and reduce the interest. It was argued in that case, as it has been in the instant one, that c. X affords the relief for corporations whose securities are publicly owned, while c. XI is available to debtors whose stock is closely held; that c. X is designed for the large corporations, c. XI for the smaller ones; that it is the character of the debtor that determines whether c. X or c. XI affords the appropriate remedy. We did not adopt that distinction in the *United States Realty* case. Rather we emphasized the need to determine on the facts of the case whether the formulation of a plan under the control of the debtor, as provided by c. XI, or the formulation of a plan under the auspices of disinterested trustees, as assured by c. X and the other protective provisions of that chapter, would better serve "the public and private interests concerned including those of the debtor." 310 U. S., at 455. The *United*

States Realty case presented a rather simple problem. There one class of creditors was being asked to make sacrifices, while the position of the stockholders remained unimpaired (*id.*, 453–454, 456), contrary to the teachings of *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. Moreover, the history of the company raised a serious question "whether any fair and equitable arrangement in the best interest of creditors" could be effected "without some re-arrangement of its capital structure." *Id.*, 456. For those reasons c. X was held to offer the appropriate relief.

The character of the debtor is not the controlling consideration in a choice between c. X and c. XI. Nor is the nature of the capital structure. It may well be that in most cases where the debtor's securities are publicly held c. X will afford the more appropriate remedy. But that is not necessarily so. A large company with publicly held securities may have as much need for a simple composition of unsecured debts as a smaller company. And there is no reason we can see why c. XI may not serve that end. The essential difference is not between the small company and the large company but between the needs to be served.

Readjustment of all or a part of the debts of an insolvent company without sacrifice by the stockholders may violate the fundamental principle of a fair and equitable plan (see *Case* v. *Los Angeles Lumber Products Co., supra*), as the *United States Realty Co.* case emphasizes.

Readjustment of the debt structure of a company, without more, may be inadequate unless there is also an accounting by the management for misdeeds which caused the debacle.

Readjustment of the debts may be a minor problem compared with the need for new management. Without a new management today's readjustment may be a temporary moratorium before a major collapse.

These are typical instances where c. X affords a more adequate remedy than c. XI. The appointment of a disinterested trustee (§ 156), his broad powers of investigation (§ 167), the role of the trustee in preparing a plan (§ 169), the duty of the Securities and Exchange Commission to render an advisory report on the plan (§ 172), the requirement that the plan be "fair and equitable, and feasible" (§§ 174, 221), the power to include the subsidiaries, Stineway and Ford Hopkins, in the reorganization of petitioner (§ 129)—these are controls which c. X gives to the entire community of interests in the company being reorganized and which are lacking under c. XI. These controls are essential both where a complicated debt structure must be readjusted and where a sound discretion indicates either that there must be an accounting from the management or that a new management is necessary. Those conditions only illustrate the need for c. X. There may be others equally compelling.

The history of this debtor indicates not fraud but either an improvident overextension or a business that has been out of step with modern trends. One corporate reorganization has already been suffered. Heavy short-term loans hang ominously over the company; and it has been converted from an operating company to a holding company with the shares of the subsidiaries pledged to creditors. It is argued that only a short moratorium is needed. There are, however, fears that a short moratorium may be merely a prelude to new disasters, that what the company needs is a fundamental reorganization of its capital structure, so that its limited cash resources will not be dissipated in an effort to meet the demands for debt reduction. A question as to what is "fair and equitable" between creditors and stockholders may eventually be reached in the reorganization. But the paramount issue at present concerns what is "feasible." A "feasible" plan within the meaning of c. X, §§ 174, 221, might mean, first,

a merger of the subsidiaries with the holding company, and, second, a funding of the unsecured debt and a realignment of debt and stock so as to give a balanced capital structure. The old business has been liquidated and the new one launched with heavy borrowings on a short-term basis. If the new one is to succeed, it may well need a more thoroughgoing capital readjustment than is possible under c. XI. That was the view of two lower courts. We could reverse them only if their exercise of discretion transcended the allowable bounds. We cannot say that it does. Rather we think that the lower courts took a fair reading of c. X and the functions it serves and reasonably concluded that this business needed a more pervasive reorganization than is available under c. XI.

Affirmed.

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, dissenting.

This is a proceeding for confirmation of an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. § 701 *et seq.* The controlling facts are these. Petitioner is a corporation with a simple capital structure, with its common stock, which is traded on the American Stock Exchange, held in the hands of 7,000 stockholders. The proposed arrangement exclusively affects the unsecured creditors, including wage earners whom the Bankruptcy Act accords priority of payment. All these creditors strongly support confirmation of the arrangement. The Securities and Exchange Commission, in its capacity of protector of public investors, opposed the resort to Chapter XI and insisted on the reorganization procedure defined by Chapter X. The stockholders themselves have not opposed the arrangement, barring only a single stock-

holder representing two-tenths of one percent of the common stock of the debtor. There is no suggestion of fraud or other improper behavior on the part of the management of the debtor, which has suffered business misadventure apparently attributable to changes in consumer response to the type of business conducted by the original Schulte tobacco stores. The District Court dismissed the petition under Chapter XI, with leave to the debtor to meet the requirements of reorganization under Chapter X.* 129 F. Supp. 801. A divided Court of Appeals sustained the District Court, 222 F. 2d 234, and its judgment is here affirmed.

The essence of this Court's decision is that the District Court acted as it did in the exercise of allowable discretion. But if the exercise of discretion by the District Court was guided by inappropriate standards, its exercise of discretion is left without a supporting basis and cannot stand. Such, I believe, is the situation here.

The District Court was set on its course by what it deemed the guiding ruling of this Court in *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434. But the usually careful district judge misconceived the demands of that case upon him by relying on some general observation without the qualifying illumination of the literary and factual context of what he quoted from the opinion in that case. The District Court found guidance in the statement that "the two chapters [X and XI] were specifically devised to afford different procedures, the one adapted to the reor-

*At the time of the *Realty* decision, if a proceeding was found to have been improperly brought under Chapter XI, it had to be dismissed and a proceeding started anew under Chapter X. Section 30 of the Act of July 7, 1952, amended the law so as to allow a transfer of a Chapter XI proceeding, if improperly filed thereunder, to Chapter X. 66 Stat. 420, 432, and see H. R. Rep. No. 2320, 82d Cong., 2d Sess. 19.

ganization of corporations with complicated debt structures and many stockholders, the other to composition of debts of small individual business and corporations with few stockholders . . . ." 310 U. S. 434, 447.

In the first place, his quotation breaks into a sentence, which plainly enough indicated that what the district judge quoted was not the *ratio decidendi* of the *Realty* case but a loose generality. The district judge left unquoted the qualifying introduction, "While we do not doubt that in general," with the further cautionary phrase, "as will presently appear more in detail . . . ." The later details derive significance from the wholly different set of facts in the *Realty* case. In that case the arrangement for which shelter was sought under Chapter XI involved changes affecting security holders, and those changes, the Court found, easily might adversely affect the creditors. This precluded a finding that the arrangement was "for the best interests of the creditors," which is an essential requisite for confirmation. The Court was very careful to say that the application it gave to Chapter XI in the *Realty* case "does not mean that there is no scope for application of that chapter in many cases where the debtor's financial business and corporate structure differ from respondent's." 310 U. S., at 454.

Again, while what was quoted from the *Realty* case by the district judge seemed to indicate a sharp line between corporations "with many stockholders" and corporations "with few stockholders," assigning Chapter X to the former and restricting Chapter XI to the latter, the opinion in the *Realty* case went on to say (what was not quoted below), "we find in neither chapter any definition or classification which would enable us to say that a corporation is small or large, its security holders few or many, or that its securities are 'held by the public,' so as to place the corporation exclusively within the jurisdiction of the

court under one chapter rather than the other." 310 U. S., at 447.

The upshot of the matter is that a critical reading of the extended opinion in the *Realty* case requires the conclusion that all its general observations must be limited to the particular situation which elicited them. And yet, the controlling consideration in the District Court's dismissal of the Chapter XI proceeding is fairly attributable to the fact that the plan of arrangement concerned "a corporation with 7,000 holders of two and a quarter million shares of stock listed on the American Stock Exchange and recently selling at under two dollars a share." 129 F. Supp. 801, 805. Such a basis for judgment disregards the informal, efficient, and economical procedure for financial readjustments of a corporation with its creditors where no change in the capital structure is involved, where no charge of impropriety in corporate management is intimated, where all the creditors urge that the proposed arrangement is for their "best interests" (§ 366 of the Chandler Act, 52 Stat. 840, 911), and where a refusal to entertain the arrangement would work real hardship to 174 wage claimants.

Not only was the District Court's exercise of discretion against entertainment of the Chapter XI proceeding based on a misconception of the holding in the *Realty* case. It was also in disregard of the amendment to Chapter XI by § 35 of the Act of July 7, 1952, 66 Stat. 420, 433. By that amendment Congress eliminated the requirement that a plan of arrangement had to be "fair and equitable." That requirement was in Chapter XI, as it stood at the time of the *Realty* decision, and by it Congress had written into Chapter XI the absolute rule for equity reorganizations laid down by this Court in *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482, and *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106. (H. R. Rep. No. 2320, 82d

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Cong., 2d Sess. 21.) Even if the "fair and equitable" rule were still in Chapter XI, there is nothing in the facts of this case to show that the arrangement would not satisfy that requirement, for we have noted that the plan of arrangement here, unlike the situation in *Realty*, leaves untouched the position of the security holders. Since the *Realty* decision to no small degree turned on the enforcement of the "fair and equitable" rule, it is noteworthy that no consideration was given by the lower courts, and none is given by this Court, to the significance of this amendment by Congress. One would suppose that the elimination, in 1952, of this drastic requirement is the clearest possible indication that Chapter XI should be given a more generous scope than even the narrowest reading of *Realty* might suggest. Chapter XI should not be shriveled in its availability.

I would reverse the Court of Appeals.

Syllabus.

MITCHELL, SECRETARY OF LABOR, *v.* BUDD ET AL.

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

No. 278. Argued February 29–March 1, 1956.—Decided March 26, 1956.

The Secretary of Labor sued under § 17 of the Fair Labor Standards Act to enjoin respondents from violating the minimum wage and record-keeping provisions of the Act with respect to employees working in their tobacco-bulking plants in Quincy, Florida, which has a population in excess of 2,500. The bulking process takes from 4 to 8 months, requires a large amount of equipment, and substantially changes the physical properties and chemical content of the tobacco. Most farmers in the region have their tobacco processed by others. Two of the respondents process only tobacco grown on their own farms and the third processes only tobacco grown by others. *Held:* Respondents are not exempted by § 13 (a) (10) or § 13 (a) (6) from the minimum wage and record-keeping provisions of the Act. Pp. 474–482.

(a) The Administrator's definition of "area of production," within the meaning of § 13 (a) (10), as including only plants located "in the open country or in a rural community . . . not including any city, town or urban place of 2,500 or greater population" and within a specified mileage distance from the source of 95% of its commodities, is sustained. Pp. 476–480.

(b) Even when done by the grower, the bulking process is not "preparation for market," within the meaning of § 3 (f), and therefore not within the agricultural exemption of § 13 (a) (6). Pp. 480–482.

221 F. 2d 406, reversed.

114 F. Supp. 865, affirmed.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Stuart Rothman* and *James R. Billingsley.*

Milton C. Denbo argued the cause for J. T. Budd, Jr. & Co. et al., respondents. With him on the brief was *Philip Levy.*

Mark F. Hughes argued the cause and filed a brief for the May Tobacco Co., respondent.

Briefs of *amici curiae* urging affirmance were filed by *John H. Todd, M. Richard Garstang* and *Joseph O. Parker* for the National Grange et al., and *Martin Burns* and *Allen Lauterbach* for the American Farm Bureau Federation.

Mr. Justice Douglas delivered the opinion of the Court.

These are actions brought by the Secretary of Labor under § 17 of the Fair Labor Standards Act, 52 Stat. 1060, 63 Stat. 910, 29 U. S. C. § 201, to enjoin respondents from violating the minimum wage, § 6, and record-keeping provisions, § 11, of the Act. The employees concerned work in tobacco-bulking plants operated by respondents in Quincy, Florida, which has a population in excess of 2,500. Respondents claim these employees are exempt from the Act. The District Court ruled against the respondents. 114 F. Supp. 865. The Court of Appeals reversed. 221 F. 2d 406. We granted certiorari, 350 U. S. 859, because of the importance of the problems presented and of the apparent conflicts between the decision below and *Tobin* v. *Traders Compress Co.*, 199 F. 2d 8, and *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254.

The processing operations involve U. S. Type 62 Sumatra tobacco, a leaf tobacco used exclusively for cigar wrappers. This type of tobacco requires special cultivation. It is grown in fields that are completely enclosed and covered with cheesecloth shade. The leaves of the plant are picked in stages, as each matures. The leaves are taken immediately to a tobacco barn, located on the farm, where they are strung on sticks and dried by heat. Before the drying process is completed, the leaves are allowed to absorb moisture. Then they are dried again. There is some fermentation at this stage. But the treat-

ment in the tobacco barns is essentially a drying operation during which the moisture content is reduced to between 10% and 25%.

At the end of the drying operation, the leaves are packed in boxes and taken from the farm to a bulking plant for further processing. At the bulking plant, the leaves are placed in piles, known as "bulks," aggregating from 3,500 to 4,500 pounds of tobacco. This is the "sweating" or fermentation process, which requires carefully controlled regulation of temperature and humidity. Proper heat control includes, among other things, breaking up the bulk, redistributing the tobacco, and adding water. Proper fermentation or aging requires the bulk to be reconstructed several times. The bulking process lasts from four to eight months, after which the tobacco is baled. The bulking process requires a large amount of equipment, including a steam-heated plant, platforms, thermometers, bulk covers, baling boxes and presses, baling mats and packing, sorting and grading tables. The bulking process substantially changes the physical properties and chemical content of the tobacco, improving the color, increasing combustibility, and eliminating the rawness and harshness of the freshly cured leaf.

The overwhelming majority of farmers in the region in litigation in this case have their tobacco processed by others. In that region there are 300 farmers who grow this type of tobacco. Of these, only 9 maintain and operate bulking plants; and only 5 maintain and operate bulking plants processing tobacco grown only by themselves. It appears that bulking cannot be economically done by the ordinary small farmer growing less than 100 acres. Of the 300 farmers in the present group, 80% grow less than 25 acres per year, while the majority grow from 1½ to 10 acres a year.

Respondent Budd grows no tobacco itself and confines its operations to processing the tobacco grown on 263

acres by 52 farmers. Budd employs about 108 workers for bulking, sorting, grading, and baling tobacco.

Respondent King Edward processes in the bulking plant involved in this litigation only tobacco produced on farms operated by it. (It has two other bulking plants that process tobacco purchased from other growers.) The bulking plant involved here is about 13 miles from King Edward's farms. A majority of the 120 employees in the bulking plant also work on King Edward's farms.

May has its own bulking plant and processes there only the tobacco which it grows on its own farms. This plant is about 10 miles from the farms. The employees, who work the farms, work in the bulking plant, being transported back and forth by May. Seventy are employed in the bulking plant.

Area of Production.—Section 13 (a) of the Act creates several exemptions from the minimum wage and maximum hours provisions of the Act. One of those exemptions contained in § 13 (a)(10) includes:

> "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

The Administrator's definition of "area of production" provides that a plant is within the "area of production" if it is located (1) "in the open country or in a rural community," which is defined as not including "any city, town or urban place of 2,500 or greater population," and (2) within a specified mileage distance from the source of 95% of its commodities.[1]

[1] The entire regulation is set forth in the Appendix to this opinion, *post*, p. 482.

The Court of Appeals, following its earlier decisions in *Jenkins* v. *Durkin,* 208 F. 2d 941, and *Lovvorn* v. *Miller,* 215 F. 2d 601, held that the regulation was invalid. It concluded that once "geographic lines of the area of production have been established, the act makes the exemption effective within that area," and that any qualification by reason of size of the town where the establishment is located is invalid. 215 F. 2d, at 603. For that conclusion the Court of Appeals found comfort in *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607.

Holly Hill involved one of the alternative definitions of "area of production." That alternative defined "area of production" in geographic terms and then added another standard—whether the employee was in an establishment having no more than seven employees. We held that ". . . Congress did not leave it to the Administrator to decide whether within geographic bounds defined by him the Act further permits discrimination between establishment and establishment based upon the number of employees." *Id.,* at 616. We said that the phrase "area of production" had "plain geographic implications" with which the size of a plant within the area was not consistent. *Id.,* at 618. That definition, therefore, was struck down. But its alternative, substantially the one that is involved here, was not passed upon. In fact, we reserved decision in *Holly Hill* as to whether the population criterion, now presented for decision, was valid. *Id.,* 610.

We think the present regulation is a valid definition of "area of production." We think it valid by the standard we used in *Holly Hill.* In that case we said that ". . . 'area' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and

more or less near their production." *Id.*, at 613–614. The aim of Congress was to exempt employees "employed in agriculture," § 13 (a)(6), and those engaged in agricultural enterprises in the "area of production," § 13 (a)(10). That meant drawing a line between agricultural enterprises operating under rural-agricultural conditions and those subject to urban-industrial conditions. An individual working in an agricultural packing plant on the edge of Los Angeles is in a strikingly different environment from one doing the same work in a small town in the heart of Kansas. Nearness to a large city has relation to the problem of the Administrator in making his definition. For the proximity of the plant to a metropolitan center, like the size of the town where the plant is located, may make the decisive difference between an agricultural and an urban environment.[2] Likewise, nearness of the plant to its supplies cannot be considered an irrelevancy. For "area" is understandable in terms of nearness and

[2] On this phase of the problem the Administrator said in his findings dated December 18, 1946:

"Although it is clear that any line attempting to distinguish between 'urban-industrial' and 'rural-agricultural' communities on the basis of population can at best be only an approximation, it is equally clear that none of the proposals advanced at the hearing would accomplish the objectives of such a test with as much accuracy as the 2,500 population test. As a class, places of 2,500 population or more are predominantly industrial, while places with populations of less than 2,500 are predominantly agricultural. A population limit of 2,500, moreover, has for over 35 years been the official dividing line between 'rural' and 'urban' employed by the Bureau of the Census in its studies. This dividing line has also been accepted and used in studies made by the Bureau of Agricultural Economics, the Federal Emergency Relief Administration, the Works Progress Administration and other government agencies. It has furnished the definition of 'rural' communities which has been the basis of studies of rural and urban communities by many sociologists. It has been incorporated into statute by the Congress of the United States in

farness. Distance is an important factor in any formula which seeks to treat more or less as a unity labor on farms and labor in agricultural enterprises in the "area of production." [3]

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special legislation for rural communities.* To a very great extent the handling and processing of agricultural and horticultural commodities is carried on in the open country or in towns of less than 2,500. For example, only about 10% of grain elevators are located in towns of 2,500 or more. Only about 11% of cotton gins are located in such populated places. About two-thirds of all fresh fruit and vegetable canning and packing, cheese manufacturing and poultry and egg assembling are carried on in the open country or in towns of 2,500 or less.

"On the basis of all the evidence, it is my conclusion that a population test of 2,500, while not drawing a line between 'urban-industrial' and 'rural-agricultural' conditions with a fine precision, will come as close to accomplishing this objective as it is possible to come in a general rule applicable to many situations."

*The references were to 39 Stat. 356, 40 Stat. 1200.

[3] On this phase of the problem the Administrator said:

"The selection of appropriate distances for the different commodities and groups of commodities has been no easy task, and was accomplished only after carefully weighing and synthesizing a large variety of complicated economic factors. Among the many factors taken into consideration were the following: the kind of crop; the distances from which the establishments in each industry receive the agricultural or horticultural commodities upon which they perform the operations specified in the pertinent sections of the Act; the geography and topography of the various sections of the country in which the different commodities are normally produced; the location of the plants within these areas; the concentration of cultivation of the different commodities in various sections of the country; the pattern of concentration of agricultural production with respect to the location of the establishment; differences in practice as between single crop areas and diversified farming areas; the perishability of the commodities received; the extent to which the plants deal with a single commodity rather than a variety of commodities; the nature of the operations performed on the commodities received, including

No definition of "area of production" could produce complete equality, for the variables are too numerous. The Administrator fulfills his role when he makes a reasoned definition. See *Gray* v. *Powell,* 314 U. S. 402, 411. On no phase of this problem can we say that the Administrator proceeded capriciously or by the use of inadmissible standards. Experts might disagree over the desirability of one formula rather than another. It is enough for us that the expert stayed within the allowable limits. We think he did here and that the definition of "area of production" under § 13 (a)(10) is a valid one.

Agriculture.—The Court of Appeals held that the employees in the bulking plants of King Edward and May were exempt under § 13 (a)(6) which covers "any employee employed in agriculture." It relied on the broad definition of "agriculture" contained in § 3 (f) of the Act which provides, in relevant part, that the term "includes farming in all its branches and among other things includes . . . any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to . . . market or to carriers for transportation to market." The work in the bulking plants, the court ruled, was "preparation for market" within the meaning of § 3 (f).

The exemption of § 13 (a)(6) read with § 3 (f) covers large operators as well as small ones, as we recently said in *Maneja* v. *Waialua Agricultural Co., supra,* at 260. It also includes "extraordinary methods" of agriculture as well

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the degree of industrialization of the various operations; the number of hands or operations through which the particular commodity has moved since leaving the farm, including the possibility of passing increased labor costs back to the farmer; the marketing practices of the particular industries; and the wage rates paid, and overtime practices in the various communities concerned with particular commodities."

as the more conventional ones. *Id.*, at 261. The question in the *Waialua* case was whether sugar milling was included in the agriculture exemption of § 13 (a)(6). We said that it was necessary to look to all the facts surrounding the process to determine whether that process was incident to farming. *Id.*, at 264–265. We held that sugar milling was not, even when done by the grower. We think like considerations indicate that in this case the agriculture operation does not extend through the bulking plants but ends, as the District Court ruled, with the delivery of the tobacco at the receiving platform of the bulking plant. That is the "delivery . . . to market" within the meaning of § 3 (f) of the Act.

It is true that King Edward and May are farmers and process in their bulking plants only the tobacco they raise. It is also true that many employees who work their farms also work in their bulking plants. These are heavily stressed as indicia that bring the bulking plants into the agriculture exemption. But there are two other factors which in our view tip the scales the other way.

First, tobacco farmers do not ordinarily perform the bulking operation. As already mentioned, of the 300 farmers who grow this type of tobacco in this area, only 9 maintain and operate their own bulking plants. The remaining farmers have their crops processed by others. The bulking operation is for the most part divorced from the cultivation of tobacco and from the drying operation in the tobacco barns on the farm. The bulking process for the most part is a separate processing stage.

Second, the bulking operation is a process which changes the natural state of the freshly cured tobacco as significantly as milling changes sugar cane. As indicated above, the bulking process changes and improves the leaf in many ways and turns it into an industrial product. What we said in *Waialua* concerning sugar milling is apt here: a process that results in such important changes is

"more akin to manufacturing than to agriculture." 349 U. S., at 265.

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

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

The Administrator defined "area of production," as used in § 13 (a)(10) of the Fair Labor Standards Act, as follows (29 CFR, c. V, § 536.2):

(a) An individual shall be regarded as employed in the "area of production" within the meaning of section 13 (a)(10) of the Fair Labor Standards Act in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) With respect to the ginning of cotton—10 miles;

(ii) With respect to operations on fresh fruits and vegetables—15 miles;

(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within:

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) Three air-line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater,

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received

(i) from farms within such specified distances, or

(ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or

(iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a

calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

DOUD ET AL., DOING BUSINESS AS BONDIFIED SYSTEMS, ET AL. *v.* HODGE, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL.

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

No. 129. Argued February 29, 1956.—Decided March 26, 1956.

A three-judge federal district court has jurisdiction under 28 U. S. C. §§ 1331, 2281 and 2284 of a suit to enjoin enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution, even though the state courts have not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute. Pp. 485–487.

127 F. Supp 853, judgment vacated and case remanded.

John J. Yowell argued the cause and filed a brief for appellants.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for appellees. With him on the brief was *Latham Castle,* Attorney General. *Raymond S. Sarnow,* Assistant Attorney General, was also on a Motion to Affirm.

MR. JUSTICE MINTON delivered the opinion of the Court.

The appellants are a partnership and its agent, all residents of Illinois. The partnership was engaged exclusively in the business of selling and issuing money orders in the State of Illinois. This business activity was to be conducted through agents who are principally persons engaged in operating retail drug, hardware and grocery stores. Appellant Derrick, a drug store proprietor, contracted with the partnership to act as its agent for the sale of money orders which it issued.

Illinois, by statute,[1] has sought to license and regulate community currency exchanges. Section 1 of the Community Currency Exchanges Act defines a community currency exchange as "any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged . . . in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money order, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services." [2] Subsequent sections of the Act provide for the licensing and comprehensive regulation of such businesses.

Appellants brought this suit in the Northern District of Illinois seeking to enjoin the appellees, who are the Auditor of Public Accounts, the Attorney General of the State of Illinois and the State's Attorney of Cook County, Illinois, from enforcing the Community Currency Exchanges Act against them. Jurisdiction was asserted under 28 U. S. C. § 1331. Appellants argued that a permanent injunction should be issued on the ground that the Act denied them equal protection of the laws in violation of § 1 of the Fourteenth Amendment to the Federal Constitution in that appellants are required to obtain a license and submit to regulation in the conduct

[1] Ill. Rev. Stat., 1955, c. 16½, §§ 30–56.3.

[2] Ill. Rev. Stat., 1955, c. 16½, § 31.

of their money order business in the State while the American Express Company, which is engaged in the identical business activity in Illinois, is excepted from the operation of the Act. Since the complaint attacked the validity of a state statute under the Fourteenth Amendment to the Federal Constitution, the suit was tried before a three-judge District Court pursuant to 28 U. S. C. §§ 2281 and 2284.

The District Court heard the case at length and made findings of fact, the material portions of which we have set forth above. The District Court dismissed the complaint, holding that it lacked jurisdiction to determine the constitutional question presented in the absence of an authoritative determination by the Supreme Court of Illinois as to whether the exemption of the American Express Company from the terms of the Act is unconstitutional as applied to these appellants. 127 F. Supp. 853. We noted probable jurisdiction. 350 U. S. 814.

It is clear that the District Court had jurisdiction to entertain appellants' complaint by virtue of the authority vested in it by 28 U. S. C. §§ 2281 and 2284. This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute.

We hold that the District Court has jurisdiction of this cause. It was error to dismiss the complaint for lack of jurisdiction. The judgment of the District Court is vacated and the case is remanded to it. We do not decide what procedures the District Court should follow on remand.

It is so ordered.

362618 O—56——37

MURDOCK ACCEPTANCE CORP. *v.* UNITED STATES.

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

No. 56. Argued February 27, 1956.—Decided March 26, 1956.

1. Under 18 U. S. C. § 3617, providing conditions to the remission of forfeitures under liquor laws, the substance of the reply which petitioner finance company received from the Internal Revenue Service regarding the automobile purchaser's reputation as a liquor law violator satisfied that requirement of the statute, though the reply disclaimed knowledge of the purchaser's reputation among state and local officers. Pp. 488–490.
2. Whatever may be the extent of the District Court's discretionary power to deny remission of forfeiture under 18 U. S. C. § 3617, there was no occasion for its exercise in the circumstances of this case. Pp. 490–491.

218 F. 2d 702, reversed and remanded.

Elizabeth Hulen Grayson argued the cause for petitioner. With her on the brief were *T. H. Watkins, W. H. Watkins* and *P. H. Eager.*

John F. Davis argued the cause for the United States. On the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello.*

PER CURIAM.

The United States filed a libel in the District Court for the Eastern District of Louisiana, under §§ 3116 and 3321 of the Internal Revenue Code of 1939, 53 Stat. 362, 401, for the forfeiture of an automobile which had been used to transport nontax-paid whiskey. Petitioner, a finance company which had accepted an assignment of a conditional sales contract when the automobile was purchased, sought remission of the forfeiture to the extent

of its interest under 18 U. S. C. § 3617. That section provides that in a forfeiture proceeding the District Court "shall have exclusive jurisdiction to remit" the forfeiture, but that the court "shall not allow" remission unless the finance company (1) acquired its interest in good faith; (2) had no reason to believe that the automobile would be used in violation of the liquor laws; and (3),

> "was informed in answer to [its] inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality . . . that [the purchaser] had no . . . record or reputation [for violating laws of the United States or of any State relating to liquor]."

It is conceded that petitioner satisfied the first two requirements. As to the third, petitioner made a timely inquiry regarding the purchaser of the automobile to the state office of the Federal Alcohol and Tobacco Unit, from which it received the following reply:

> "No record or reputation as a liquor law violator as of [the date of the inquiry]. This office does not keep a complete file of State and local arrests or prosecutions, and has no knowledge of the subject's reputation among State and local officers."

It is conceded that the inquiry was made to an appropriate office and that, if the substance of the reply satisfied the statute, no further inquiries were required by the statute. The issue is whether the substance of the reply was adequate.

The reply received by petitioner was a form reply designed by the Internal Revenue Service expressly for the purpose of satisfying this statutory requirement. It had for years been accepted as compliance with the statute in administrative remissions and in forfeiture proceedings in

other district courts. Nevertheless, the District Court denied remission on the ground that the reply did not satisfy the statute in that it expressly disclaimed any knowledge of the purchaser's record or reputation for *state* liquor law violations. 121 F. Supp. 265. The Court of Appeals for the Fifth Circuit affirmed, 218 F. 2d 702, with one judge dissenting upon rehearing, 220 F. 2d 279. We think the courts below misconstrued the reply. The first sentence affirmatively stated that the purchaser had no record or reputation in that office as a "liquor law violator," and that statement was not limited to federal violations. The second sentence did not qualify the negative character of the reply but merely made clear that that office's knowledge was not unlimited.

The District Court also based its decision on the alternative ground that, even if the requirements of the statute were technically met, remission would be denied in the discretion of the court. The sole basis for that holding was that petitioner was "put on notice" by the reply that the purchaser might well have a record as a liquor law violator with the state authorities, and its failure to investigate further disclosed "an indifference on its part which does not commend it to the equitable conscience of this court." We need not decide the extent of the District Court's discretionary power to deny remissions, since in any event we think there was no occasion for its exercise here. The very purpose of prescribing in detail in the statute the type of inquiry to be made was to avoid uncertainty over the extent of investigation necessary to protect finance companies against forfeitures. That purpose would be frustrated if a duty to investigate further could be grounded solely upon the alleged inadequacy of a reply clearly satisfying the statutory investigation requirements. In limiting the inquiry duty to any one of several offices, Congress must necessarily have contem-

plated that the records of one office only would be checked. It considered that adequate.

The judgment below is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER dissents.

WERNER MACHINE CO., INC. *v.* DIRECTOR OF DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY, OF NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 63. Argued March 5–6, 1956.—Decided March 26, 1956.

As applied to this New Jersey corporation, the New Jersey corporation tax here involved, measured by the corporation's "net worth," is a tax on the corporate franchise, does not discriminate against federal obligations, and is valid despite the inclusion of federal bonds in the determination of net worth. Pp. 492–494.

17 N. J. 121, 110 A. 2d 89, affirmed.

Charles Goodwin, Jr. argued the cause for appellant. With him on the brief were *Halsey T. Tichenor, III,* and *Leopold Frankel.*

Harold Kolovsky, Assistant Attorney General of New Jersey, argued the cause for appellee. With him on the brief were *Grover C. Richman, Jr.,* Attorney General, and *Lawrence E. Stern* and *David D. Furman,* Deputy Attorneys General. *Ned J. Parsekian,* Deputy Attorney General, was on a Motion to Dismiss.

PER CURIAM.

The State of New Jersey imposes on each domestic corporation "an annual franchise tax . . . for the privilege of having or exercising its corporate franchise" in the State.[1] This tax, as applied to appellant, is measured by the corporation's "net worth," which is defined as the sum of the corporation's issued and outstanding capital stock, paid-in or capital surplus, earned surplus and undivided profits, other surplus accounts which will accrue to the shareholders (not including depreciation reserves), and debts owed to shareholders owning 10 percent or more

[1] N. J. Laws 1945, c. 162, N. J. S. A. §§ 54:10A–1 *et seq.*

of the corporation's stock.[2] Appellant is a corporation organized under the laws of New Jersey, and is therefore subject to the tax. In assessing appellant's tax for 1952, the Tax Commissioner included in appellant's net worth the value of certain federal bonds held by appellant, thereby increasing the amount due by $320.07. Appellant protested, claiming that under R. S. § 3701, 31 U. S. C. § 742, these bonds were immune from state taxation. The New Jersey courts upheld the Commissioner's assessment, and this appeal contests the validity of the state statute as so applied.

Appellant contends that this tax is not in reality a franchise tax, but is rather in the nature of a direct property tax on the immune federal obligations. Corporate franchises granted by a State create a relationship which may legitimately be made the subject of taxation, *Home Ins. Co.* v. *New York,* 134 U. S. 594, 599–600; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 388; and the statute expressly declares this to be a franchise tax. Moreover, the Supreme Court of New Jersey has, on independent examination, found this to be "a *bona fide* franchise tax."[3] While this is, of course, not conclusive here, *Society for Savings* v. *Bowers,* 349 U. S. 143, we find no basis in this instance for not accepting the state court's conclusion that this tax is not imposed directly on the property held by the corporation. Cf. *Pacific Co.* v. *Johnson,* 285 U. S. 480, 495–496.

Appellant argues further that even if this is a franchise tax, it must fall because its effect is the same as if it had been imposed directly on the tax-exempt federal securities. Since the tax remains the same whatever the character of

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[2] *Id.,* §§ 54:10A–4 (d)(5).

[3] *Werner Machine Co.* v. *Director of Division of Taxation,* 17 N. J. 121, 125, 110 A. 2d 89, 91.

the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations. And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, *e. g., Society for Savings* v. *Coite,* 6 Wall. 594; *Provident Institution* v. *Massachusetts,* 6 Wall. 611; *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632; *Home Ins. Co.* v. *New York, supra; Educational Films Corp.* v. *Ward, supra; Pacific Co.* v. *Johnson, supra.* We have only recently adhered to this principle in another aspect of this field of taxation. See *Society for Savings* v. *Bowers, supra,* at 147–148. *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals,* 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal incidence this Court found to be upon the intangible assets of the corporation.

Since as applied here this is a permissible tax on the corporate franchise, the decision below must be

Affirmed.

PETROWSKI ET AL. *v.* HAWKEYE-SECURITY INSURANCE CO.

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

No. 469. Argued March 7, 1956.—Decided March 26, 1956.

The District Court had jurisdiction of the subject matter in this case; and respondent, by its stipulation, waived any right to assert a lack of personal jurisdiction over it. Pp. 495–496.
226 F. 2d 126, reversed and remanded.

Richard P. Tinkham, Jr. argued the cause and filed a brief for petitioners.

Victor M. Harding argued the cause for respondent. With him on the brief was *Herbert C. Hirschboeck.*

PER CURIAM.

Respondent, Hawkeye-Security Insurance Company, filed a motion to quash the return of service of summons on the grounds that the District Court acquired no personal jurisdiction over it and that the power of attorney which it had filed with the Commissioner of Motor Vehicles of the State of Wisconsin did not authorize him to accept service of process for it in this case. After this motion was denied, respondent filed its answer to the complaint in which it again pressed its claim that the District Court lacked personal jurisdiction over it. Subsequently, however, respondent filed (1) a motion to amend its answer and to interplead; (2) a counterclaim; (3) a stipulation and order adding a party-plaintiff and amending the complaint and answer; and (4) a stipulation that judgment be entered against the alleged insured in favor of the additional party-plaintiff. The latter

stipulation included the following provision, together with others consistent with it and confirmatory of its purpose:

> "1. That each of the parties to this stipulation voluntarily submits to the jurisdiction of the above entitled Court without service of process herein, the same as if personal service had been obtained by each against the other."

Following a trial on the merits, judgment was entered against respondent, but the Court of Appeals, with one judge dissenting, reversed on the ground that respondent's motion to quash should have been granted. 226 F. 2d 126.

Upon examination of the record and the law, we conclude that the District Court had jurisdiction of the subject matter and that respondent, by its stipulation, waived any right to assert a lack of personal jurisdiction over it. We, therefore, reverse the judgment of the Court of Appeals and remand the case to it for further proceedings.

Reversed and remanded.

PENNSYLVANIA *v.* NELSON.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

No. 10. Argued November 15–16, 1955.—Decided April 2, 1956.

The Smith Act, as amended, 18 U. S. C. § 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. Pp. 498–510.

1. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the States to supplement it. Pp. 502–504.

2. The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. Pp. 504–505.

3. Enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Pp. 505–510.

377 Pa. 58, 104 A. 2d 133, affirmed.

Frank F. Truscott, Special Deputy Attorney General of Pennsylvania, and *Harry F. Stambaugh* argued the cause for petitioner. With them on the brief were *Frank P. Lawley, Jr.,* Deputy Attorney General, and *Albert A. Fiok.*

Herbert S. Thatcher argued the cause for respondent. With him on the brief was *Victor Rabinowitz.*

By special leave of Court, *Charles F. Barber* argued the cause for the United States, and *Louis C. Wyman,* Attorney General, for the State of New Hampshire, as *amici curiae,* urging reversal. On the brief with *Mr. Barber* were *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Harold D. Koffsky* and *Philip R. Monahan. Mr. Wyman* also filed a brief.

Briefs of *amici curiae* urging reversal were filed by *George Fingold,* Attorney General, and *Lowell S. Nicholson, Samuel H. Cohen* and *Fred L. True, Jr.,* Assistant Attorneys General, for the State of Massachusetts, and *Ralph B. Gregg* for the American Legion.

Briefs of *amici curiae* urging affirmance were filed by *Osmond K. Fraenkel* and *Herbert Monte Levy* for the American Civil Liberties Union, *Walter C. Longstreth, Allen S. Olmsted, 2d* and *William Allen Rahill* for the Civil Liberties Committee of the Philadelphia Yearly Meeting of the Religious Society of Friends, and *Frank J. Donner, Royal W. France, Arthur Kinoy* and *Marshall Perlin* for Feldman et al.

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

The respondent Steve Nelson, an acknowledged member of the Communist Party, was convicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, of a violation of the Pennsylvania Sedition Act [1] and sentenced to imprisonment for twenty years and to a fine of $10,000 and to costs of prosecution in the sum of $13,000. The Superior Court affirmed the conviction. 172 Pa. Super. 125, 92 A. 2d 431. The Supreme Court of Pennsylvania, recognizing but not reaching many alleged serious trial errors and conduct of the trial court infringing upon respondent's right to due process of law,[2] decided

[1] Pa. Penal Code § 207, 18 Purdon's Pa. Stat. Ann. § 4207. The text of the statute is set out in an Appendix to this opinion, *post,* p. 510.

[2] The Supreme Court also did not have to reach the question of the constitutionality of subdivision (c) of the Pennsylvania Act, the basis of four counts of the twelve-count indictment, which punishes utterances "or conduct [intended to] incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt." Cf. *Winters* v. *New York,* 333 U. S. 507. This provision is strangely

the case on the narrow issue of supersession of the state law by the Federal Smith Act.[3] In its opinion, the court stated:

> "And, while the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania." [4]

The precise holding of the court, and all that is before us for review, is that the Smith Act of 1940,[5] as amended in 1948,[6] which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct.

Many State Attorneys General and the Solicitor General of the United States appeared as *amici curiae* for petitioner, and several briefs were filed on behalf of the respondent. Because of the important question of federal-state relationship involved, we granted certiorari. 348 U. S. 814.

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reminiscent of the Sedition Act of 1798, 1 Stat. 596, which punished utterances made "with intent to defame the . . . government, or either house of the . . . Congress, or the . . . President, or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States . . . ."

[3] 377 Pa. 58, 104 A. 2d 133.

[4] 377 Pa., at 69, 104 A. 2d, at 139.

[5] 54 Stat. 670.

[6] 18 U. S. C. § 2385. The text of the statute is set out in an Appendix to this opinion, *post*, p. 511. (Another part of the Smith Act, punishing the advocacy of mutiny, is now 18 U. S. C. § 2387.)

It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. The distinction between the two situations was clearly recognized by the court below.[7] Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction, as was done under the Eighteenth Amendment and the Volstead Act. *United States* v. *Lanza,* 260 U. S. 377. Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds.[8] Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power, as was done in *Fox* v. *Ohio,* 5 How. 410, and *Gilbert* v. *Minnesota,* 254 U. S. 325, relied upon by petitioner as authority herein. In neither of those cases did the state statute impinge on

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[7] "No question of federal supersession of a state statute was in issue . . . when the Supreme Court upheld the validity of the state statutes in *Gitlow* v. *New York,* 268 U. S. 652 (1925), and *Whitney* v. *California,* 274 U. S. 357 (1927)." 377 Pa., at 73–74, 104 A. 2d, at 141.

Although the judgments of conviction in both *Gitlow* and *Whitney* were rendered in 1920, before repeal of the federal wartime sedition statute of 1918, 41 Stat. 1359, the question of supersession was not raised in either case and, of course, not considered in this Court's opinions.

[8] "Nor is a State stripped of its means of self-defense by the suspension of its sedition statute through the entry of the Federal Government upon the field. There are many valid laws on Pennsylvania's statute books adequate for coping effectively with actual or threatened internal civil disturbances. As to the nationwide threat to all citizens, imbedded in the type of conduct interdicted by a sedition act, we are—all of us—protected by the Smith Act and in a manner more efficient and more consistent with the service of our national welfare in all respects." 377 Pa., at 70, 104 A. 2d, at 139.

federal jurisdiction. In the *Fox* case, the federal offense was counterfeiting. The state offense was defrauding the person to whom the spurious money was passed. In the *Gilbert* case this Court, in upholding the enforcement of a state statute, proscribing conduct which would "interfere with or discourage the enlistment of men in the military or naval forces of the United States or of the State of Minnesota," treated it not as an act relating to "the raising of armies for the national defense, nor to rules and regulations for the government of those under arms [a constitutionally exclusive federal power]. It [was] simply a local police measure . . . ." [9]

Where, as in the instant case, Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate,[10] dif-

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[9] 254 U. S., at 331. The Court went on to observe: ". . . the State knew the conditions which existed and could have a solicitude for the public peace, and this record justifies it. Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence. And such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the power of the State." *Id.*, at 331–332.

[10] Petitioner makes the subsidiary argument that 18 U. S. C. § 3231 shows a congressional intention not to supersede state criminal statutes by any provision of Title 18. Section 3231 provides:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

The office of the second sentence is merely to limit the effect of the jurisdictional grant of the first sentence. There was no intention to resolve particular supersession questions by the Section.

ferent criteria have furnished touchstones for decision. Thus,

> "[t]his Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula." *Hines* v. *Davidowitz,* 312 U. S. 52, 67.

And see *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230–231. In this case, we think that each of several tests of supersession is met.

First, "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S., at 230. The Congress determined in 1940 that it was necessary for it to re-enter the field of antisubversive legislation, which had been abandoned by it in 1921. In that year, it enacted the Smith Act which proscribes advocacy of the overthrow of any government—federal, state or local—by force and violence and organization of and knowing membership in a group which so advocates.[11] Conspiracy to commit any of these acts is punishable under the general criminal conspiracy provisions in 18 U. S. C. § 371. The Internal Security Act of 1950 is aimed more directly at Communist organizations.[12] It distinguishes between "Communist-

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[11] See Appendix, *post,* p. 511. See also the Voorhis Act passed in 1940, now codified as 18 U. S. C. § 2386, and the Foreign Agents Registration Act passed in 1938, 22 U. S. C. § 611 *et seq.*

[12] 50 U. S. C. § 781 *et seq.*

action organizations" and "Communist-front organizations," [13] requiring such organizations to register and to file annual reports with the Attorney General giving complete details as to their officers and funds.[14] Members of Communist-action organizations who have not been registered by their organization must register as individuals.[15] Failure to register in accordance with the requirements of Sections 786–787 is punishable by a fine of not more than $10,000 for an offending organization and by a fine of not more than $10,000 or imprisonment for not more than five years or both for an individual offender—each day of failure to register constituting a separate offense.[16] And the Act imposes certain sanctions upon both "action" and "front" organizations and their members.[17] The Communist Control Act of 1954 declares "that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States" and that "its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States." [18] It also contains a legislative finding that the Communist Party is a "Communist-action organization" within the meaning of the Internal Security Act of 1950 and provides that "knowing" members of the Communist Party are "subject to all the provisions and penalties" of that Act.[19] It furthermore sets up a new classification of "Communist-infiltrated organ-

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[13] *Id.*, § 782 (3), (4).

[14] *Id.*, § 786.

[15] *Id.*, § 787.

[16] *Id.*, § 794 (a).

[17] *Id.*, §§ 784, 785, 789, 790.

[18] 50 U. S. C. (1955 Supp.) § 841.

[19] *Id.*, § 843.

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izations" [20] and provides for the imposition of sanctions against them.

We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law. As was said by Mr. Justice Holmes in *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604:

> "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

Second, the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230, citing *Hines* v. *Davidowitz, supra.*[21] Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. Our external defenses have been strengthened, and a plan to

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[20] *Id.*, § 782 (4A).

[21] It is worth observing that in *Hines* this Court held a Pennsylvania statute providing for alien registration was superseded by Title III of the same Act of which the commonly called Smith Act was Title I. Title II amended certain statutes dealing with the exclusion and deportation of aliens. The provisions of Title I involve a field of no less dominant federal interest than Titles II and III, in which Congress manifestly did not desire concurrent state action.

protect against internal subversion has been made by it. It has appropriated vast sums, not only for our own protection, but also to strengthen freedom throughout the world. It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our Government, and has denominated such activities as part of a world conspiracy. It accordingly proscribed sedition against all government in the nation—national, state and local. Congress declared that these steps were taken "to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government . . . ." [22] Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. As was said in the court below:

> "Sedition against the United States is not a *local* offense. It is a crime against the *Nation.* As such, it should be prosecuted and punished in the Federal courts where this defendant has in fact been prosecuted and convicted and is now under sentence.[23] It is not only important but vital that such prosecutions should be exclusively within the control of the Federal Government . . . ." [24]

Third, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Since 1939, in order to avoid a hampering of uniform enforcement of its program by sporadic local prosecutions, the Federal Government has urged

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[22] 50 U. S. C. § 781 (15).

[23] *United States* v. *Mesarosh* [Nelson], 116 F. Supp. 345, aff'd, 223 F. 2d 449, cert. granted, 350 U. S. 922.

[24] 377 Pa., at 76, 104 A. 2d, at 142.

local authorities not to intervene in such matters, but to turn over to the federal authorities immediately and unevaluated all information concerning subversive activities. The President made such a request on September 6, 1939, when he placed the Federal Bureau of Investigation in charge of investigation in this field:

> "The Attorney General has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations.
>
> "This task must be conducted in a comprehensive and effective manner on a national basis, and all information must be carefully sifted out and correlated in order to avoid confusion and irresponsibility.
>
> "To this end I request all police officers, sheriffs, and all other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality laws." [25]

And in addressing the Federal-State Conference on Law Enforcement Problems of National Defense, held on August 5 and 6, 1940, only a few weeks after the passage of the Smith Act, the Director of the Federal Bureau of Investigation said:

> "The fact must not be overlooked that meeting the spy, the saboteur and the subverter is a problem that must be handled on a nation-wide basis. An isolated incident in the middle west may be of little significance, but when fitted into a national pattern

[25] The Public Papers and Addresses of Franklin D. Roosevelt, 1939 Volume, pp. 478–479 (1941).

> of similar incidents, it may lead to an important revelation of subversive activity. It is for this reason that the President requested all of our citizens and law enforcing agencies to report directly to the Federal Bureau of Investigation any complaints or information dealing with espionage, sabotage or subversive activities. In such matters, time is of the essence. It is unfortunate that in a few States efforts have been made by individuals not fully acquainted with the far-flung ramifications of this problem to interject superstructures of agencies between local law enforcement and the FBI to sift what might be vital information, thus delaying its immediate reference to the FBI. This cannot be, if our internal security is to be best served. This is no time for red tape or amateur handling of such vital matters. There must be a direct and free flow of contact between the local law enforcement agencies and the FBI. The job of meeting the spy or saboteur is one for experienced men of law enforcement." [26]

Moreover, the Pennsylvania Statute presents a peculiar danger of interference with the federal program. For, as the court below observed:

> "Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking. It is

[26] Proceedings, p. 23.

> important that punitive sanctions for sedition *against the United States* be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority's judiciary. If that be done, sedition will be detected and punished, no less, wherever it may be found, and the right of the individual to speak freely and without fear, even in criticism of the government, will at the same time be protected." [27]

In his brief, the Solicitor General states that forty-two States plus Alaska and Hawaii have statutes which in some form prohibit advocacy of the violent overthrow of established government. These statutes are entitled anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws, etc. Although all of them are primarily directed against the overthrow of the United States Government, they are in no sense uniform. And our attention has not been called to any case where the prosecution has been successfully directed against an attempt to destroy state or local government. Some of these Acts are studiously drawn and purport to protect fundamental rights by appropriate definitions, standards of proof and orderly procedures in keeping with the avowed congressional purpose "to protect freedom from those who would destroy it, without infringing upon the freedom of all our people." Others are vague and are almost wholly without such safeguards. Some even purport to punish mere membership in subversive organizations which the federal statutes do not punish where federal registration requirements have been fulfilled.[28]

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[27] 377 Pa., at 74–75, 104 A. 2d, at 141.

[28] *E. g.*, compare Fla. Stat., 1953, § 876.02: "Any person who— . . . (5) Becomes a member of, associated with or promotes the interest of any criminal anarchistic, communistic, nazi-istic or fascistic organization, . . . [s]hall be guilty of a felony . . . ," with 50 U. S. C. § 783 (f): "Neither the holding of office nor membership in any

When we were confronted with a like situation in the field of labor-management relations, Mr. Justice Jackson wrote:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." [29]

Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned by Mr. Justice Jackson, but the added conflict engendered by different criteria of substantive offenses.

Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable.

We are not unmindful of the risk of compounding punishments which would be created by finding concurrent state power. In our view of the case, we do not reach the question whether double or multiple punishment for the same overt acts directed against the United States has constitutional sanction.[30] Without compelling

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Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

[29] *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491.

[30] But see Grant, The *Lanza* Rule of Successive Prosecutions, 32 Col. L. Rev. 1309.

indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment. Cf. *Houston* v. *Moore,* 5 Wheat. 1, 31, 75; *Jerome* v. *United States,* 318 U. S. 101, 105.

The judgment of the Supreme Court of Pennsylvania is

Affirmed.

[For dissenting opinion of MR. JUSTICE REED, joined by MR. JUSTICE BURTON and MR. JUSTICE MINTON, see *post,* p. 512.]

APPENDIX.

Pennsylvania Penal Code § 207.

The word "sedition," as used in this section, shall mean:

Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

The word "sedition" shall also include:

(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined.

Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both.

18 U. S. C. § 2385.

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of

overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

The problems of governmental power may be approached in this case free from the varied viewpoints that focus on the problems of national security. This is a jurisdictional problem of general importance because it involves an asserted limitation on the police power of the States when it is applied to a crime that is punishable also by the Federal Government. As this is a recurring problem, it is appropriate to explain our dissent.

Congress has not, in any of its statutes relating to sedition, specifically barred the exercise of state power to punish the same Acts under state law. And, we read the majority opinion to assume for this case that, absent federal legislation, there is no constitutional bar to punishment of sedition against the United States by both a State and the Nation.[1] The majority limits to the federal

[1] No problem of double punishment exists in this case. See the Court's opinion, p. 499, and its last paragraph, p. 509. See *United States* v. *Lanza,* 260 U. S. 377, 382; The Federalist, No. 32. Cf. *Houston* v. *Moore,* 5 Wheat. 1, statement at p. 22 with that at pp. 44–45.

courts the power to try charges of sedition against the Federal Government.

First, the Court relies upon the pervasiveness of the antisubversive legislation embodied in the Smith Act of 1940, 18 U. S. C. § 2385, the Internal Security Act of 1950, 64 Stat. 987, and the Communist Control Act of 1954, 68 Stat. 775. It asserts that these Acts in the aggregate mean that Congress has occupied the "field of sedition" to the exclusion of the States. The "occupation of the field" argument has been developed by this Court for the Commerce Clause and legislation thereunder to prevent partitioning of this country by locally erected trade barriers. In those cases this Court has ruled that state legislation is superseded when it conflicts with the comprehensive regulatory scheme and purpose of a federal plan. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148. The two cases cited by the Court to support its argument that the broad treatment of any subject within the federal power bars supplemental action by States are of this nature. In our view neither case is apposite to the Smith Act. The *Varnville* case dealt with general regulation of interstate commerce making the originating carrier liable to the holder of its interstate bill of lading for damage caused by a common carrier of property. This Court held that the section through the federal commerce power superseded a state right of action against a nonoriginating carrier for damages and a penalty for injury occurring on another line. The pertinent section, 34 Stat. 595, § 7, expressed a controlling federal policy for this commerce. The *Rice* case dealt with regulations of warehouses. We barred state action in that area because the Act declared that the authority it conferred "shall be exclusive with respect to all persons securing a license" under the Act. 331 U. S., at 224 and 233.

But the federal sedition laws are distinct criminal statutes that punish willful advocacy of the use of force

against "the government of the United States or the government of any State." These criminal laws proscribe certain local activity without creating any statutory or administrative regulation. There is, consequently, no question as to whether some general congressional regulatory scheme might be upset by a coinciding state plan.[2] In these circumstances the conflict should be clear and direct before this Court reads a congressional intent to void state legislation into the federal sedition acts.[3] Chief Justice Marshall wrote:

> "To interfere with the penal laws of a State, where they . . . have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. . . . It would be taken deliberately, and the intention would be clearly and unequivocally expressed." *Cohens* v. *Virginia,* 6 Wheat. 264, 443.

Moreover, it is quite apparent that since 1940 Congress has been keenly aware of the magnitude of existing state legislation proscribing sedition. It may be validly assumed that in these circumstances this Court should not void state legislation without a clear mandate from Congress.[4]

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[2] Hunt, Federal Supremacy and State Anti-Subversive Legislation, 53 Mich. L. Rev. 407, 427–428; Note, 55 Col. L. Rev. 83, 90.

[3] *Gilbert* v. *Minnesota,* 254 U. S. 325, 328–333; *Reid* v. *Colorado,* 187 U. S. 137, 148; *Sinnot* v. *Davenport,* 22 How. 227, 243; *Fox* v. *Ohio,* 5 How. 410, 432–435.

[4] Forty-two States, along with Alaska and Hawaii, now have laws which penalize the advocacy of violent overthrow of the federal or state governments. Digest of the Public Record of Communism in the United States (Fund for the Republic, 1955) 266–306. In hearings before the House Judiciary Committee on the proposed Smith Act, both witnesses and members of the Committee made references to existing state sedition laws. Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, on H. R. 5138,

We cannot agree that the federal criminal sanctions against sedition directed at the United States are of such a pervasive character as to indicate an intention to void state action.

Secondly, the Court states that the federal sedition statutes touch a field "in which the federal interest is so dominant" they must preclude state laws on the same subject. This concept is suggested in a comment on *Hines* v. *Davidowitz*, 312 U. S. 52, in the *Rice* case, at 230. The Court in *Davidowitz* ruled that federal statutes compelling alien registration preclude enforcement of state statutes requiring alien registration. We read *Davidowitz* to teach nothing more than that, when the Congress provided a single nation-wide integrated system of regulation so complete as that for aliens' registration (with fingerprinting, a scheduling of activities, and continuous information as to their residence), the Act bore so directly on our foreign relations as to make it evident that Congress intended only one uniform national alien registration system.[5]

76th Cong., 1st Sess., pp. 7, 69, 83–85. Similar comment was heard in the congressional debates. 84 Cong. Rec. 10452. In fact, the Smith Act was patterned on the New York Criminal Anarchy Statute. *Commonwealth* v. *Nelson*, 377 Pa. 58, 86, 104 A. 2d 133, 147. The original text of the Smith Act is set out in the hearings before Subcommittee No. 3, *supra*, p. 1, and the New York Act may be read in *Gitlow* v. *New York*, 268 U. S. 652, 654–655. Further evidence of congressional notice of state legislation may be found since the passage of the Smith Act. S. Rep. No. 1358, 81st Cong., 2d Sess., p. 9; H. R. Rep. No. 2980, 81st Cong., 2d Sess., p. 2; H. R. Rep. No. 1950, 81st Cong., 2d Sess., pp. 25–46 (Un-American Activities Committee). See 67 Harv. L. Rev. 1419, 1420; 40 Cornell L. Rev. 130, 133.

[5] In *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 749, we said: "In the *Hines* case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system

We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the Nation, or any State, or any political subdivision of either.[6] Such an exercise of federal police power carries, we think, no such dominancy over similar state powers as might be attributed to continuing federal regulations concerning foreign affairs or coinage, for example.[7] In the responsibility of national and local governments to protect themselves against sedition, there is no "dominant interest."

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of regulation to function alongside of a federal system. In that field, any 'concurrent state power that may exist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways."

The *Davidowitz* case is distinguishable on other grounds. Alien registration is not directly related to control of undesirable conduct; consequently there is no imperative problem of local law enforcement. 102 Pa. L. Rev., at 1091. There is also considerable legislative history behind the Alien Registration Act which suggests that Congress was trying to avoid overburdening of aliens; some features of the conflicting state law had been expressly rejected by Congress. 312 U. S., at 71–73. See 39 Minn. L. Rev. 213. It should be noted also that the coincidence between the state and federal laws in the *Davidowitz* case was so great that no real purpose was served by the state law. 34 Boston U. L. Rev. 514, 517–518.

States are barred by the Constitution from entering into treaties and by 18 U. S. C. § 953 from correspondence or intercourse with foreign governments with relation to their disputes or controversies with this Nation.

[6] Such efforts may be punishable crimes. *Dennis* v. *United States,* 341 U. S. 494, 508–510.

[7] It seems quite reasonable to believe "that the exclusion principle is to be more strictly applied when the Congress acts in a field wherein the constitutional grant of power to the federal government is exclusive, as in its right to protect interstate commerce and to control international relations." *Albertson* v. *Millard,* 106 F. Supp. 635, 641.

We are citizens of the United States and of the State wherein we reside and are dependent upon the strength of both to preserve our rights and liberties. Both may enact criminal statutes for mutual protection unless Congress has otherwise provided. It was so held in *Gilbert* v. *Minnesota,* 254 U. S. 325. In *Gilbert* the federal interest in raising armies did not keep this Court from permitting Minnesota to punish persons who interfered with enlistments (*id.,* at 326), even though a comprehensive federal criminal law proscribed identical activity. 40 Stat. 553. We do not understand that case as does the majority. In our view this Court treated the Minnesota statute only alternatively as a police measure, p. 331. Minnesota made it unlawful to advocate "that men should not enlist in the military or naval forces of the United States." It was contended, pp. 327–328, that the power to punish such advocacy was "conferred upon Congress and withheld from the States." This Court ruled against the contention, saying:

> "An army, of course, can only be raised and directed by Congress, in neither has the State power, but it has power to regulate the conduct of its citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the Nation and State. To do so is not to usurp a National power, it is only to render a service to its people, ..." *Id.,* at 330–331.[8]

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[8] Mr. Justice Brandeis, dissenting, emphasized the ruling here applicable thus:

"Congress has the exclusive power to legislate concerning the Army and the Navy of the United States, and to determine, among other things, the conditions of enlistment. . . .

". . . The States act only under the express direction of Congress. . . .

". . . As exclusive power over enlistments in the Army and the Navy of the United States and the responsibility for the conduct of war is vested by the Federal Constitution in Congress, legislation by

Thirdly, the Court finds ground for abrogating Pennsylvania's antisedition statute because, in the Court's view, the State's administration of the Act may hamper the enforcement of the federal law. Quotations are inserted from statements of President Roosevelt and Mr. Hoover, the Director of the Federal Bureau of Investigation, to support the Court's position. But a reading of the quotations leads us to conclude that their purpose was to gain prompt knowledge of evidence of subversive activities so that the federal agency could be fully advised. We find no suggestion from any official source that state officials should be less alert to ferret out or punish subversion. The Court's attitude as to interference seems to us quite contrary to that of the Legislative and Executive Departments. Congress was advised of the existing state sedition legislation when the Smith Act was enacted and has been kept current with its spread.[9] No declaration of exclusiveness followed. In this very case the Executive appears by brief of the Department of Justice, *amicus curiae*. The brief summarizes this point:

> "The administration of the various state laws has not, in the course of the fifteen years that the federal and state sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act. The significance of this absence of conflict in administration or enforce-

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a State on this subject is necessarily void unless authorized by Congress. . . . Here Congress not only had exclusive power to act on the subject; it had exercised that power directly by the Espionage Law before Gilbert spoke the words for which he was sentenced. . . . The States may not punish treason against the United States . . . although indirectly acts of treason may affect them vitally. No more may they arrogate to themselves authority to punish the teaching of pacifism which the legislature of Minnesota appears to have put into that category." *Id.*, at 336–343.

[9] See note 4, *supra*.

> ment of the federal and state sedition laws will be appreciated when it is realized that this period has included the stress of wartime security requirements and the federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders." [10] *Id.*, at 30–31.

Mere fear by courts of possible difficulties does not seem to us in these circumstances a valid reason for ousting a State from exercise of its police power. Those are matters for legislative determination.

Finally, and this one point seems in and of itself decisive, there is an independent reason for reversing the Pennsylvania Supreme Court. The Smith Act appears in Title 18 of the United States Code, which Title codifies the federal criminal laws. Section 3231 of that Title provides:

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

That declaration springs from the federal character of our Nation. It recognizes the fact that maintenance of order and fairness rests primarily with the States. The section was first enacted in 1825 and has appeared successively in the federal criminal laws since that time.[11] This Court has interpreted the section to mean that States may provide concurrent legislation in the absence of explicit congressional intent to the contrary. *Sexton* v. *California,* 189 U. S. 319, 324–325. The majority's position in this case

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[10] The brief added, p. 31: ". . . the Attorney General of the United States recently informed the attorneys general of the several states . . . that a full measure of federal-state cooperation would be in the public interest. See *New York Times,* Sept. 15, 1955, p. 19."

[11] 4 Stat. 115, 122–123; 18 U. S. C. A. § 3231 (Historical and Revision Notes).

cannot be reconciled with that clear authorization of Congress.

The law stands against any advocacy of violence to change established governments. Freedom of speech allows full play to the processes of reason. The state and national legislative bodies have legislated within constitutional limits so as to allow the widest participation by the law enforcement officers of the respective governments. The individual States were not told that they are powerless to punish local acts of sedition, nominally directed against the United States. Courts should not interfere. We would reverse the judgment of the Supreme Court of Pennsylvania.

IN RE APPLICATION OF BURWELL.

NO. 736. CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Decided April 2, 1956.

1. A Court of Appeals has jurisdiction to entertain applications for certificates of probable cause, under 28 U. S. C. § 2253, addressed to that Court instead of to a judge or judges thereof. P. 522.
2. It is for the Court of Appeals to determine whether an application to that Court for a certificate of probable cause under 28 U. S. C. § 2253 is to be considered by a panel of that Court, by one of its judges, or in some other way that the Court deems appropriate. P. 522.
3. It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U. S. C. § 2253, should be exercised; and, so long as that Court keeps within the bounds of judicial discretion, its action is not reviewable. P. 522.

Certificates dismissed.

PER CURIAM.

The Court of Appeals for the Ninth Circuit has certified to this Court the following three questions:

> "(1) Has Congress created in the Court of Appeals, as a court, the jurisdiction to issue a certificate of probable cause, sought from the court, as a court, by the provisions of 28 U. S. C. § 2253, replacing the repealed 28 U. S. C. § 466?
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> "(2) If the Supreme Court holds that Congress has not given the Courts of Appeal such jurisdiction, did the Supreme Court create that jurisdiction, by its per curiam opinion, rendered without argument, which failed to consider 28 U. S. C. § 2253 and was based on the repealed 28 U. S. C. § 466 and House v. Mayo, 324 U. S. 42, 48 (1945), and its remand to

*Together with No. 737, *In re Application of Rogers,* also on certificate from the same Court.

this court 'so that the petitioner's application for a certificate of probable cause may be entertained on its merits'?

"(3) If the Supreme Court holds that Congress or the Court creates such jurisdiction by 28 U. S. C. § 2253 and that House v. Mayo applies, does its mandate mean that all the judges, as judges, or some individual judge, or the court as a court shall consider the petition for a certificate of probable cause?"

Earlier this Term we were constrained to find that the Court of Appeals for the Ninth Circuit was in error in deeming itself without jurisdiction to entertain applications for certificates of probable cause, under 28 U. S. C. § 2253, addressed to that court instead of to a judge or judges thereof. Accordingly, we reversed the judgments in these cases. *Burwell* v. *Teets,* 350 U. S. 808; *Rogers* v. *Teets,* 350 U. S. 809. Each of these cases was reversed "so that the petitioner's application for a certificate of probable cause may be entertained on its merits."

We did not attempt to lay down a procedure for the Court of Appeals to follow for the entertainment of such applications on their merits. We shall not do so now. It is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers. Cf. *Western Pacific R. Corp.* v. *Western Pacific R. Co.,* 345 U. S. 247. It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U. S. C. § 2253, should be exercised. See *United States* v. *Rosenburgh,* 7 Wall. 580. As long as that court keeps within the bounds of judicial discretion, its action is not reviewable.

The entire certificate in each of these cases must be

Dismissed.

SCHULZ, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO.

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

No. 282. Argued March 27–28, 1956.—Decided April 9, 1956.

On the record in this case, a suit under the Jones Act to recover for the death of a tugboat fireman who disappeared while working at night on four unlighted, icy and undermanned tugboats and whose drowned body was found later partly clothed and clutching a flashlight, the evidence was sufficient to go to the jury on the issues of whether respondent was negligent in failing to provide the deceased with a safe place to work and whether such negligence was the proximate cause of his death; and the trial court erred in directing a verdict for respondent. Pp. 523–527.

222 F. 2d 540, reversed.

Nathan Baker argued the cause and filed a brief for petitioner.

Joseph P. Allen argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner brought this suit for damages under the Jones Act,[1] alleging that her husband while employed by the respondent railroad as a tug fireman was drowned because of the negligent failure of respondent to provide him with a safe place to work. The District Judge directed the jury to return a verdict for the defendant, stating, "There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two." The Court of Appeals affirmed, saying that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to

[1] 41 Stat. 1007, 46 U. S. C. § 688.

defendant's breach of duty" it failed to show "where the accident occurred" or "that it was proximately caused by any default on the part of the defendant." [2]

The jury trial "is part and parcel of the remedy afforded railroad workers under the Employers Liability Act," which the Jones Act makes applicable to those working as petitioner's husband was here.[3] The Seventh Amendment to the Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." [4] We granted certiorari to consider the failure of the District Court to let this case go to the jury. 350 U. S. 882.

While some facts were in dispute there was evidence from which a jury could have found: On Christmas Day 1949, at about 5:15 p. m., the deceased, Schulz, reported for work on his job at Pier H, Jersey City, New Jersey, and was assigned to work on four tugboats docked side by side there. He went immediately to check the boats without waiting to change from his street to his working clothes. Returning to the pier alongside the tugs about seven o'clock, Schulz reported that he had finished his checking and was now going back to the boats to change to his work clothes and proceed with his other duties there. He was last seen alive walking in the direction of the nearest tug. At 1:25 a. m., a supervisor found Schulz was not on the boats. His street clothes were hanging in the upper engine room where the tug attendants usually changed clothes. His lunch package was also there. Three of the tugs were at all times wholly unlighted and dark; one was partially illuminated by

[2] 222 F. 2d 540, 541.

[3] *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354.

[4] For a discussion of the right to trial by jury under the Seventh Amendment see *Galloway* v. *United States*, 319 U. S. 372, and cases there cited.

spotlights from the pier. The night was cold—10 above zero—and there was some ice on the tugs. Because the company did not have enough workers that night properly to perform the duties that were required Schulz had to try to take care of all four tugs by himself. To do this he had to step from one boat to another in the dark except for such limited illumination as he could obtain from a flashlight. Several weeks after Schulz disappeared from the boats his body was found in the water near an adjacent pier. He was clothed in nothing but shorts and socks. A flashlight was in his hand. He had drowned. It is conceded that the deceased was not under the influence of alcohol when he came to the boat, that he did not commit suicide, that there was no foul play, and that he met his death by accident. The evidence showed that he was a capable and experienced workman who had been employed by the defendant for several years.

In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. "[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions

as these as well as others." *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888).

In this case petitioner is entitled to recover if her husband's death resulted "in whole or in part" [5] from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties.[6] But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences.[7] For "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." [8] Fact finding does not require mathematical certainty.[9] Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

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[5] 53 Stat. 1404, 45 U. S. C. § 51; 41 Stat. 1007, 46 U. S. C. § 688.

[6] Cf. *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784.

[7] *Johnson* v. *United States*, 333 U. S. 46.

[8] *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35. Conversely, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Ibid.*

[9] *Lavender* v. *Kurn*, 327 U. S. 645, 653.

We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so.

Reversed.

MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON dissent.

MR. JUSTICE FRANKFURTER.

Considerations that I have heretofore spelled out govern me in the conviction that the writ in this case should be dismissed as improvidently granted. *McAllister* v. *United States,* 348 U. S. 19, 23; *Carter* v. *Atlanta & St. A. B. R. Co.,* 338 U. S. 430, 437; *Cahill* v. *New York, N. H. & H. R. Co.,* 350 U. S. 898; *Anderson* v. *Atlantic Coast Line R. Co.,* 350 U. S. 807; *Swafford* v. *Atlantic Coast Line R. Co.,* 350 U. S. 807; *Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573, 578; *Affolder* v. *New York, C. & St. L. R. Co.,* 339 U. S. 96, 101; see Frankfurter and Landis, The Business of the Supreme Court, 206 *et seq.*

COLLINS ET AL. *v.* AMERICAN BUSLINES, INC. ET AL.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 523. Argued March 29, 1956.—Decided April 9, 1956.

The widow and child of a bus driver applied for compensation under the Arizona Workmen's Compensation Act for his accidental death while driving an interstate bus in Arizona. He was a resident of California and was covered by the California Workmen's Compensation Act. The bus line operated exclusively in interstate commerce and was not insured in Arizona. *Held:* The Commerce Clause of the Federal Constitution did not preclude Arizona from awarding compensation, even if the effect were to force the bus line to obtain insurance against liabilities arising in Arizona. Pp. 528–531.

79 Ariz. 220, 286 P. 2d 214, reversed and remanded.

John P. Frank argued the cause and filed a brief for petitioners.

John F. Franks argued the cause and filed a brief for the Industrial Commission of Arizona, respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Adolphus Henry Collins was killed in an accident near Ehrenburg, Arizona, on September 30, 1953. The accident resulted from the blowout of a tire on an American Buslines' vehicle which Collins was driving on a regular run from Phoenix to Los Angeles. Collins had been employed as a bus driver for American since 1944. He had done his driving on various routes in the Southwest, and from 1952 until the time of his death he was regularly employed on the Los Angeles to Phoenix and return route. He and his wife and minor child—the petitioners in this proceeding—made their home in Los Angeles, California,

in which State Collins was covered by workmen's compensation.

Petitioners applied on October 14, 1953, to the Industrial Commission of Arizona for compensation in accordance with the terms of the Arizona Workmen's Compensation Act. In an award dated November 30, 1953, that agency made, *inter alia,* the following findings:

> "That the defendant employer maintained workmen's compensation coverage in the State of California and that payroll premium on the said Adolphus Henry Collins was reported to the State of California. That no reporting of such was made at any time to the Industrial Commission of Arizona.
>
> "That the said Adolphus Henry Collins, at the time of his death, was not regularly employed in the State of Arizona as said term has been defined by the Supreme Court of Arizona in the case of Industrial Commission vs. Watson Brothers Transportation Company, [75 Ariz. 357, 256 P. 2d 730]." *
>
> "That the Industrial Commission of Arizona does not have jurisdiction in the premises, and that said . . . claim on file herein should be denied for lack of jurisdiction."

On certiorari to the Supreme Court of Arizona, the construction of the Arizona statute on which the Commission based its award was rejected, but its disposition of petitioners' claim was affirmed. After concluding that American Buslines "operated exclusively in interstate

*Section 56–928 of the Arizona Code Annotated, 1939 (Cum. Supp. 1952), provides:

"Employers subject to the provisions of this article are: . . . 3. every person who has in his employ three [3] or more workmen or operatives regularly employed . . . . For the purposes of this section 'regularly employed' includes all employments, whether continuous throughout the year, or for only a portion of the year, in the usual trade, business, profession, or occupation of an employer."

commerce," the court held that the Commerce Clause of the United States Constitution precluded recovery under the Arizona Workmen's Compensation Act because Collins was covered by the California statute, and to require his interstate employer to insure also in Arizona would place an undue burden on interstate commerce. 79 Ariz. 220, 286 P. 2d 214. We granted certiorari because of the important federal question thus presented. 350 U. S. 931.

The only respondent here is the Arizona Industrial Commission. It is not at all clear from the record before us what the interest of the state agency is in this litigation. If the employer were actively before the Court, it could claim, we assume, that an award in the circumstances of the present case burdens the interstate commerce in that the consequences of such an award would be to require it in the future to obtain insurance sufficiently comprehensive to cover potential awards in the various States through which it passes. The apparent interest of the Commission is different, namely, that as a result of an award in this case, interstate carriers will seek insurance from a single private insurance carrier capable of giving coverage in all States through which they run. The desire by interstate carriers for such insurance will cause a defection from the state compensation fund, and it is this potential defection which leads to the Commission's claim that the Arizona Act cannot be applicable in an interstate situation. But this asserted burden upon interstate commerce—the disadvantageous effect upon the state compensation fund—is too intangible and elusive to be deemed a constitutionally disallowable burden.

We have been advised, however, that American Buslines has been a non-participating defendant throughout this litigation; that it is in receivership in Nebraska; that an order has been issued by the Nebraska court barring

claims against it except in that court; and that petitioners' claim is against the state compensation fund, administered by the Industrial Commission, which will in a separate proceeding be put to such recourse as it may have against American Buslines. This is not controverted. The Commission, therefore, appears to have an immediate interest of the same character and extent that American Buslines would have were it here. Thus, the Commission can invoke the employer's claim under the Commerce Clause. But that claim—of an increased insurance burden imposed as a practical matter upon an interstate carrier—while perhaps less tenuous than the defection argument directly pertinent to the Commission's case, is hardly more substantial. Whatever dollars-and-cents burden an eventual judgment for claimants in the position of petitioners may cast either upon a carrier or the State's fund is insufficient, compared with the interest of the State in affording remedies for injuries committed within its boundaries, see *Carroll* v. *Lanza,* 349 U. S. 408, to dislodge state power. The State's power is not dislodged so long as the Federal Government has not taken over the field of remedies for injuries of employees on interstate buses as it has done in the case of employees of interstate railroad carriers. *New York Central R. Co.* v. *Winfield,* 244 U. S. 147.

The court below and the Commission here rely on *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761. It is too slender a reed. Two less similar situations, in which shelter from an exercise of state power is sought under the Commerce Clause, would be difficult to find than that presented by the circumstances of this case, compared with the circumstances of the *Southern Pacific* case.

The judgment of the Supreme Court of Arizona is reversed, and the case is remanded to that court for further proceedings.

Reversed and remanded.

ARCHAWSKI ET AL. *v.* HANIOTI.

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

No. 351. Argued March 5, 1956.—Decided April 9, 1956.

A libel in admiralty alleged that petitioners paid moneys to respondent for transportation to Europe on respondent's vessel, and that respondent breached the contract by abandonment of the voyage. The libel further alleged that respondent wrongfully appropriated the passage money to his own use and committed other fraudulent acts. *Held:* The cause of action alleged was within the admiralty jurisdiction of the Federal District Court. Pp. 532–536.

(a) The essential character of the libel as a claim for breach of a maritime contract was not altered by the allegations of wrongfulness and fraud. Pp. 534–535.

(b) So long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it. P. 535.

(c) Admiralty has jurisdiction even where a libel reads like *indebitatus assumpsit* at common law, provided that the unjust enrichment arose out of the breach of a maritime contract. Pp. 535–536.

223 F. 2d 406, reversed and remanded.

Harry D. Graham argued the cause and filed a brief for petitioners.

Israel Convisser argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The sole question in the case is whether the cause of action alleged comes within the admiralty jurisdiction of the District Court. The District Court held that this was an action on a maritime contract, within the admiralty jurisdiction, 129 F. Supp. 410. The Court of Appeals reversed, holding that the suit was in the nature of the

old common law *indebitatus assumpsit* for money had and received, based upon the wrongful withholding of money. 223 F. 2d 406. The case is here on a petition for certiorari which we granted, 350 U. S. 872, because of the seeming conflict of that ruling with *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, 124.[1]

The libel alleges that respondent, doing business in his own and in various trade names, owned and controlled a passenger vessel, known as the *City of Athens,* and held out that vessel as a common carrier of passengers for hire, and that petitioners paid moneys for passage upon the vessel, scheduled for July 15, 1947, to Europe. A contract for the transportation of passengers is a maritime contract within admiralty jurisdiction.[2] *The Moses Taylor,* 4 Wall. 411. The allegations so far mentioned are plainly sufficient to establish such a contract. The libel goes on to allege a breach of that contract through an abandonment of the voyage. If this were all, it would be plain that petitioners stated a claim for breach of a maritime contract. But the libel further alleges that the sums paid by petitioners as passage money were "wrongfully and deliberately" applied by respondent to his own use and benefit "in reckless disregard of his obligations to refund

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[1] There is also an apparent conflict with *Sword Line* v. *United States,* 228 F. 2d 344, 346, decided, after we granted certiorari, by a different panel of the Second Circuit from the one which sat in the instant case.

[2] The Court in *New Jersey Steam Navigation Company* v. *Merchants' Bank,* 6 How. 344, 392, stated that in determining admiralty jurisdiction the inquiry is "into the nature and subject-matter of the contract,—whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the sea, or tide-waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained."

the same" and that respondent "has secreted himself away and manipulated his assets . . . for the purpose of defrauding" petitioners. Then follow allegations of certain fraudulent acts and transactions.

The allegations of wrongfulness and fraud do not alter the essential character of the libel. For the ancient admiralty teaching is that, "The rules of pleading in the admiralty are exceedingly simple and free from technical requirements." *Dupont de Nemours & Co.* v. *Vance,* 19 How. 162, 171–172. And see 2 Benedict, American Admiralty (6th ed. 1940), §§ 223, 237. Though these particular allegations of the libel sound in fraud or in the wrongful withholding of moneys, it is plain in the context that the obligation to pay the moneys arose because of a breach of the contract to transport passengers. Lawyers speak of the obligation in terms of *indebitatus assumpsit,* a concept whose tortuous development gave expression to "the ethical character of the law." See Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 53, 58 (1888). As Mr. Justice Holmes once put it, "An obligation to pay money generally is enforced by an action of assumpsit and to that extent is referred to a contract even though it be one existing only by fiction of law." *Thomas* v. *Matthiessen,* 232 U. S. 221, 235.

The fiction sometimes distorted the law. A line of authorities emerged to the effect that admiralty had no jurisdiction to grant relief in such cases "because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract." [3] *United Transp. & L. Co.* v. *New York & B. T. Line,* 185 F. 386, 391. Yet that duty to pay is often referable,

[3] And see *Israel* v. *Moore & McCormack Co.,* 295 F. 919; *Home Ins. Co.* v. *Merchants' Transp. Co.,* 16 F. 2d 372; *Silva* v. *Bankers Commercial Corp.,* 163 F. 2d 602.

as here, to the breach of a maritime contract. As Mr. Justice Stone said in *Krauss Bros. Co.* v. *Dimon S. S. Corp., supra,* at 124:

> ". . . Even under the common law form of action for money had and received there could be no recovery without proof of the breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term of the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize."

The truth is that in a case such as the present one there is neither an actual promise to repay the passage moneys nor a second contract. The problem is to prevent unjust enrichment from a maritime contract. See Morrison, The Remedial Powers of the Admiralty, 43 Yale L. J. 1, 27 (1933). A court that prevents a maritime contract from being exploited in that way does not reach beyond the domain of maritime affairs. We conclude that, so long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it.

The philosophy of *indebitatus assumpsit* is, indeed, not wholly foreign to admiralty. Analogous conceptions of rights based on quasi-contract are found in admiralty. One who saves property at sea has the right to an award of salvage, regardless of any agreement between him and the owner. See *Mason* v. *Ship Blaireau,* 2 Cranch 240, 266; *The Sabine,* 101 U. S. 384, 390; 1 Benedict, *supra,* § 117 *et seq.* Likewise, where cargo is jettisoned, the owner becomes entitled to a contribution in general average from the owners of other cargo which was saved without the aid of any agreement. See *Barnard* v. *Adams,* 10 How. 270, 303–304; *Star of Hope,* 9 Wall. 203, 228–230; 1 Benedict, *supra,* § 98. Other examples could be given. See Chandler, Quasi Contractual Relief

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in Admiralty, 27 Mich. L. Rev. 23 (1928). Rights which admiralty recognizes as serving the ends of justice are often indistinguishable from ordinary quasi-contractual rights created to prevent unjust enrichment. How far the concept of quasi-contracts may be applied in admiralty it is unnecessary to decide. It is sufficient this day to hold that admiralty has jurisdiction, even where the libel reads like *indebitatus assumpsit* at common law, provided that the unjust enrichment arose as a result of the breach of a maritime contract. Such is the case here.

The judgment is reversed and the case is remanded to the Court of Appeals for proceedings in conformity with this opinion.

Reversed and remanded.

INTERNATIONAL HARVESTER CREDIT CORP. ET AL. *v.* GOODRICH ET AL., CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 82. Argued January 17–18, 1956.—Decided April 9, 1956.

New York State imposes a highway use tax, computed by the weight-distance principle, upon motor carriers operating heavy vehicles on the State's highways. The tax owed by a carrier is a statutory lien upon all motor vehicles operated by the carrier within the State, and the lien is paramount to all prior liens or encumbrances. Vendors of particular trucks, who sold them to the carrier under conditional sales agreements more than a year after the statute became effective, challenged application of the statutory tax lien, in some circumstances, as a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. *Held:*

1. As applied to taxes based upon the carrier's operation of other trucks within the State, whether before or during the time that the carrier operated the particular trucks within the State, the State's priority of lien is constitutional. Pp. 538–548.

2. As applied to taxes assessed against the carrier after the vendors have repossessed the particular trucks, but which were based upon the carrier's operations on the State's highways before such repossession, the State's priority of lien is constitutional. Pp. 538–548.

308 N. Y. 731, 124 N. E. 2d 339, affirmed.

John Lord O'Brian argued the cause for appellants. With him on the brief were *Charles A. Horsky, Robert L. Randall* and *John T. De Graff.*

James O. Moore, Jr., Solicitor General of New York, argued the cause for appellees. With him on the brief were *Jacob K. Javits,* Attorney General, *Sidney Kelly, Jr.*, Assistant Attorney General, and *Walter V. Ferris,* Deputy Assistant Attorney General.

MR. JUSTICE BURTON delivered the opinion of the Court.

The State of New York imposes a highway use tax upon motor carriers operating heavy vehicles on its public highways. Many such vehicles are purchased and operated under conditional sales agreements, and certain conditional vendors here question the extent to which the State may subordinate the vendors' security interests to the State's lien for taxes owed by the carrier. The vendors question the constitutionality of any grant of priority to the State's lien, over their rights in particular trucks, insofar as the lien is made applicable to taxes based upon the carrier's operation of other trucks within the State, whether before, or during, the time that the carrier has operated the particular trucks within the State. The vendors object, likewise, to any priority for the lien as applied to taxes assessed against the carrier after the vendors have repossessed the particular trucks, even though the taxes are based upon the carrier's operations on the State's highways before such repossession.[1] For the reasons hereafter stated, we sustain the State's priority in each instance.

International Harvester Credit Corporation, a Delaware corporation, and Brockway Motor Company, Inc., a New York corporation, as plaintiffs (now appellants), with the members of the State Tax Commission of New York as defendants (now appellees), submitted this controversy to the Supreme Court of the State of New York, Appellate Division, Third Department, on stipulated facts, pursuant to § 546 of the Civil Practice Act of New York. Appel-

[1] We do not have before us the validity of the attempted subordination of a conditional vendor's security interest in a truck sold to and operated by a carrier where the tax is measured by any use of the highways by the carrier *after* the truck has been repossessed by its vendor. Such a claim was made in this case but it was abandoned by the State.

lants sought a declaratory judgment that the liens asserted by the State were not superior to the conditional vendors' interests in certain trucks and that Article 21 of the Tax Law was unconstitutional, insofar as it prescribed the priorities to which they objected.[2] Appellants also asked that the bonds filed by them to secure payment of the taxes be canceled and returned.

With one judge not voting, the Appellate Division decided in favor of appellees, sustaining generally the State's liens and priorities.[3] 284 App. Div. 604, 132 N. Y. S. 2d 511. On appeal, taken as a matter of right, that judgment was affirmed by the Court of Appeals of New York, with one judge dissenting. 308 N. Y. 731, 124 N. E. 2d 339. On appeal to this Court, under 28 U. S. C. § 1257 (2), we noted probable jurisdiction. 350 U. S. 813.

The stipulated facts may be summarized as follows: From January 1, 1952, through February 1954, Eastern Cartage and Leasing Co., Inc., here called the "carrier," was a domestic corporation owning at least 15 motor vehicles. As a motor carrier it operated these vehicles over the public highways of the State of New York subject to the highway use tax imposed by Article 21 of the Tax Law, *supra*. That tax was imposed upon the "carrier" or "owner," and those terms did not include

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[2] Article 21 of the Tax Law, effective October 1, 1951, imposed a tax for the privilege of operating on the highways of New York motor vehicles having a gross weight of over 18,000 pounds each. McKinney's N. Y. Laws, §§ 501 (2) and 503. The tax was computed on a graduated scale beginning at six mills per mile for vehicles of between 18,001 and 20,000 pounds. The scale rose to 35 mills for trucks weighing between 74,001 and 76,000 pounds, with an additional two mills per ton and fraction thereof above that weight. The tax was determined by multiplying the number of miles operated over the highways of the State by the rate for the appropriate weight group. *Id.*, § 503.

[3] The lien was not upheld as to any taxes which accrued after repossession of the trucks.

the conditional vendor of trucks operated by the motor carrier.[4] It was payable with the monthly returns.[5]

In recognition of the administrative difficulties involved in enforcing and collecting this tax, in contrast to a flat rate tax, or one measured by gross receipts, the statute prescribed extensive remedies, as well as penalties, civil and criminal (see § 512 of the Tax Law), to protect the interest of the State.[6] The provisions for the State's lien covering the points at issue are as follows:

"§ 506. Payment of tax

. . . . . .

"The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all

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[4] "Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both." Tax Law, § 503. And see the following interpretation of the above sentence by the Attorney General of New York which we accept:

"In my opinion, the statute does not intend the inclusion of 'a conditional vendor' in the word 'owner.' The joint and several liability imposed upon an owner other than the carrier is designed to cover those who lawfully place the use and control of vehicles in the hands of others for operation upon the highways under circumstances and arrangements which do not look to divestiture of their own proprietary interests. A conditional vendor, on the other hand, retains legal title as a special interest, protecting the unpaid purchase price of the vehicle. The transaction looks to defeasance of all his interest if completed in accordance with its terms.

. . . . . .

"I conclude that a conditional vendor is not an 'owner' subjected to personal liability for the highway use tax as such." Rep. Atty. Gen. N. Y., Op., 219, 220 (1954).

" 'Carrier' shall include any person having the lawful use or control, or the right to the use or control of any motor vehicle." Tax Law, § 501 (5).

[5] Tax Law, §§ 505, 506.

[6] The Legislature adopted the weight-distance principle of taxation as a substitute for the State's former system of fuel taxes and license

motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit." McKinney's N. Y. Laws, Tax Law.

From January 1, 1952, through February 1954, the carrier incurred, and failed to pay, highway use taxes of $3,158.77, plus penalties and interest of $539.27 through April 21, 1954. The taxes carried interest at 1% per month. While neither appellant knew anything of these delinquencies until the State asserted them in April 1954, it is also true that neither appellant had inquired of the carrier or of the State as to their possible existence.[7]

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fees. It rejected proposals imposing flat fees or measuring the tax by gross receipts. N. Y. Leg. Doc. No. 67 (1951) 65–80.

"The legislature hereby finds and declares that the operation of heavy motor vehicles upon the highways of this state greatly increases wear and damage on such highways; that there is a direct relationship between the weight of the vehicle using such highways and the damage done to them; that the period of usefulness of such highways is shortened by such use; that the effect of such use is to create and augment hazards to pedestrians and other traffic and to impose on the state a heavier financial burden for highway construction, maintenance and policing than does the operation of smaller vehicles; that the provisions of this article are therefore necessary and are hereby enacted to distribute more equitably this financial burden and to compensate the state in part for the privilege granted to such heavy vehicles of using the highways of the state and for the cost of administering state traffic regulations." Laws 1951, c. 74, § 1, McKinney's N. Y. Laws, Tax Law, Historical Note, 711.

[7] During the time material here, § 514 of the Tax Law forbade the disclosure by the State of information concerning such tax delin-

In February and March 1953, while the carrier was operating under the Highway Use Tax Act, International Harvester Company, a foreign corporation doing business in New York State, sold two tractors to the carrier for $8,253 each.[8] In each such transaction, the carrier executed and delivered to the vendor a conditional sales agreement for $6,541. The agreements were assigned by the vendor to the International Harvester Credit Corporation, one of the appellants herein, and were properly filed in the office of the Clerk of the Town of Rotterdam, Schenectady County, New York. Each truck was operated by the carrier on the public highways of New York State and remained in the carrier's possession and control until repossessed January 26, 1954. The carrier was then delinquent under its sales agreements to the extent of $4,578.79 on each truck, and the vendor bought them in at public sale. It resold one to a purchaser in New York and the other to a purchaser in Massachusetts.

Comparable facts relate to the truck sold the carrier by appellant Brockway Motor Company. Its sales price was $7,257; the conditional sales agreement was for $6,757. The repossession took place March 26, 1954, when $5,625 was owed to the vendor. The record shows no disposal of the truck.

April 21, 1954, the State asserted its lien on each truck for the entire amount of the highway use tax delinquencies of the carrier, totaling $3,698.04.[9]

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quencies and made it a misdemeanor to divulge information as to the tax returns. Those restrictions have now been relaxed. Tax Law, 1955 Cum. Pocket Pt., 24.

[8] The "tractors" were motor vehicles subject to Article 21. They constituted the automotive portion of tractor-trailers and are referred to in this opinion as trucks.

[9] The lien sustained against International was for $3,409.78, with interest on $2,884.61 at 1% per month from April 21, 1954. That against Brockway was for $3,698.04, with like interest on $3,158.77

There is no dispute as to the amount of the tax due to the State nor of the claim that such sum is due from the carrier.[10] There also is no controversy as to the validity of the State's lien against the respective trucks for such part of the tax as is measured by the operation of each on the State's highways.

The issue, accordingly, has been narrowed by the parties to the validity of the subordination of the rights of the respective conditional vendors of these trucks to the State's lien for any part of the carrier's delinquent taxes that exceeds the sum determined by the operation of the trucks on the State's highways. To the extent of such excess, the vendors claim that the statutory lien deprives them of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

Separate factual considerations are presented by the State's lien (1) for the taxes measured by the carrier's operation of trucks other than the three here in question, and (2) for the taxes measured by the carrier's operation of trucks *before* its first operation of the respective three trucks in question. The principle which supports the State's priority of lien is, however, the same in both instances. That principle supports also the priority of the State's lien as dating from the time of the carrier's first operation of the respective three trucks within the State. This holds good even though no assessment of the tax

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from the same date. The trucks in New York State have been released on bond. As to the truck in Massachusetts, the State has asserted a lien against the proceeds of its resale.

[10] The constitutionality of the tax, as distinguished from the constitutionality of the liens prescribed for its collection, is not now contested. *Mid-States Freight Lines, Inc.* v. *Bates,* 279 App. Div. 451, 111 N. Y. S. 2d 578, aff'd without opinion, 304 N. Y. 700, 107 N. E. 2d 603, cert. denied, 345 U. S. 908. See also, *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542.

was made by the State until after the respective trucks had been repossessed by their conditional vendors. The State's claim of priority for its lien depends, in each instance, upon its constitutional right to enforce the collection of all taxes due it from the motor carrier for the latter's use of the highways of New York under a statute giving ample notice of the tax and of the provisions for its collection.

There is no doubt that the State may impose and enforce a lien covering all taxes owed to it by a carrier for the privilege of using the State's highways, where such lien applies to vehicles owned by the carrier free and clear of encumbrances. The lien for such taxes may be enforced against any or all of such trucks, regardless of whether the taxes accrued from the carrier's operation of one or the other of such trucks, or even whether they accrued from the carrier's use of the highways before its acquisition and operation of any of the particular trucks subjected to the lien. Likewise, the lien unquestionably could attach to the trucks as of the time of their first use by the carrier within the State. See *United States* v. *Alabama,* 313 U. S. 274, 280–282. Such liens are simple illustrations of the State's exercise of its prerogative right to impose a statutory lien for delinquent taxes upon the taxpayer's property. See *Marshall* v. *New York,* 254 U. S. 380, 382–384. A State is entitled to wide discretion in such matters.

The controversy arises here because, for the present purposes, the State treats the three trucks now before us in the same manner as it does the carrier's unencumbered trucks. The vendors, relying upon their conditional sales agreements, deny this right. The State does not dispute the validity of those agreements. The State, however, treats them as security interests rather than as absolute interests. The State emphasizes the action of the vendors in yielding control of the trucks to the carrier thus

enabling the carrier to operate them on the State's highways. The burden placed on the highways has been precisely the same as though the carrier had held unencumbered title to the trucks.

Looking at the situation from another point of view, New York has an unquestionable right to regulate the use of conditional sales agreements within the State. The prescribed priority of its highway tax liens over the rights of conditional vendors may be regarded, therefore, as in the nature of a supplement to the New York Uniform Conditional Sales Act. McKinney's N. Y. Laws, Personal Property Law, Art. 4.

New York subjects each carrier to a reasonably computed tax for the use of its highways and, in order to collect that tax, places a statutory lien upon all motor vehicles operated by the carrier within the State. The carrier here was the beneficial owner and operator of the three trucks during the time it had possession of them. The conditional sales agreements provided the vendors with security for payment of the purchase price of the trucks. As long as the carrier kept up its payments, the possession and control of the trucks were in the carrier and its use of them on the highways had the same effect on those highways as though the trucks had been paid for in full.[11]

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[11] "The parties to a conditional sale have divided property interests in the goods. The buyer is the beneficial and substantial owner, with such attributes of ownership as possession, use and control, and has his equity of redemption sedulously guarded by the law. The seller, on the other hand, reserves title to the goods solely as security for payment or performance by the buyer. Essentially a conditional sale is only a credit device. Its plain and obvious purpose is the same as a purchase-money chattel mortgage despite technical or theoretical differences between the two forms of security." *Schnitzer* v. *Fruehauf Trailer Co.*, 283 App. Div. 421, 431, 128 N. Y. S. 2d 242, 253, aff'd without opinion, 307 N. Y. 876, 122 N. E. 2d 754; 2 Williston on Sales (rev. ed. 1948) § 330 *et seq.*

The enforcement of this lien rests upon principles known to the law in other connections. A landlord's lien for unpaid rent long has been enforceable against personal property found on the premises in the possession of the tenant, even though the legal title to such personal property may be in a third party who has allowed the tenant to have possession and beneficial use of it. *Spencer* v. *M'Gowen,* 13 Wend. (N. Y.) 256.[12]

The highway use tax is not assessed on the conditional vendor or on the vendor's trucks as such. It is a tax assessed on the carrier and the lien for its collection is imposed on the trucks in the carrier's possession which have been operated by it on New York's highways. The State asserts no personal liability on the part of either of the appellants. The State's claim is limited to its lien as set forth in a statute which was in effect more than a year before the respective appellants sold their trucks to the carrier. While it is not a condition of the validity of the State's lien, it is obvious that vendors of trucks, as well as carriers, derive substantial benefits from the State's costly construction and maintenance of its highways for heavy traffic. The reasonableness of the lien is thereby emphasized. Cases condemning attempts by States to compute one person's tax by reference to the income or activities of another are not persuasive here. The tax here is on the carrier and it is computed with reference to the carrier's own use of the highways. This statutory lien does not destroy the efficacy of conditional sales financing. Practically, it suggests that the conditional vendors secure assurance from their carrier-customers that the latters' highway use taxes are not in arrears.

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[12] See also, as to the innkeeper's lien, *Waters & Co.* v. *Gerard,* 189 N. Y. 302, 82 N. E. 143, and as to the agister's lien, *Corning* v. *Ashley,* 51 Hun 483, 4 N. Y. S. 255, aff'd without opinion, 121 N. Y. 700, 24 N. E. 1100. And see *Hersee* v. *Porter,* 100 N. Y. 403, 3 N. E. 338.

While the State would not, at common law, have a lien to the extent here asserted, that is far from saying that the lien, when imposed by statute, is arbitrary or unreasonable and, therefore, lacking in due process.

Justice Cardozo said for this Court in *Burnet* v. *Wells,* 289 U. S. 670, 677–678:

> "The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases. 'Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid.' *Corliss* v. *Bowers, supra* [281 U. S. 376], p. 378. Cf. *Burnet* v. *Guggenheim, supra* [288 U. S. 280], p. 283. Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. *The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits.*" (Emphasis supplied.)

There is little doubt that if this tax on the carrier were required to be computed at a flat rate, or measured by the

gross receipts of the carrier from its use of the State's highways, that the liens here asserted on all vehicles in the carrier's fleet of trucks (although subject to conditional sales) would be valid as a reasonable means of enforcing such an unallocable tax. The State has no less a constitutional right to prescribe and enforce its lien where, as here, the tax on the carrier is allocable because computed in close proportion to the actual burden placed on the highways by the respective trucks operated by the carrier. In either case, the tax is owed by the carrier and the need for an effective lien to enforce it is all the more necessary where, as here, the tax cannot be computed or readily collected in advance.

The judgment of the Court of Appeals of the State of New York, accordingly, is

Affirmed.

MR. JUSTICE BLACK concurs in the result.

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

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

So far as the United States Constitution limits them, the States have the amplest scope in imposing highway taxes and devising relevant means for enforcing them. Within the vast range of its discretionary taxing power, a State may provide that a creditor who adds to the corpus of equipment used by his debtor on the State's highways cannot be heard to complain if his equity in such equipment is subordinated not only to tax liens on that specific equipment, but also, as is true of the New York State legislation, for tax liens incurred by all the debtor's vehicles for the entire period during which the creditor has enabled his debtor to have added vehicles on the road. As a practical matter, the carrier's creditor may

well have adequate means of protecting himself regarding the incidence of highway taxes and their default during the whole of the period that such creditor helped to enhance the totality of vehicles used by the carrier.

We therefore agree with the Court that taxes incurred by all the vehicles in Eastern's service during the period that the three International Harvester tractors were on the road may be collected by way of enforcing tax liens for such total taxes against the three International tractors. It is immaterial that these three tractors were held under a credit arrangement whereby International Harvester reserved interest in them by way of security for payment of their purchase price.

A very different situation is presented for such part of the taxes as are sought to be collected by way of lien out of these International Harvester tractors for the period antedating their conditional sale to Eastern.

Property is included within the triad of interests protected by the Due Process Clause of the Fourteenth Amendment—"nor shall any State deprive any person of life, liberty, or property, without due process of law." When one man's property is taken and given to another or, as in this case, is taken to satisfy the debts of another, a justifying public purpose must meet the requirements of the Due Process Clause. See *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 79–80.

It is one thing for a creditor, who has enabled his debtor to hold himself out as having dominion over property which the creditor has placed within his debtor's control, to suffer for debts incurred by his debtor to third persons. It is quite another thing to saddle such creditor's property with satisfaction of prior obligation to a third person when the creditor had no means whatever of safeguarding himself against the enforcement of such third-party indebtedness. Nor does it matter that the third party is the State.

In the situation before us, International Harvester had no means of protecting itself against highway taxes incurred by Eastern prior to the time that it put its three tractors into Eastern's hands. It is admitted that under New York law in force at the time of the conditional sale of these tractors, International Harvester could not possibly have protected itself against the losses to which it is now subjected except by avoiding such sales. It could not possibly have ascertained the tax liabilities of its conditional vendee prior to the credit arrangement in the sale of these tractors. It could not have informed itself by examining the tax returns of its vendee. New York made it a misdemeanor for any state official to divulge such information. N. Y. Tax Law, Art. 21, § 514. Thus, there is no connection whatever between the undoubted property interest that International Harvester had in the three tractors and the extent of the lien that the State sought to foreclose in them. When one considers the important rôle played in our economy by credit sales, it will hardly do for the law to deem such transactions extra-hazardous and subject such creditors to an insurer's risks.

We would therefore remand the case to the New York courts in order to restrict the enforcible lien in appellant's tractors to the highway taxes incurred by Eastern for the period that appellant's vehicles were in Eastern's service.

SLOCHOWER *v.* BOARD OF HIGHER EDUCATION OF NEW YORK CITY.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 23. Argued October 18–19, 1955.—Decided April 9, 1956.

Section 903 of the New York City Charter provides that, whenever a city employee utilizes the privilege against self-incrimination to avoid answering before a legislative committee a question relating to his official conduct, his employment shall terminate. A teacher in a college operated by the City was summarily discharged under this section, without notice or hearing, because, while testifying before a federal legislative committee, he refused to answer questions concerning his membership in the Communist Party in 1940 and 1941, on the ground that his answers might tend to incriminate him. Under the New York Education Law, he was entitled to tenure and could be discharged only for cause and after notice, hearing and appeal. *Held:* In the circumstances of this case, his summary dismissal violated the Due Process Clause of the Fourteenth Amendment. Pp. 552–559.

(a) The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. Pp. 556–558.

(b) On the record in this case, it cannot be claimed that the Board's action in dismissing the teacher was part of a bona fide attempt to gain needed and relevant information regarding his qualifications for his position. Pp. 558–559.

(c) Since no inference of guilt was possible from the claim of the privilege against self-incrimination before the federal committee, the discharge falls of its own weight as wholly without support. P. 559.

(d) *Adler* v. *Board of Education*, 342 U. S. 485, and *Garner* v. *Los Angeles Board*, 341 U. S. 716, distinguished. Pp. 555–556.

(e) *Wieman* v. *Updegraff*, 344 U. S. 183, followed. Pp. 556–558.

306 N. Y. 532, 119 N. E. 2d 373, 307 N. Y. 806, 121 N. E. 2d 629, reversed and remanded.

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Ephraim London argued the cause and filed a brief for appellant.

Daniel T. Scannell argued the cause for appellee. With him on the brief were *Peter Campbell Brown, Seymour B. Quel* and *Helen R. Cassidy.*

Osmond K. Fraenkel and *Emanuel Redfield* filed a brief for the New York Civil Liberties Union, as *amicus curiae,* urging reversal.

Mr. Justice Clark delivered the opinion of the Court.

This appeal brings into question the constitutionality of § 903 of the Charter of the City of New York. That section provides that whenever an employee of the City utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct, "his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." [1] Appellant Slochower invoked the privilege against self-incrimination

[1] The full text of § 903 provides:

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

under the Fifth Amendment before an investigating committee of the United States Senate, and was summarily discharged from his position as associate professor at Brooklyn College, an institution maintained by the City of New York. He now claims that the charter provision, as applied to him, violates both the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment.

On September 24, 1952, the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate held open hearings in New York City. The investigation, conducted on a national scale, related to subversive influences in the American educational system. At the beginning of the hearings the Chairman stated that education was primarily a state and local function, and therefore the inquiry would be limited to "considerations affecting national security, which are directly within the purview and authority of the subcommittee." Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of Senate Committee on the Judiciary, 82d Cong., 2d Sess. 1. Professor Slochower, when called to testify, stated that he was not a member of the Communist Party, and indicated complete willingness to answer all questions about his associations or political beliefs since 1941. But he refused to answer questions concerning his membership during 1940 and 1941 on the ground that his answers might tend to incriminate him. The Chairman of the Senate Subcommittee accepted Slochower's claim as a valid assertion of an admitted constitutional right.

It had been alleged that Slochower was a Communist in 1941 in the testimony of one Bernard Grebanier before the Rapp-Coudert Committee of the New York Legislature. See *Report of the Subcommittee of the Joint Legislative Committee to Investigate Procedures and Methods of*

Allocating State Moneys for Public School Purposes and Subversive Activities, Legislative Document (1942), No. 49, State of New York, at 318. Slochower testified that he had appeared twice before the Rapp-Coudert Committee, and had subsequently testified before the Board of Faculty relating to this charge. He also testified that he had answered questions at these hearings relating to his Communist affiliations in 1940 and 1941.

Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the College; three days later his position was declared vacant "pursuant to the provisions of Section 903 of the New York City Charter." [*]

Slochower had 27 years' experience as a college teacher and was entitled to tenure under state law. McKinney's New York Laws, Education Law, § 6206 (2). Under this statute, appellant may be discharged only for cause, and after notice, hearing, and appeal. § 6206 (10). The Court of Appeals of New York, however, has authoritatively interpreted § 903 to mean that "the assertion of the privilege against self incrimination is equivalent to a resignation." *Daniman* v. *Board of Education,* 306 N. Y. 532, 538, 119 N. E. 2d 373, 377. Dismissal under this provision is therefore automatic and there is no right to charges, notice, hearing, or opportunity to explain.

The Supreme Court of New York, County of Kings, concluded that appellant's behavior fell within the scope of § 903, and upheld its application here. 202 Misc. 915, 118 N. Y. S. 2d 487. The Appellate Division, 282 App. Div. 718, 122 N. Y. S. 2d 286, reported *sub nom. Shlakman* v. *Board,* and the Court of Appeals, reported

*[Reporter's Note: A sentence which was reported in the Preliminary Print at p. 554, lines 13–18, was deleted by an order of the Court entered May 28, 1956, 351 U. S. 944.]

sub nom. Daniman v. *Board, supra,* each by a divided court, affirmed. We noted probable jurisdiction, 348 U. S. 935, because of the importance of the question presented.[2]

Slochower argues that § 903 abridges a privilege or immunity of a citizen of the United States since it in effect imposes a penalty on the exercise of a federally guaranteed right in a federal proceeding. It also violates due process, he argues, because the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment. Appellee insists that no question of "privileges or immunities" was raised or passed on below, and therefore directs its argument solely to the proposition that § 903 does not operate in an arbitrary or capricious manner. We do not decide whether a claim under the "privileges or immunities" clause was considered below, since we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law.

The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. *Adler* v. *Board of Education,* 342 U. S. 485, upheld the New York Feinberg Law which authorized the public school authorities to

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[2] Thirteen other individuals brought suit for reinstatement after their dismissal for pleading the privilege against self-incrimination in the same federal investigation. We dismissed the appeal of these individuals "for want of a properly presented federal question." *Daniman* v. *Board,* 348 U. S. 933. See *Daniman* v. *Board,* 307 N. Y. 806, 121 N. E. 2d 629, where the New York Court of Appeals declined to amend its remittitur to state that a federal question had been presented and passed on as to these appellants, but did so amend its remittitur as to Slochower.

dismiss employees who, after notice and hearing, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim.[3] Likewise *Garner* v. *Los Angeles Board,* 341 U. S. 716, 720, upheld the right of the city to inquire of its employees as to "matters that may prove relevant to their fitness and suitability for the public service," including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities.[4]

But in each of these cases it was emphasized that the State must conform to the requirements of due process. In *Wieman* v. *Updegraff,* 344 U. S. 183, we struck down a so-called "loyalty oath" because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary.[5] This case rests squarely on the proposition that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U. S., at 192.

Here the Board, in support of its position, contends that only two possible inferences flow from appellant's claim

[3] Mr. Justice Black and Mr. Justice Douglas dissented. Mr. Justice Frankfurter dissented on grounds of standing and ripeness.

[4] Mr. Justice Black and Mr. Justice Douglas dissented. Mr. Justice Frankfurter and Mr. Justice Burton concurred in this aspect of the case, but dissented from other portions of the decision in separate opinions.

[5] Mr. Justice Black and Mr. Justice Frankfurter concurred in separate opinions in which Mr. Justice Douglas joined. Mr. Justice Burton concurred in the result.

of self-incrimination: (1) that the answering of the question would tend to prove him guilty of a crime in some way connected with his official conduct; or (2) that in order to avoid answering the question he falsely invoked the privilege by stating that the answer would tend to incriminate him, and thus committed perjury. Either inference, it insists, is sufficient to justify the termination of his employment. The Court of Appeals, however, accepted the Committee's determination that the privilege had been properly invoked and it further held that no inference of Communist Party membership could be drawn from such a refusal to testify. It found the statute to impose merely a condition on public employment and affirmed the summary action taken in the case. With this conclusion we cannot agree.

At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as "one of the most valuable prerogatives of the citizen." *Brown* v. *Walker,* 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States,* 349 U. S. 155. In *Ullmann* v. *United States,* 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann,* a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might

be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955).

With this in mind, we consider the application of § 903. As interpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman* v. *Updegraff, supra.*

It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs, or government of the city, or . . . official conduct of city employees." In this respect the present case differs materially from *Garner,* where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information.

Without attacking Professor Slochower's qualification for his position in any manner, and apparently with full knowledge of the testimony he had given some 12 years

before at the state committee hearing, the Board seized upon his claim of privilege before the federal committee and converted it through the use of § 903 into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. There has not been the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. *Ohio Bell Telephone Co.* v. *Commission,* 301 U. S. 292, 302.

This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join the Court's judgment and opinion, but also adhere to the views expressed in their dissents in *Adler* v. *Board of Education,* and *Garner* v. *Los Angeles Board, supra,* and to their concurrences in *Wieman* v. *Updegraff, supra.*

MR. JUSTICE REED, with whom MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

In reliance upon the Due Process Clause of our Constitution, the Court strikes deep into the authority of New York to protect its local governmental institutions from influences of officials whose conduct does not meet

the declared state standards for employment. This New York City Charter, § 903, adopted in 1936, to take effect in 1938, was designed to eliminate from public employment individuals who refused to answer legally authorized inquiries as to the "official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him." Its provisions, as applicable to Professor Slochower and others, have been upheld by the Court of Appeals of New York under multi-pronged state grounds of attack in the instances where he and other city teachers of New York have sought to bar their removal from their positions.[1]

The sole reliance of the Court for reversal of the New York Court of Appeals is that § 903, as here applied, violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. The Court of Appeals amended its remittitur to show that it held federal due process was not violated. 307 N. Y. 806, 121 N. E. 2d 629. In view of the conclusions of the Court of Appeals we need deal only with that problem. The Court of Appeals has exclusive power to determine the reach of its own statute.

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[1] *Matter of Daniman* v. *Board of Education, Matter of Shlakman* v. *Board of Higher Education,* 306 N. Y. 532, 119 N. E. 2d 373.

"In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. . . . We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. . . . Communism is opposed to such loyalty. . . . Internal security affects local as well as National Governments." *Id.*, at 540–541, 119 N. E. 2d, at 379. The majority decided § 903 was applicable to a "hearing before a Federal legislative committee" and that this appellant was an employee of the city. *Id.*, at 541, 119 N. E. 2d, at 379.

The Court finds it a denial of due process to discharge an employee merely because he relied upon the Fifth Amendment plea of self-incrimination to avoid answering questions which he would be otherwise required to answer. We assert the contrary—the city does have reasonable ground to require its employees either to give evidence regarding facts of official conduct within their knowledge or to give up the positions they hold. Petitioners never contended that error or inadvertence led them to refuse to answer. Their contention is set out in the margin below.[2] Discharges under § 903 do not depend upon any conclusion as to the guilt of the employee of some crime that might be disclosed by his testimony or as to his guilt of perjury, if really there was no prosecution to fear. We disagree with the Court's assumption that § 903 as a practical matter takes the questions asked as confessed. Cities, like other employers, may reasonably conclude that a refusal to furnish appropriate information is enough to justify discharge. Legally authorized bodies have a right to demand that citizens furnish facts pertinent to official inquiries. The duty to respond may be refused for personal protection against prosecution only, but such avoidance of public duty to furnish information can prop-

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[2] Appellant's petition to the Supreme Court of the State of New York stated in pertinent part as follows:

"9. Petitioners answered some and refused to answer others of the questions referred to in paragraph 8 on various and numerous grounds, including the ground that the Subcommittee had not jurisdiction to inquire into such matters, the ground that the First Amendment to the Constitution of the United States forbade such inquiry, the ground that the procedures of the Subcommittee violated their rights under the Fifth Amendment to the Constitution of the United States and that they could not be required under the Fifth Amendment to answer such questions, and on other grounds. The Subcommittee acquiesced in the refusal of petitioners to answer such questions."

erly be considered to stamp the employee as a person unfit to hold certain official positions. Such a conclusion is reinforced when the claimant for protection has the role of instructor to youth. The fact that the witness has a right to plead the privilege against self-incrimination protects him against prosecution but not against the loss of his job.[3]

The Court may intend merely to hold that since the facts of Slochower's alleged Communist affiliations prior to 1941 were known to the Board before the federal claim, and since the inquiries of the Committee were asked for a purpose unrelated to his college functions, therefore it was a denial of due process to vacate his office. If so, its conclusion is likewise, we think, erroneous. We agree that this case is not like *Garner* v. *Los Angeles Board,* 341 U. S. 716, an attempt to elicit information about professional qualifications. But § 903 is directed at the propriety of employing a man who refuses to give needed information to appropriate public bodies.

Consideration of the meaning of "due process" under the Fourteenth Amendment supports our position that § 903 of the City Charter does not violate that concept. For this Court to hold that state action in the field of its unchallenged powers violates the due process of the Federal Constitution requires far more than mere disagreement with the legal conclusions of state courts. To require, as the Court does, that New York stay its hand in discharging a teacher whom the city deems unworthy to occupy a chair in its Brooklyn College, demands that this Court say, if it follows our prior cases, that the action of the Board in declaring Professor Slochower's position

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[3] Cf. *Ullmann* v. *United States,* 350 U. S. 422, at 438–439:
"For the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts . . . .'"

vacant was inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[4] A denial of due process is "a practice repugnant to the conscience of mankind." [5] Surely no such situation exists here.

Those charged with educational duties in a State bear heavy responsibilities. Only a few years ago, in *Adler* v. *Board of Education,* 342 U. S. 485, we upheld against three dissents the Feinberg Law of New York making ineligible for employment as a teacher in any public school a member of any subversive organization, if he knew its purpose. The argument that the "fact found bears no relation to the fact presumed," *i. e.,* "disqualification for employment," was rejected. There also the contention was denial of due process. We said:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty." *Id.,* at 493.

A great American university has declared that members of its faculty who invoked the Fifth Amendment before committees of Congress were guilty of "misconduct"

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[4] *Hebert* v. *Louisiana,* 272 U. S. 312, 316. Cf. *Twining* v. *New Jersey,* 211 U. S. 78, 100.

[5] *Palko* v. *Connecticut,* 302 U. S. 319, 323, 325, 326. Cf. *Francis* v. *Resweber,* 329 U. S. 459, 463; *Adamson* v. *California,* 332 U. S. 46, 53.

though not grave enough to justify dismissal.[6] Numerous other colleges and universities have treated the plea of the Fifth Amendment as a justification for dismissal of faculty members.[7] When educational institutions themselves feel the impropriety of reserving full disclosure of facts from duly authorized official investigations, can we properly say a city cannot protect itself against such conduct by its teachers?

The New York rule is not the patently arbitrary and discriminatory statute of *Wieman* v. *Updegraff*, 344 U. S. 183. There "[a] state servant may have joined a proscribed organization unaware of its activities and purposes." P. 190. This Court unanimously condemned as arbitrary the requirement of an oath that covered both innocent and knowing membership without distinction. A different situation exists here. Section 903 was included

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[6] 42 American Association of University Professors Bulletin 96. Compare The Rights and Responsibilities of Universities and their Faculties, Association of American Universities, March 24, 1953, III:

"As in all acts of association, the professor accepts conventions which become morally binding. Above all, he owes his colleagues in the university complete candor and perfect integrity, precluding any kind of clandestine or conspiratorial activities. He owes equal candor to the public. If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor. Refusal to do so, on whatever legal grounds, cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak and the maximum protection of that freedom available in our society. In this respect, invocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to reexamine his qualifications for membership in its society.

. . . . . .

". . . When the powers of legislative inquiry are abused, the remedy does not lie in noncooperation or defiance; it is to be sought through the normal channels of informed public opinion."

[7] 42 American Assn. of University Professors Bulletin 61–94.

in the Seabury Report to help in the elimination of graft and corruption.[8] Numerous employees had refused to testify as to criminal acts on the ground of self-incrimination. New York decided it did not want that kind of public employees. We think New York had that right. We would affirm the judgment of the Court of Appeals.

MR. JUSTICE HARLAN, dissenting.

I dissent because I think the Court has misconceived the nature of § 903 as construed and applied by the New York Court of Appeals, and has unduly circumscribed the power of the State to ensure the qualifications of its teachers.

As I understand MR. JUSTICE CLARK'S opinion, the Court regards § 903 as raising some sort of presumption of guilt from Dr. Slochower's claim of privilege. That is not the way the Court of Appeals construed the statute. On the contrary, that Court said: "we do not presume, of course, that these petitioners [one of whom was Dr. Slochower] by their action have shown cause to be discharged under the Feinberg Law (L. 1949, ch. 360) since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination." [1] Since § 903 is inoperative if even incriminating answers are given, it is apparent that it is the exercise of the privilege itself which is the basis for the discharge, quite apart from any inference of guilt. Thus the Court of Appeals could say that "The assertion of the privilege against self incrimination is equivalent to a resignation." [2] It is also clear that the Board of Education's discharge of Dr. Slochower was on this same

[8] In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury, December 27, 1932, pp. 9–10.

[1] 306 N. Y. 532, 538, 119 N. E. 2d 373, 377.

[2] *Ibid.*

premise. The question this case presents, therefore, is not whether any inferences can constitutionally be drawn from a claim of privilege, but whether a State violates due process when it makes a claim of privilege grounds for discharge.

In effect, what New York has done is to say that it will not employ teachers who refuse to cooperate with public authorities when asked questions relating to official conduct. Does such a statute bear a reasonable relation to New York's interest in ensuring the qualifications of its teachers? The majority seems to decide that it does not. This Court has already held, however, that a State may properly make knowing membership in an organization dedicated to the overthrow of the Government by force a ground for disqualification from public school teaching. *Adler* v. *Board of Education,* 342 U. S. 485. A requirement that public school teachers shall furnish information as to their past or present membership in the Communist Party is a relevant step in the implementation of such a state policy, and a teacher may be discharged for refusing to comply with that requirement. *Garner* v. *Los Angeles Board,* 341 U. S. 716. Moreover, I think that a State may justifiably consider that teachers who refuse to answer questions concerning their official conduct are no longer qualified for public school teaching, on the ground that their refusal to answer jeopardizes the confidence that the public should have in its school system. On either view of the statute, I think Dr. Slochower's discharge did not violate due process.

It makes no difference that the question which Dr. Slochower refused to answer was put to him by a federal rather than a state body. The authority of the subcommittee to ask the question is not controverted. While as an original matter I would be doubtful whether § 903 was intended to apply to federal investigations, the

Court of Appeals has ruled otherwise, and its interpretation is binding on us. Dr. Slochower cannot discriminate between forums in deciding whether or not to answer a proper and relevant question, if the State requires him to answer before every lawfully constituted body. Here, the information sought to be elicited from Dr. Slochower could have been considered by state authorities in reviewing Dr. Slochower's qualifications, and the effect of his claim of privilege on the public confidence in its school system was at least as great as it would have been had his refusal to answer been before a state legislative committee.

There is some evidence that Dr. Slochower had already answered, before a state committee, the same question which he refused to answer before the congressional subcommittee.[3] Even assuming that New York already had the information, I cannot see how that would prevent New York from constitutionally applying § 903 to this claim of privilege. Apart from other considerations, who can tell whether Dr. Slochower would have answered the question the same way as he had before?

On this record I would affirm the decision of the Court of Appeals. A different question would be presented under the Privileges and Immunities Clause of the Fourteenth Amendment. But that question was not raised below, and is therefore not open here. *Dewey* v. *Des Moines,* 173 U. S. 193.

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[3] At the Senate subcommittee hearing, in response to Senator Ferguson's inquiry whether or not Dr. Slochower had "ever" answered a question concerning Communist Party membership in 1940 or 1941, Dr. Slochower replied: "Yes, I did answer it."

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ARMSTRONG *v.* ARMSTRONG ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 38. Argued November 15, 1955.—Decided April 9, 1956.

Petitioner, a resident of Florida, obtained there a divorce from his wife, who had separated from him and gone to Ohio, where she had established a residence. The service of process on her was constructive only, she did not appear, and the Florida court decreed that "no award of alimony be made" to her. Later, the wife sued in Ohio for divorce and alimony, and petitioner appeared and set up the Florida divorce. The Ohio court denied a divorce because of the prior Florida decree, but granted the wife alimony. *Held:* The Florida court did not adjudicate the wife's right to alimony, and the Ohio court therefore did not fail to give full faith and credit to the Florida decree. Pp. 568–572.

162 Ohio St. 406, 123 N. E. 2d 267, affirmed.

Robert N. Gorman argued the cause for petitioner. With him on the brief were *James N. Hengelbrok* and *Julius R. Samuels.*

Walter K. Sibbald argued the cause and filed a brief for Armstrong, respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner, while residing in Dade County, Florida, filed a suit for divorce from his wife, who had separated from him and gone to Ohio, where she had established her residence. The wife was not personally served, nor did she appear in person or by attorney in the Florida suit. Service on her was constructive only. A divorce decree was granted petitioner by the Florida court, and he contends that that court also denied alimony to the respondent.

Later, the respondent wife instituted a suit in Ohio for divorce and for alimony. The petitioner appeared and

set up the divorce obtained in Florida. The Ohio court found that the respondent had established grounds for divorce in Ohio but denied the divorce because Florida had already decreed a divorce to the petitioner. The Ohio court proceeded to pass on the question of alimony and granted the wife alimony, taking into account the total property owned by the petitioner. The petitioner appealed to the Court of Appeals, 99 Ohio App. 7, 130 N. E. 2d 710, and then to the Supreme Court of Ohio, which affirmed the judgments of the lower courts. 162 Ohio St. 406, 123 N. E. 2d 267. Petitioner argued and contends here that the Ohio courts have denied full faith and credit to the Florida decree. We granted certiorari. 349 U. S. 915.

The sole question presented by the petition for certiorari was whether the Ohio courts were required to give full faith and credit to the *ex parte* Florida divorce decree, which petitioner alleges not only granted him a divorce but also decreed that the wife was not entitled to alimony. As we interpret the Florida decree, however, the Florida court did not purport to adjudicate the absent wife's right to alimony. The Ohio courts, therefore, in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree. Accordingly, we do not reach the constitutional question sought to be presented. But even if there is doubt as to the meaning of the Florida decree, we should construe its action as a refusal to pass on the question of alimony and thus avoid the constitutional question as to its power to do so.

The Florida court found that Mrs. Armstrong "has not come into this court in good faith or made any claim to the equitable conscience of the court and has made no showing of any need on her part for alimony. It is, therefore, specifically decreed that no award of alimony be made to the defendant . . . ." Taken literally, that language means only that, for the reasons it gave, the

court would refrain from making an affirmative award of alimony to the wife, not that it adjudicated in favor of the husband that his wife was not entitled to alimony. The husband's bill of complaint did not ask for greater relief. It offered to show that Mrs. Armstrong's interest in jointly held property was "ample to support the defendant and that she has no further need of alimony." The purpose of this offer, however, was revealed by the next sentence of the complaint: "Nevertheless the plaintiff hereby offers to do equity and to abide by such orders or decrees, with reference to the settlement of the property affairs, as to this court may be deemed equitable." Thus the husband did not seek a decree holding the wife not entitled to alimony but rather merely submitted to the court's jurisdiction to condition its grant of divorce to him upon an award of alimony to his wife. The prayer for relief was fully satisfied by the decision that protection of the absent wife did not require the court to fix alimony before granting the divorce.

The Florida master's report is confirmatory of the limited scope of the decree. The master stated that "the question of the wife's alimony, if any, cannot be determined at this stage of the proceeding," pointing out that most of the marital property was in the wife's possession in Ohio and was the subject matter of litigation pending there. He accordingly found that "the defendant is not entitled to receive alimony . . . under the facts and circumstances presented in this case" and recommended "that no award of alimony be made." The master's recommendation meant no more than that the question of alimony should not be decided because the wife had in her possession property adequate to meet her immediate needs, and the unresolved litigation made it impossible to determine her future needs. Presumably, the court's decree meant no more when it adopted in terms the master's recommendation that "no award of alimony be

made." Like the master's report, the decree expressly recognized that the parties' property rights depended upon the outcome of the pending litigation in Ohio and that the wife had not shown any need for alimony.

When the Florida court said, "it is, therefore, specifically decreed that no award of alimony be made to the defendant," it recognized that no issue of alimony should be decided by it. The court simply said that no award of alimony be made—a purely negative assertion that it would not pass on the question.

It is true that the decree "that no award of alimony be made" was followed in the same sentence by a declaration, based on the court's and master's view of Florida property law, quieting title in the husband to certain Florida real property. At most, however, the fact that both matters were dealt with in a single sentence suggests only that the court might have reserved alimony out of that specific property had it concluded that such action was necessary to protect the wife's interests. That it did not do so is consistent with our conclusion that the Florida court did no more than refrain from awarding alimony at that time.

There was a valid decree in Florida dissolving the bonds of matrimony. There was no decree as to alimony. Ohio had personal service on both parties in a suit for divorce and alimony brought there by Mrs. Armstrong. The court denied her a decree of divorce because Florida had already dissolved the bonds of matrimony. The Ohio court found that, but for the decree in Florida, Mrs. Armstrong had established grounds for divorce in the Ohio suit. It considered that the matter before it was not a division of property, but an application for alimony, and it proceeded to hear evidence on that basis and finally entered a personal judgment against the defendant husband for alimony. The Ohio court, which had complete jurisdiction of both parties and the cause of action, entered

a decree as to alimony only, which decree seems clearly authorized by the Ohio cases. *Slapp* v. *Slapp,* 143 Ohio St. 105, 54 N. E. 2d 153; *Cox* v. *Cox,* 19 Ohio St. 502. The Florida judgment was given full faith and credit by Ohio as far as the judgment in Florida went, and no other questions are presented here.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER, joining the opinion of the Court.

It is, of course, desirable to have a Court opinion, if one can be achieved without straining one's conscience. I am sufficiently in agreement with MR. JUSTICE MINTON'S construction of the Florida decree to be able to join him.

On my study of the record, I would dismiss the writ as improvidently granted. And for these reasons. After a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the preliminary examination of the questions that were urged in the petition for certiorari. Due regard for the working of the certiorari system requires this. In view of the fact that about 1,300 applications were made last Term for leave to be heard (and this is a fair average of the volume of the Court's business), determination during this sifting process of the jurisdictional merits in all these 1,300 cases can hardly be expected. Theory and practice alike reject any such notion. The inevitably cursory consideration that is normally given in a case on the preliminary round precludes the assumption that a tentative finding of a federal question will survive the thorough study of the record which consideration of a case on the merits implies. Therefore, it is that cases have again and again been dismissed for want of jurisdiction, *i. e.,* a substantial federal question was found wanting; on the contrary, it became

clear that the state court judgment rested on an adequate state ground.

The petition for writ of certiorari in this case vigorously argued that

> "The sole question is whether the courts of Ohio, under Article IV of the Constitution of the United States, are compelled to give full faith and credit to the *entire* decree, granting a divorce, and denying alimony, rendered by the court in Florida, the matrimonial domicile of the parties, following the decision of *Thompson* v. *Thompson,* 226 U. S. 551."

The references to the Florida decree in the opinion of the Ohio Supreme Court—the two documents are hardly to be deemed conspicuously lucid—warranted, without more, a belief that the case did present the question formulated by petitioner. Such a question would, no doubt, raise an important problem in the construction of the Full Faith and Credit Clause.

But the course of the oral argument, for such is one of its functions, and an exacting scrutiny of the record, for such is the requirement of plenary consideration of a case, put in a very different light the decree of the Florida court and thereby the significance of the litigation in Ohio.

A study of the Florida decree, a portion of which is set out in the margin,[1] in conjunction with Florida case law [2]

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[1] "This court takes recognition of the fact that litigation is now pending in the state of Ohio relative to the recovery of . . . stocks and bonds as well as the settlement of other matters concerning property rights between the parties. This court recognizes that the courts of Ohio will have the ultimate determination of the question of property rights where the property itself is in the state of Ohio . . . ."

[2] Compare *Burkhart* v. *Circuit Court, Eleventh Judicial Circuit,* 146 Fla. 457, 1 So. 2d 872, and *Lucian* v. *So. Ohio Savings Bank & Trust Co.,* 156 Fla. 370, 23 So. 2d 674, with *Pawley* v. *Pawley,* 46 So. 2d 464 (Fla.), and *Sorrells* v. *Sorrells,* 82 So. 2d 684 (Fla.).

demonstrates, I believe, that Florida expressly disavowed any adjudication regarding claims to and in property situated in Ohio, the very properties which are the subject matter of the challenged Ohio decree.

Thus, the sole question that survives is the power of Ohio, as a matter of its own policy, to define rights in property situated in Ohio in the circumstances of this case. A question of due process might be raised, though not successfully. (Both the real property and securities which had their locus in Ohio were subject to Ohio's control in that both items constituted "property within the State." *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271.) In any event, it was not raised, and the claim under the Full Faith and Credit Clause has evaporated, because Ohio merely dealt with property within its borders which Florida had not purported to affect.

Of course we have to go through all this reasoning to determine whether a substantial federal question was raised by reason of Ohio's disregard of Florida's decree. The Court not infrequently is required to find its way through a tangled or confused record in order to determine whether a state court judgment turned on a state ground or on a federal ground. In short, the Court has jurisdiction to decide whether it has jurisdiction. But when adequate analysis discloses that a state judgment amply rests on a state ground, we are barred from proceeding to the merits of the alleged federal question. The appropriate disposition is to dismiss the case for want of jurisdiction.

[For concurring opinion of MR. JUSTICE BLACK, joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK, see next page.]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE CLARK join, concurring.

The opinion of the Court takes the position that the Florida court did not adjudicate Mrs. Armstrong's right to alimony. We cannot agree. In the husband's Florida complaint he alleged that his wife's property was "ample to support the defendant and that she has no further need of alimony or property settlement." The Florida court expressly held that it had jurisdiction over both parties and over the subject matter of the complaint. It then proceeded to find that the wife was at fault in leaving her husband and the "matrimonial domicile." The court even suggested that Mrs. Armstrong was guilty of a criminal act in taking some of her husband's money and securities to Ohio. The decree continued: "This court, *therefore,* finds the defendant has not come into this court in good faith or made any claim to the equitable conscience of the court and has made no showing of any need on her part for alimony. It is, *therefore, specifically decreed* that no award of alimony be made to the defendant . . . ." (Emphasis added.) This was plainly a denial of alimony, not on the ground that the court was leaving the matter open but because the judge thought the wife should not have alimony.[1]

We agree with the majority that the Ohio decree was an alimony judgment and not a division of property.

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[1] MR. JUSTICE FRANKFURTER's separate opinion takes the position that "Ohio merely dealt with property within its borders which Florida had not purported to affect." But the Florida decree stated that Mrs. Armstrong "is hereby directed and specifically ordered to return the said stock certificates and bonds to the plaintiff within fifteen (15) days . . . ." These were the very stocks which the Ohio court ordered Mr. Armstrong to transfer to Mrs. Armstrong as alimony.

Thus in our view there is a direct conflict between that decree and the decree of the Florida court denying alimony to the wife. We therefore reach the constitutional question whether the Ohio court was justified in denying full faith and credit to the Florida decree.

We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party. It has been the constitutional rule in this country at least since *Pennoyer* v. *Neff,* 95 U. S. 714, decided in 1878, that nonresidents cannot be subjected to personal judgments without such service or appearance. We held in *Estin* v. *Estin,* 334 U. S. 541, that an alimony judgment was this kind of "personal judgment." See also *Kreiger* v. *Kreiger,* 334 U. S. 555; *Barber* v. *Barber,* 21 How. 582, 588; *Barrett* v. *Failing,* 111 U. S. 523, 525. The *Estin* case was much like this one. There, after the wife had obtained a separation and permanent alimony decree in New York, the husband went to Nevada and obtained a divorce. In accord with our previous holding in *Williams* v. *North Carolina,* 317 U. S. 287, we held that the Nevada divorce was valid and must be given full faith and credit by New York even though rendered without personal service on the wife. It was argued that New York also had to recognize Nevada's rule of law that the dissolution of a marriage put an end to a support order. We held, however, that Nevada could not adjudicate rights of the wife under the New York judgment because she had not been personally served with process and did not appear in the Nevada proceedings. 334 U. S., at 547–549. The considerations supporting that holding are

applicable here. The fact that Mrs. Estin's claim to support had been reduced to judgment prior to divorce while Mrs. Armstrong's had not is not a meaningful distinction. Mrs. Armstrong's right to support before judgment, like Mrs. Estin's right to support after judgment, is the kind of personal right which cannot be adjudicated without personal service. Cf. *May* v. *Anderson,* 345 U. S. 528.

The husband here seeks to distinguish the *Estin* case on the ground that there the husband left the "matrimonial domicile" and established a residence elsewhere, while here the husband kept his domicile in Florida and the wife fled from him. He argues, as the Florida court held, that it was impossible as a matter of law for Mrs. Armstrong to obtain a new domicile separate and apart from that of her husband. He bases this argument on the Florida court's finding on *ex parte* evidence that Florida, where the couple had resided during a considerable part of their marriage, was the "matrimonial domicile," and that the wife had left her home in Florida without cause. On this premise, the Florida court held that she "did not have the right to separate and claim a separate legal domicile and in truth and in fact, her domicile was that of her husband." The fiction that a woman cannot have a separate "domicile" from that of her husband is a relic of the old discredited idea that women must always play a subordinate role in society; it does not justify a departure from settled constitutional principles. The concept of "matrimonial domicile" was expressly repudiated in both the *Williams* cases.[2] Yet the Court is asked to say here that a State's power over

[2] *Williams* v. *North Carolina,* 317 U. S. 287, 325 U. S. 226. In the latter case the Court said: "In view of *Williams* v. *North Carolina, supra,* the jurisdictional requirement of domicil is freed from confusing refinements about 'matrimonial domicil' . . . and the like." 325 U. S., at 230.

an alimony case is to depend on which spouse is to blame in leaving the other. We adhere to what was said in the first *Williams* case: "the question as to where the fault lies has no relevancy to the existence of state power in such circumstances." 317 U. S., at 300.

Relying on *Milliken* v. *Meyer,* 311 U. S. 457, the husband further contends that regardless of "matrimonial domicile" personal service was unnecessary because Mrs. Armstrong was actually domiciled in Florida at the time the Florida action was brought. The Florida court did find she was domiciled there, but that was in an uncontested proceeding. This finding was open to challenge in Ohio. *Williams* v. *North Carolina,* 325 U. S. 226. The issue was tried in Ohio with both parties present, and the trial court expressly found that Mrs. Armstrong had returned to Ohio and was a "resident" there within the meaning of the Ohio divorce statute at the time the Florida divorce proceedings were instituted. See Page's Ohio Rev. Code Ann., 1954, § 3105.03. This statute has been uniformly interpreted by the Ohio courts to require residence accompanied by an intention to make the State of Ohio a permanent home. See, *e. g., Saalfeld* v. *Saalfeld,* 86 Ohio App. 225, 89 N. E. 2d 165. We would accept the Ohio court's finding that Mrs. Armstrong was such a resident of Ohio when the Florida suit was brought as amply supported by evidence in the record. Consequently the husband's reliance on *Milliken* v. *Meyer* is misplaced.

There was nothing novel in our holding in *Estin* v. *Estin* that a State where one of the parties to a marriage is domiciled can dissolve the marriage without personal service but that it cannot render a personal decree granting or denying alimony. The distinction between a decree which grants a divorce and one which grants a personal money judgment was recognized and the reasons for the distinction were stated by this Court in *Pennoyer* v. *Neff,*

95 U. S. 714.[3] The state courts have long recognized the rule that a court lacking personal jurisdiction over a husband cannot render a valid alimony judgment against him.[4] We see no reason why a court lacking personal ju-

[3] ". . . we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. . . . The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress." *Pennoyer* v. *Neff*, 95 U. S., at 734–735.

As early as 1832 the distinction received recognition in a state court. *Harding* v. *Alden*, 9 Greenl. (Me.) 140. There the court said:

"In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood, that the grounds upon which we place our decision, is limited to the dissolution of the marriage. In the libel, alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or an annual allowance, to be paid by the husband, and the courts of this or any other State had been resorted to to enforce it, a different question would be presented . . . ." 9 Greenl. (Me.), at 151. See also 2 Kent's Commentaries (14th ed., Gould, 1896) *110, n. (*a*).

[4] *Beard* v. *Beard*, 21 Ind. 321 (1863); *Ellison* v. *Martin*, 53 Mo. 575 (1873); *Prosser* v. *Warner*, 47 Vt. 667 (1875); *Bunnell* v. *Bunnell*, 25 F. 214 (1885); *Anderson* v. *Anderson*, 55 Mo. App. 268 (1893); *Dillon* v. *Starin*, 44 Neb. 881, 63 N. W. 12 (1895); *De la Montanya* v. *De la Montanya*, 112 Cal. 101, 44 P. 345 (1896). See also *Barrett* v. *Failing*, 111 U. S. 523, 525. And see 2 Bishop, Marriage & Divorce (6th ed. 1881), § 381*a*; Cooley, Constitutional Limitations (6th ed., Angell, 1890), 497–498.

risdiction over a wife should be allowed to render a valid judgment denying alimony to her.[5] Personal jurisdiction is as necessary to protect a wife's interests as it is to protect a husband's. It is an essential to this kind of determination. Not long after *Pennoyer* v. *Neff* was decided, this Court upheld the validity of a legislative divorce which was granted without notice, service of process or a hearing of any kind, judicial or otherwise. *Maynard* v. *Hill,* 125 U. S. 190.[6] But legislative divorces attempting to create or destroy financial obligations incident to marriage have not been sustained by the courts.[7] Thus the different treatment *Estin* v. *Estin* accorded to alimony and divorce is well grounded in the judicial and legislative history of our country.

It is argued that this case is controlled by *Thompson* v. *Thompson,* 226 U. S. 551. That case, however, was decided before the *Williams* cases, the *Estin* and *Kreiger* cases, and *May* v. *Anderson.* It relied, moreover, on the case of *Atherton* v. *Atherton,* 181 U. S. 155, which in holding that an *ex parte* divorce was entitled to full faith and credit itself quoted extensively from authorities recognizing that such a divorce may be binding "*so far as related to the dissolution of the marriage,* though not as to other parts of the decree, such as an order for the payment of money by the husband." 181 U. S., at 166. The

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[5] See, *e. g., Turner* v. *Turner,* 44 Ala. 437, 450 (1870); *Vanderbilt* v. *Vanderbilt,* 1 App. Div. 2d 3, 147 N. Y. S. 2d 125 (1955), stayed pending appeal, 309 N. Y. 971, 132 N. E. 2d 333 (1956); *Hopson* v. *Hopson,* 95 U. S. App. D. C. 285, 221 F. 2d 839.

[6] In that case the Court said: "If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented." 125 U. S., at 206.

[7] *Crane* v. *Meginnis,* 1 Gill & J. (Md.) 463 (1829); *Wright* v. *Wright's Lessee,* 2 Md. 429 (1852). See also 1 Bishop, Marriage & Divorce (6th ed. 1881), § 693; 2 *id.,* § 382; 2 Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed., Blakemore, 1921), §§ 1471–1473.

Thompson case stands alone in the United States Reports in supporting the proposition that a valid *ex parte* divorce in one State cuts off alimony rights in another.[8] To the extent that the *Thompson* decision can be considered as in any way inconsistent with *Pennoyer* v. *Neff* and *Estin* v. *Estin*, the *Thompson* case should no longer be considered to be the law.

For the foregoing reasons we concur with the Court in affirming the judgment of the Supreme Court of Ohio.

[8] It may be noted that this question was not argued by the wife in the *Thompson* case. And the District of Columbia Court of Appeals stated "it was conceded at bar that, if the Virginia decree was not void, this action could not, upon any theory, be maintained." 35 App. D. C. 14, 26.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 581 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM END OF OCTOBER TERM, 1954, THROUGH APRIL 9, 1956.

Cases Dismissed in Vacation.

No. 13. Engine Air Service, Inc. et al. *v.* Halpert, Trustee in Bankruptcy. Certiorari, 348 U. S. 854, to the United States Court of Appeals for the Second Circuit. June 9, 1955. Dismissed on motion of petitioners pursuant to Rule 60 of the Rules of this Court. *James G. Moore* for petitioners. Reported below: 212 F. 2d 860.

No. 166. Illinois Central Railroad Co. *v.* Coussens, Administratrix. On petition for writ of certiorari to the Supreme Court of Mississippi. July 26, 1955. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *James L. Byrd* was on the stipulation for petitioner. With him on the petition were *Joseph H. Wright* and *John W. Freels.* Reported below: —— Miss. ——, 77 So. 2d 818.

No. 10, Misc. Masuth *v.* Indiana. On petition for writ of certiorari to the Supreme Court of Indiana. August 4, 1955. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Richard W. Mehl* for petitioner. *Edwin K. Steers,* Attorney General of Indiana, for respondent. Reported below: 233 Ind. 515, 120 N. E. 2d 272.

No. 128. Goldbaum et al. *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. August 9, 1955. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Irvin Goldstein* for petitioners. *Solicitor*

General Sobeloff was on the stipulation for the United States. With him on a brief in opposition to the petition were *Assistant Attorney General Holland, Ellis N. Slack, John H. Mitchell, Joseph M. Howard* and *Dickinson Thatcher*. Reported below: 222 F. 2d 360.

No. 107, Misc. HODGE *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. August 29, 1955. Dismissed on motion of petitioner under Rule 60 of the Rules of this Court.

No. 269. LAMBERT'S POINT DOCKS, INC. *v.* KENDALL, ASSISTANT DIRECTOR, OFFICE OF DEFENSE MOBILIZATION. On petition for writ of certiorari to the United States Emergency Court of Appeals. August 30, 1955. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *W. R. Ashburn* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 224 F. 2d 284.

OCTOBER 3, 1955.

Case Dismissed Under Rule 60.

No. 15. DERECKTOR *v.* UNITED STATES. Certiorari, 348 U. S. 926, to the Court of Claims. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Seymour W. Miller* was on the stipulation for petitioner. With him on a brief was *Israel G. Seeger*. *Solicitor General Sobeloff* was on the stipulation for the United States. Reported below: 129 Ct. Cl. 103, 128 F. Supp. 136.

OCTOBER 10, 1955.

Decisions Per Curiam.

No. 43. WADE ET UX. *v.* MICHIGAN. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

of a substantial federal question. *Thurman Arnold* for appellants. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellee.

No. 59. WILKOWSKI *v.* HART, LIEUTENANT GOVERNOR. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Joseph A. McMenamin* for appellant. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellee.

No. 62. WHITAKER ET AL., DOING BUSINESS AS BLUE MOTOR COACH LINES, *v.* LOUISVILLE TRANSIT CO. ET AL. Appeal from the Court of Appeals of Kentucky. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Jack Garrett Scott, George Bronz* and *Reuben S. Haslam* for appellants. *John E. Tarrant* and *Earl S. Wilson* for the Louisville Transit Co., appellee. Reported below: 274 S. W. 2d 391.

No. 99. BUDBERG ET AL. *v.* COUNTY OF SANGAMON ET AL. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Hugh J. Graham, Jr.* for appellants. *George P. Coutrakon* for appellees. Reported below: 4 Ill. 2d 518, 123 N. E. 2d 479.

No. 121. CULLEN ET AL. *v.* BOHLINGER, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL. Appeal from the Court of Appeals of New York and the

Appellate Division of the Supreme Court of New York, First Department. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Samuel A. Berger* for appellants. *Jacob K. Javits,* Attorney General, *James O. Moore, Jr.,* Solicitor General, and *Samuel A. Hirshowitz* and *Daniel M. Cohen,* Assistant Attorneys General, for the Superintendent of Insurance of New York, and *Ralph M. Carson* and *W. Perry Epes* for the Insurance Company of North America et al., appellees. Reported below: 308 N. Y. 886, 126 N. E. 2d 564; 284 App. Div. 963, 136 N. Y. S. 2d 361.

No. 142. New York, Chicago & St. Louis Railroad Co. *v.* Leonard. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Edwin Knachel, Donald E. Ryan* and *Richard C. Ogline* for appellant. *Samuel T. Gaines* for appellee. Reported below: 162 Ohio St. 548, 124 N. E. 2d 156.

No. 174. Atwood et al. *v.* Willacy County Navigation District. Appeal from the Supreme Court of Texas and the Court of Civil Appeals of Texas, Fourth Supreme Judicial District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *William C. Wines* for appellants. *William Robert Smith* for appellee. Reported below: 153 Tex. 646; 271 S. W. 2d 137.

No. 52. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, et al. *v.* Great Lakes Greyhound Lines. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Harold A. Cranefield* for appellants. *Edmund M. Brady* for appellee. Reported below: 341 Mich. 290, 67 N. W. 2d 105.

No. 55. NORTH CAROLINA ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of North Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Harry McMullan,* Attorney General, and *I. Beverly Lake,* Assistant Attorney General, for the State of North Carolina, and *R. Brookes Peters* for the North Carolina State Highway and Public Works Commission, appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, and *James B. McDonough, Jr., Charles P. Reynolds, Arthur J. Winder, William T. Joyner, Arthur J. Dixon* and *Henry J. Karison* for the Aberdeen & Rockfish Railroad Co. et al., appellees. Reported below: 128 F. Supp. 718.

No. 212. BURKHALTER *v.* LIBERTY MUTUAL INSURANCE COMPANIES, INC. ET AL. Appeal from the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Appellant *pro se.* *H. Plant Osborne* for Copp et al.; and *Harry T. Gray* and *Sam R. Marks* for the Chrysler Sales Corporation, appellees. Reported below: 221 F. 2d 212.

No. 108. LANDES *v.* DOMESTIC RELATIONS COURT OF THE 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 want of jurisdiction. Appellant *pro se.* *Peter Campbell Brown* and *Seymour B. Quel* for appellees. Reported below: 308 N. Y. 756, 125 N. E. 2d 110.

No. 186. BLUMENSCHEIN ET AL. *v.* HOUSING AUTHORITY OF THE CITY OF PITTSBURGH. Appeal from the Supreme Court of Pennsylvania, Western District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Paul Ginsburg* for appellants. *Theodore L. Hazlett, Jr.* for appellee. Reported below: 379 Pa. 566, 109 A. 2d 331.

Nos. 187 and 188. IN RE RINES, ADMINISTRATOR. Appeals from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *David Rines* and *Robert H. Rines* for appellant.

No. 217. ALBUQUERQUE BROADCASTING CO. *v.* BUREAU OF REVENUE OF NEW MEXICO ET AL. Appeal from the Supreme Court of New Mexico. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Arthur T. Hannett* for appellant. Reported below: 59 N. M. 201, 281 P. 2d 654.

No. 238. COTA *v.* COFFMAN. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this case. Appellant *pro se*. *George R. Richter, Jr.* and *Gordon F. Hampton* for appellee.

No. 50. RASMUSSEN *v.* BROWNELL, ATTORNEY GENERAL. 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 is reversed and the case is remanded to the Court of Appeals for consideration on the merits. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Jack Wasserman* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 95 U. S. App. D. C. 260, 221 F. 2d 541.

No. 91. KRETSKE *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. On consideration of the record and the confession of error by the Solicitor General, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a new trial. *Myer H. Gladstone* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 220 F. 2d 785.

No. 143. ANDERSON, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO.; and

No. 261. SWAFFORD *v.* ATLANTIC COAST LINE RAILROAD CO. On petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petitions for writs of certiorari in these cases are granted and the judgments are reversed. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN are of the opinion that certiorari should not have been granted in these cases. *Thomas J. Lewis* and *Richard M. Maxwell* for petitioner in No. 143. *Howard P. Macfarlane* for petitioner in No. 261. *William M. Howell* for respondent in No. 143. *G. L. Reeves, Norman C. Shepard* and *Frank G. Kurka* for respondent in No. 261. Reported below: No. 143, 221 F. 2d 548; No. 261, 220 F. 2d 901.

No. 223. BLOCK *v.* BLOCK. On petition for writ of certiorari to the Supreme Court of Ohio. *Per Curiam:* The petition for writ of certiorari is granted; the judgment is vacated, and the cause is remanded to the Supreme Court of Ohio for clarification as to whether its decision rests on state or federal grounds. See *Halvey* v. *Halvey*, 330 U. S. 610. *Henry B. Street* and *Philip R. Toomin* for petitioner. *Murray Seasongood* and *Robert P. Goldman* for respondent. Reported below: 163 Ohio St. 230, 126 N. E. 2d 331.

No. 271. UNITED STATES *v.* COLOTTA ET AL., DOING BUSINESS AS LONG & CHAMBLESS PLUMBING & HEATING CO. On petition for writ of certiorari to the Supreme Court of Mississippi. *Per Curiam:* The petition for writ of certiorari in this case is granted and the judgment is reversed. MR. JUSTICE DOUGLAS dissents. *Solicitor General Sobeloff, Assistant Attorney General Holland, Marvin E. Frankel, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman* for the United States. Reported below: —— Miss. ——, 79 So. 2d 474.

No. 30, Misc. GREGORY *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration on the merits. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 219 F. 2d 809.

No. 283, Misc. BURWELL *v.* TEETS, WARDEN. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The motion for stay of execution of death sentence and the peti-

tion for writ of certiorari to the Court of Appeals for the Ninth Circuit are granted. The judgment of that court is reversed, and the case is remanded so that the petitioner's application for a certificate of probable cause may be entertained on its merits. *House* v. *Mayo,* 324 U. S. 42, 48 (1945). Petitioner *pro se. Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent. Reported below: 226 F. 2d 309.

No. 262, Misc. ROGERS *v.* TEETS, WARDEN. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The motion for stay of execution of death sentence and the petition for writ of certiorari to the Court of Appeals for the Ninth Circuit are granted. The judgment of that court is reversed, and the case is remanded so that the petitioner's application for a certificate of probable cause may be entertained on its merits. *House* v. *Mayo,* 324 U. S. 42, 48 (1945). Petitioner *pro se. Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

Miscellaneous Orders.

No. 170. GENERAL STORES CORP. *v.* SHLENSKY ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Motion for leave to file brief of respondents, Wage Claimants, granted. Petition for writ of certiorari granted. *Edwin M. Otterbourg* for petitioner. *Solicitor General Sobeloff, William H. Timbers, Thomas G. Meeker* and *David Ferber* for the Securities & Exchange Commission, *A. Alan Reich* for Shlensky, *Samuel Blumberg* for the Creditors

Committee, and *Max Goldweber* for the Wage Claimants, respondents. Reported below: 222 F. 2d 234.

No. 242. INTER-STATE NATIONAL BANK OF KANSAS CITY *v.* LUTHER, TRUSTEE. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Motion to add the First National Bank of Kansas City as a party petitioner granted. Petition for writ of certiorari granted. *Frank H. Terrell* for petitioner and the First National Bank of Kansas City. *John F. Eberhardt* for respondent. Reported below: 221 F. 2d 382.

No. 307. PURITAN CHURCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. Motion for disqualification of certain Justices denied. Motion for appointment of a Commissioner denied. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Petitioners *pro se*. *Solicitor General Sobeloff* and *Assistant Attorney General Holland* for respondent.

No. 67, Misc. CARPENTER *v.* HARLEM VALLEY STATE HOSPITAL ET AL.;

No. 70, Misc. GUNTER *v.* EIDSON, WARDEN; and

No. 96, Misc. MARSH *v.* MAILER ET AL., MEMBERS OF BOARD OF PAROLE, STATE OF NEW YORK. Motions for leave to file petitions for writs of habeas corpus denied.

No. 42, October Term, 1952. F. W. WOOLWORTH CO. *v.* CONTEMPORARY ARTS, INC., 344 U. S. 228. The motion for clarification of the mandate is denied. THE CHIEF JUSTICE and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Cedric W. Porter*

and *Harry F. R. Dolan* were on the motion for respondent. *Kenneth W. Greenawalt* and *Martin A. Schenck* were on the brief for petitioner in opposition to the motion.

No. 131, October Term, 1954. WHITEHOUSE ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL., 349 U. S. 366. The petition for modification of the opinion is denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* were on the petition for the Carrier Members, National Railroad Adjustment Board, Third Division, respondents. *Milton Kramer* in opposition.

No. 406, October Term, 1954. BOUDOIN *v.* LYKES BROTHERS STEAMSHIP CO., INC., 348 U. S. 336. The motion of petitioner to amend the judgment is granted. It is ordered that the certified copy of the judgment sent to the District Court be recalled and that the judgment be amended so as to provide for a remand of the cause to the United States Court of Appeals for the Fifth Circuit for further proceedings in conformity with the opinion of this Court. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Raymond H. Kierr* was on the motion. *William E. Wright* was on a memorandum in opposition.

No. 3. UNITED STATES EX REL. TOTH *v.* TALBOTT, SECRETARY OF THE AIR FORCE, 349 U. S. 949. Quarles, present Secretary of the Air Force, substituted in place of Talbott, resigned.

No. 4. RYAN STEVEDORING CO., INC. *v.* PAN-ATLANTIC STEAMSHIP CORP., 349 U. S. 926. The motions for leave to file briefs of American Merchant Marine Institute, Inc., and Association of American Ship Owners, as *amici curiae,* are denied.

No. 58. ULLMANN *v.* UNITED STATES. Certiorari, 349 U. S. 951, to the United States Court of Appeals for the Second Circuit. The motion for leave to file brief of Emergency Civil Liberties Committee, as *amicus curiae,* is denied.

No. 7, Original. UNITED STATES *v.* LOUISIANA, 340 U. S. 899. The motion of the plaintiff for modification of decree is denied. THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Attorney General Brownell, Solicitor General Sobeloff, Assistant Attorney General Rankin, Oscar H. Davis, John F. Davis* and *George S. Swarth* for the United States, plaintiff. *Fred S. LeBlanc,* Attorney General, *John L. Madden,* Assistant Attorney General, *Bailey Walsh,* Special Assistant Attorney General, *W. Scott Wilkinson, L. H. Perez* and *Frank J. Looney* for the State of Louisiana, defendant.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The report of the Special Master is received and it is ordered that exceptions thereto, if any, by the California defendants be filed on or before Friday, October 14th, next. It is ordered that *Simon H. Rifkind,* of New York City, be and he hereby is appointed Special Master in this case in the place of *George I. Haight,* deceased. THE CHIEF JUSTICE took no part in the consideration or decision of these questions.

No. 12, Original. SOUTH CAROLINA *v.* GEORGIA ET AL. The motion for leave to file complaint is denied. *T. C. Callison,* Attorney General, for the State of South Carolina, plaintiff. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Thomas L. McKevitt* for the United States, and *Eugene Cook,* Attorney General, and *Thomas H. Gignilliat,* Deputy Assistant Attorney General, for the State of Georgia, defendants.

No. 56, Misc. CHRISP *v.* NORTH CAROLINA;

No. 86, Misc. JOHNSON *v.* UTAH; and

No. 102, Misc. PATTERSON *v.* SUPREME COURT OF ILLINOIS. Applications denied.

No. 60, Misc. IN RE STEWART; and

No. 76, Misc. ELLIOTT *v.* BUTZEL, CHIEF JUSTICE, SUPREME COURT OF MICHIGAN. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 54. UNITED STATES *v.* GREEN ET AL. Appeal from the United States District Court for the Southern District of Illinois. Probable jurisdiction noted. *Solicitor General Sobeloff* for the United States. *A. M. Fitzgerald* for appellees. Reported below: 135 F. Supp. 162.

No. 102. UNITED STATES ET AL. *v.* CONTRACT STEEL CARRIERS, INC. Appeal from the United States District Court for the Northern District of Indiana. Probable jurisdiction noted. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman* and *Edward M. Reidy* for appellants. Reported below: 128 F. Supp. 25.

No. 63. WERNER MACHINE CO., INC. *v.* DIRECTOR OF DIVISION OF TAXATION, DEPARTMENT OF TREASURY, NEW JERSEY. Appeal from the Supreme Court of New Jersey. Probable jurisdiction noted. *Charles Goodwin, Jr., Halsey T. Tichenor, III,* and *Leopold Frankel* for appellant. *Grover C. Richman, Jr.,* Attorney General of New Jersey, and *Ned J. Parsekian,* Deputy Attorney General, for appellee. Reported below: 17 N. J. 121, 110 A. 2d 89.

No. 82. INTERNATIONAL HARVESTER CREDIT CORP. ET AL. *v.* GOODRICH ET AL., CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK. Appeal from the Court of

Appeals of New York. Probable jurisdiction noted. *John Lord O'Brian* for appellants. Reported below: 308 N. Y. 731, 124 N. E. 2d 339.

No. 129. DOUD ET AL., DOING BUSINESS AS BONDIFIED SYSTEMS, ET AL. *v.* HODGE, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *John J. Yowell* for appellants. *Latham Castle,* Attorney General of Illinois, and *William C. Wines* and *Raymond S. Sarnow,* Assistant Attorneys General, for appellees. Reported below: 127 F. Supp. 853.

No. 233. DIXIE CARRIERS, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Texas. Probable jurisdiction noted. *Donald Macleay* for the Dixie Carriers, Inc. et al., and *Nuel D. Belnap* for the Federal Barge Line, Inc. et al., appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States, *Samuel R. Howell* for the Interstate Commerce Commission, and *John A. Daily* for the New York Central Railroad Co. et al., appellees. Reported below: 129 F. Supp. 28.

No. 132. HOLOPHANE CO., INC. *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of Ohio. Probable jurisdiction noted. MR. JUSTICE HARLAN took no part in the consideration or decision of this question. *Howard F. Burns, Shepard Broad* and *Lewis Horwitz* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States. Reported below: 119 F. Supp. 114.

No. 151. UNITED STATES *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this question. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States. *John Lord O'Brian, Hugh B. Cox* and *Charles A. Horsky* for E. I. du Pont de Nemours & Co., and *Ferris E. Hurd* and *Henry M. Hogan* for the General Motors Corporation, appellees. Reported below: 126 F. Supp. 235.

No. 158. FROZEN FOOD EXPRESS *v.* UNITED STATES ET AL.;

Nos. 159 and 163. INTERSTATE COMMERCE COMMISSION *v.* FROZEN FOOD EXPRESS ET AL.;

No. 160. AMERICAN TRUCKING ASSOCIATIONS ET AL. *v.* FROZEN FOOD EXPRESS ET AL.;

Nos. 161 and 164. AKRON, CANTON & YOUNGSTOWN RAILROAD CO. ET AL. *v.* FROZEN FOOD EXPRESS ET AL.; and

No. 162. EAST TEXAS MOTOR FREIGHT LINES, INC. ET AL. *v.* FROZEN FOOD EXPRESS ET AL. Appeals from the United States District Court for the Southern District of Texas. Probable jurisdiction noted. *Carl L. Phinney* for Frozen Food Express. *Leo H. Pou* for appellant in No. 159. With him was *Samuel R. Howell* for appellant in No. 163. *Rollo E. Kidwell* for appellants in No. 160. *Peter T. Beardsley* for the American Trucking Associations, Inc., and *Clarence D. Todd* and *Dale C. Dillon* for the Common Carrier Conference Irregular Route et al., appellants in Nos. 160 and 162. *David G. Macdonald* and *Francis W. McInerny* for the East Texas Motor Freight Lines et al., appellants in No. 162. *Joseph H. Hays, Carl Helmetag, Jr.* and *Charles P. Reynolds* for the Akron, Canton & Youngstown Railroad Co. et al.,

appellants in Nos. 161 and 164. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Robert L. Farrington* and *Neil Brooks* for the United States and the Secretary of Agriculture, appellees in Nos. 162, 163 and 164. Reported below: 128 F. Supp. 374.

Certiorari Granted. (*See also Nos. 50, 91, 143, 170, 223, 242, 261, 271 and Misc. Nos. 30, 262 and 283, supra.*)

No. 92. BLACK ET AL. *v.* CUTTER LABORATORIES. Supreme Court of California. Certiorari granted. *Bertram Edises* and *A. L. Wirin* for petitioners. *Gardiner Johnson* for respondent. *Arthur J. Goldberg, Jay A. Darwin* and *Fred Okrand* filed a brief for the Congress of Industrial Organizations et al., as *amici curiae,* in support of the petition. Reported below: 43 Cal. 2d 788, 278 P. 2d 905.

No. 94. UNITED STATES ET AL. *v.* STORER BROADCASTING CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Sobeloff* and *Warren E. Baker* for petitioners. *Albert R. Connelly, Thomas H. Wall* and *John E. McCoy* for respondent. Reported below: 95 U. S. App. D. C. 97, 220 F. 2d 204.

No. 134. SQUIRE, COLLECTOR OF INTERNAL REVENUE, *v.* CAPOEMAN ET UX. C. A. 9th Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. *John W. Cragun, Glen A. Wilkinson* and *Robert W. Barker* for respondents. Reported below: 220 F. 2d 349.

No. 201. HYUN *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *John W. Porter* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for respondent. Reported below: 219 F. 2d 404.

No. 213. UNITED STATES *v.* ZUCCA, ALIAS SARNI. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. *Orrin G. Judd* and *Earle K. Moore* for respondent. Reported below: 221 F. 2d 805.

No. 231. HATAHLEY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Norman M. Littell, Laurence A. Davis* and *Marvin J. Sonosky* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 220 F. 2d 666.

No. 56. MURDOCK ACCEPTANCE CORP. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *T. H. Watkins, Elizabeth Hulen Grayson, W. H. Watkins* and *P. H. Eager* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 218 F. 2d 702.

No. 66. RIVERBANK LABORATORIES *v.* HARDWOOD PRODUCTS CORP. C. A. 7th Cir. Certiorari granted. *Jack H. Oppenheim* and *Philip B. Kurland* for petitioner. *David A. Fox, Gerrit P. Groen* and *Roger Sherman Hoar* for respondent. Reported below: 220 F. 2d 465.

No. 105. THOMPSON *v.* COASTAL OIL CO. C. A. 3d Cir. Certiorari granted. *Silas Blake Axtell* and *Charles A. Ellis* for petitioner. *Michael E. Hanrahan* for respondent. Reported below: 221 F. 2d 559.

No. 110. CAMMER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Charles E. Ford* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General*

Olney, Beatrice Rosenberg and *Richard J. Blanchard* for the United States. Reported below: 96 U. S. App. D. C. 30, 223 F. 2d 322.

No. 250. National Labor Relations Board *v.* Babcock & Wilcox Co. C. A. 5th Cir. Certiorari granted. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for petitioner. *O. B. Fisher* for respondent. Reported below: 222 F. 2d 316.

No. 251. National Labor Relations Board *v.* Seamprufe, Inc. (Holdenville Plant). C. A. 10th Cir. Certiorari granted. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for petitioner. *Howard Lichtenstein* and *Karl H. Mueller* for respondent. Reported below: 222 F. 2d 858.

No. 257. Southern Pacific Co. *v.* Gileo et al. Supreme Court of California. Certiorari granted. *Arthur B. Dunne* and *Horace B. Wulff* for petitioner. *Clifton Hildebrand* for Gileo, *Nathaniel S. Colley* for Moreno et al., and *Archibald Marison Mull, Jr.* for Eufrazia, respondents. Reported below: 44 Cal. 2d 539, 543, 547, 881, 882, 282 P. 2d 872, 875, 877, 879, 880.

No. 286. Commissioner of Internal Revenue *v.* Southwest Exploration Co. C. A. 9th Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for petitioner. *Melvin D. Wilson* and *Joseph D. Peeler* for respondent. Reported below: 220 F. 2d 58.

No. 287. United States *v.* Huntington Beach Co. Court of Claims. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for the United States. *Fran-*

cis R. Kirkham and *Harry R. Horrow* for respondent. Reported below: 132 Ct. Cl. 427, 132 F. Supp. 718.

No. 72. COSTELLO *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?"

MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Osmond K. Fraenkel, Morris Shilensky* and *Joseph Leary Delaney* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Marvin E. Frankel, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 221 F. 2d 668.

No. 76. COLD METAL PROCESS CO. ET AL. *v.* UNITED ENGINEERING & FOUNDRY CO. C. A. 3d Cir. Certiorari granted. *William H. Webb, Clarence B. Zewadski* and *William Wallace Booth* for petitioners. *Jo. Baily Brown* for respondent. Reported below: 221 F. 2d 115.

No. 79. NATIONAL LABOR RELATIONS BOARD *v.* COCA-COLA BOTTLING CO. OF LOUISVILLE, INC. C. A. 6th Cir. Certiorari granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Solicitor General Sobeloff* and *Theophil C. Kammholz* for petitioner. *James E. Fahey* for respondent. Reported below: 219 F. 2d 441.

No. 150. SHIELDS *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari granted. The Court calls this case to the attention of the Interstate Commerce Commission and expresses its readiness to accept any brief it might wish to submit. *M. R. Nachman, Jr.* for peti-

tioner. *Norman C. Shepard* for respondent. Reported below: 220 F. 2d 242.

No. 156. REMMER *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to the questions presented under III A of the petition for the writ. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *John R. Golden, Leslie C. Gillen* and *Spurgeon Avakian* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 222 F. 2d 720.

No. 255. MILLINERY CENTER BUILDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to questions 1 and 2 presented by the petition for the writ which read as follows:

"1. Where a lessee, the owner of a valuable building on leased land, acquires the fee to the land to be relieved of what it considers to be the burdensome terms of a lease, may the lessee deduct the excess of the payment over the determined value of the land at the date of purchase as an ordinary expense of doing business under § 23 (a) of the United States Internal Revenue Code of 1939 or under § 23 (f) as a loss on a transaction entered into for profit and not compensated for by insurance or otherwise.

"2. In the alternative, may the lessee-petitioner consider the excess payment over the determined value of the land to be in the nature of a prepayment of rent for the remaining term of the extinguished lease and amortize such amount over 21 years?"

Bernard Weiss for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Louise Foster* for respondent. Reported below: 221 F. 2d 322.

No. 23, Misc. GREENWOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 219 F. 2d 376.

Certiorari Denied. (*See also Nos. 186, 238 and 307, supra.*)

No. 61. SEELEY TUBE & BOX CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Walter J. Bilder* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 219 F. 2d 389.

No. 65. UNITED STATES *v.* PUTTY. C. A. 9th Cir. Certiorari denied. *Solicitor General Sobeloff* for the United States. *Thomas M. Jenkins* for respondent. Reported below: 220 F. 2d 473.

No. 67. BELLAH *v.* WHITTLESEY. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Harry Graham Balter* for petitioner. *Joseph P. Loeb* for respondent. Reported below: 130 Cal. App. 2d 182, 278 P. 2d 511.

No. 68. GREAT LAKES STEEL CORP. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Sherwin A. Hill, Edward T. Goodrich, James McEvoy, Jr.* and *Harry D. Fenske* for petitioner. *Samuel R. Howell* for the Interstate Commerce Commission, and *Willis T. Pierson* and *Frank H. Cole, Jr.* for the Baltimore & Ohio Railroad Co. et al., respondents. Reported below: 220 F. 2d 751.

No. 69. ORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Virgil H. Goode* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 221 F. 2d 632.

No. 70. SWIDLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Joseph M. Howard, James X. Kilbridge* and *Harold S. Larsen* for the United States. Reported below: 220 F. 2d 351.

No. 75. SHUTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wm. Andress, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter* and *Benjamin Forman* for the United States. Reported below: 218 F. 2d 10.

No. 77. WOLCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harold Leventhal* and *Leo R. Friedman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Philip Elman* for the United States. Reported below: 218 F. 2d 505.

No. 78. IGOE, U. S. DISTRICT JUDGE, *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Philip B. Perlman, James R. Browning* and *James A. Dooley* for petitioner. *Eaton Adams, M. V. Thompson* and *Hale Houts* for respondent. Reported below: 220 F. 2d 299.

No. 80. UNITED STATES EX REL. FERETIC *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Albert Mayer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for respondent. Reported below: 221 F. 2d 262.

No. 81. LICHTER ET AL., DOING BUSINESS AS SOUTHERN FIREPROOFING CO., *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Cir-

cuit. Certiorari denied. *Paul W. Steer* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for respondents. Reported below: 95 U. S. App. D. C. 316, 221 F. 2d 869.

No. 83. MAH TOI *v.* BROWNELL, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 219 F. 2d 642.

No. 84. SAN ANTONIO TRANSIT CO. *v.* SCOFIELD, FORMERLY COLLECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Robert Allan Ritchie, Robert F. Ritchie, Sylvan Lang* and *Leslie Byrd* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Davis W. Morton, Jr.* for respondent. Reported below: 219 F. 2d 149.

No. 85. MARTIN BROTHERS BOX CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. *George L. Quinn, Jr.* and *Donald A. Schafer* for petitioner. *Samuel R. Howell* for the Interstate Commerce Commission, and *James C. Dezendorf, James E. Lyons* and *Charles W. Burkett, Jr.* for the Southern Pacific Co., respondents. Reported below: 219 F. 2d 811.

No. 86. CRIST *v.* WASHINGTON, VIRGINIA & MARYLAND COACH CO., INC. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 196 Va. 642, 85 S. E. 2d 213.

No. 87. LADUE & CO. *v.* BROWNELL, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. *Nathan Shefner*

for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for respondent. Reported below: 220 F. 2d 468.

No. 88. NEWMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *T. Reuben Burnside* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 220 F. 2d 289.

No. 89. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* FRIEDMAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for petitioners. *Victor B. Harris* and *Seymour Krieger* for respondent. Reported below: 95 U. S. App. D. C. 128, 220 F. 2d 808.

No. 90. TALACHE MINES, INC. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *W. H. Langroise* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for respondents. Reported below: 218 F. 2d 491.

No. 93. BUSSOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert H. Shutan* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 218 F. 2d 683.

No. 96. ESSO SHIPPING CO. *v.* COMPANIA DE MADERAS DE CAIBARIEN, S. A. C. A. 5th Cir. Certiorari denied. *Joseph M. Rault* and *Walter Carroll* for petitioner. Reported below: 220 F. 2d 120.

No. 97. DEMELLE, DOING BUSINESS AS CURLEY'S TRANSPORTATION CO., *v.* INTERSTATE COMMERCE COMMIS-

SION. C. A. 1st Cir. Certiorari denied. *Harry C. Ames, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman* and *Samuel R. Howell* for respondent. Reported below: 219 F. 2d 619.

No. 98. WALSH, U. S. DISTRICT JUDGE, ET AL. *v.* LYONS ET AL., DOING BUSINESS AS LYONS ELECTRICAL DISTRIBUTING CO. C. A. 2d Cir. Certiorari denied. *Albert R. Connelly* for petitioners. *Copal Mintz* for respondents. Reported below: 222 F. 2d 184.

No. 101. SOC. ARMADORA DEL NORTE *v.* LAHDE. C. A. 9th Cir. Certiorari denied. *Charles B. Howard* and *Lane Summers* for petitioner. *Oscar A. Zabel* for respondent. Reported below: 220 F. 2d 357.

No. 103. GARIEPY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William E. Leahy* for petitioner. *Solicitor General Sobeloff* and *Assistant Attorney General Holland* for the United States. Reported below: 220 F. 2d 252.

No. 104. MCFEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Elden McFarland* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Joseph M. Howard* and *Dickinson Thatcher* for the United States. Reported below: 221 F. 2d 807.

No. 106. LEIGHTON *v.* SECURITIES & EXCHANGE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, William H. Timbers* and *Alexander Cohen* for respondent. Reported below: 95 U. S. App. D. C. 217, 221 F. 2d 91.

No. 107. 450 ACRES OF LAND, MORE OR LESS, IN CHATHAM COUNTY, GEORGIA, ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Henry Hammer* for petitioners. *Solicitor General Sobeloff* and *Assistant Attorney General Morton* for the United States, and *Eugene Cook,* Attorney General, and *Thomas H. Gignilliat,* Deputy Assistant Attorney General, for the State of Georgia, respondents. Reported below: 220 F. 2d 353.

No. 109. UNITED STATES EX REL. CZAPKOWSKI *v.* HOLLAND, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Filindo B. Masino* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for respondent. Reported below: 220 F. 2d 436.

No. 113. JEOFFROY MFG., INC. *v.* GRAHAM. C. A. 5th Cir. Certiorari denied. *W. W. Gibson* for petitioner. *Claude A. Fishburn* and *Orville O. Gold* for respondent. Reported below: 219 F. 2d 511.

No. 114. LASH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Reginald Heber Smith* and *Joseph N. Welch* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Joseph M. Howard* and *Dickinson Thatcher* for the United States. Reported below: 221 F. 2d 237.

No. 115. JONES *v.* AVCO MANUFACTURING CORP. C. A. 8th Cir. Certiorari denied. *E. A. Taylor* for petitioner. *R. Carter Tucker* for respondent. Reported below: 218 F. 2d 406.

No. 116. STERN ET AL. *v.* BOARD OF LEVEE COMMISSIONERS, ORLEANS LEVEE DISTRICT, ET AL. Supreme Court of

Louisiana. Certiorari denied. *R. Emmett Kerrigan, Ralph L. Kaskell, Jr.* and *René H. Himel, Jr.* for petitioners. *Moses C. Scharff* for the Board of Levee Commissioners, and *Gerard H. Schreiber* for Roussel, respondents.

No. 122. Gleeson et ux. *v.* Carr, Trustee in Bankruptcy. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. Reported below: 219 F. 2d 64.

No. 123. Long et al. *v.* Ryan, U. S. District Judge, et al. C. A. 2d Cir. Certiorari denied. *John A. Wilson* and *Willard M. L. Robinson* for petitioners. *I. Arnold Ross* for respondents.

No. 124. Bass et al., doing business as Joseph A. Bass Co., et al. *v.* United States et al. C. A. 8th Cir. Certiorari denied. *Josiah E. Brill* and *Max O'Rell Truitt* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for respondents. Reported below: 221 F. 2d 494.

No. 125. Emery & Kaufman, Ltd. *v.* Heyl. Supreme Court of Louisiana. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. Reported below: 227 La. 616, 633, 80 So. 2d 95, 101.

No. 126. Halfen *v.* United States C. A. 5th Cir. Certiorari denied. *John Peace* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 220 F. 2d 440.

No. 127. Sickles *v.* Graybar Electric Co. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Alfred H. Highland* for respondent. Reported below: 219 F. 2d 847.

No. 130. Coco *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Wallace N. Maer* for petitioner.

No. 131. FARONE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *James F. Carroll* for petitioner. *Jacob K. Javits,* Attorney General of New York, *James O. Moore, Jr.,* Solicitor General, and *Ruth Kessler Toch* and *Arthur H. Christy,* Assistant Attorneys General, for respondent. Reported below: 304 N. Y. 391, 107 N. E. 2d 504; 308 N. Y. 305, 125 N. E. 2d 582.

No. 133. SILLIMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Joseph J. O'Connell, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 220 F. 2d 282.

No. 135. ECHELES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 222 F. 2d 144.

No. 136. SOPER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hubert A. Gilbert* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 220 F. 2d 158.

No. 137. NEW CUT RATE LIQUORS, INC. ET AL. *v.* SEAGRAM DISTILLERS CORP. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioners. *Frank D. Mayer, Louis A. Kohn* and *Robert L. Stern* for respondent. Reported below: 221 F. 2d 815.

No. 138. IRVING TRUST CO. ET AL., EXECUTORS, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Ben-*

jamin M. Cardozo and *Eli J. Blair* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *I. Henry Kutz* for the United States. Reported below: 221 F. 2d 303.

No. 139. EARHART *v.* CALLAN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *John Egan Belcher* for petitioner. Reported below: 221 F. 2d 160.

No. 141. CHAITT *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Lemuel B. Schofield* for petitioner. Reported below: 380 Pa. 532, 112 A. 2d 379.

No. 145. NEW YORK EX REL. GADSON *v.* HOY, SHERIFF. Appellate Division of the Supreme Court of New York, Second Department. Certiorari denied. *Curtis F. McClane* for petitioner. *John J. O'Brien* for respondent. Reported below: 285 App. Div. 974, 138 N. Y. Supp. 2d 704.

No. 146. AMERICAN METAL CO., LTD. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Norris Darrell, John F. Dooling, Jr.* and *Robert MacCrate* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 221 F. 2d 134.

No. 147. REINECKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Henry C. Lowenhaupt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Louise Foster* for respondent. Reported below: 220 F. 2d 406.

No. 148. MULLETT ET AL. *v.* KORTH, COLLECTOR OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Shirley P. Jones* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 219 F. 2d 732.

No. 149. BURRIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Eugene Gressman* for petitioner. Reported below: 161 Tex. Cr. R. 210, 276 S. W. 2d 260.

No. 152. SOUTHERN PINE ELECTRIC COOPERATIVE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *J. M. Williams* and *Helen F. Humphrey* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 218 F. 2d 824.

No. 153. SCOTT *v.* STANDARD CONVEYOR CO. C. A. 8th Cir. Certiorari denied. *John S. Marsalek* for petitioner. *C. Arthur Anderson* for respondent. Reported below: 221 F. 2d 460.

No. 154. TINKER & RASOR ET AL. *v.* STEARNS ET AL. C. A. 9th Cir. Certiorari denied. *Edward B. Gregg* and *Henry Gifford Hardy* for petitioners. *James B. Simms* for respondents. Reported below: 220 F. 2d 49.

No. 157. PONS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Jack Wasserman, Orlando J. Antonsanti* and *David Carliner* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 220 F. 2d 399.

No. 165. LEADMAN *v.* GREYHOUND CORPORATION. Court of Appeals of Kentucky. Certiorari denied. *Cleon K. Calvert* for petitioner. *R. W. Keenon* for respondent. Reported below: 285 S. W. 2d 177.

No. 167. SNOW ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *Willis C. Moffatt* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Louise Foster* for respondents. Reported below: 223 F. 2d 103.

No. 168. BURDICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harold S. Larsen* for the United States. Reported below: 221 F. 2d 932.

No. 169. TURNER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *C. R. Wharton* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Dickinson Thatcher* for the United States. Reported below: 222 F. 2d 926.

No. 171. HURON MILLING CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Jay O. Kramer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph F. Goetten* for the United States. Reported below: 131 Ct. Cl. 733, 130 F. Supp. 818.

No. 172. CAMPODONICO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Maxwell M. Willens* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *James X. Kilbridge* for the United States. Reported below: 222 F. 2d 310.

No. 173. PACE *v.* TOMLINSON, DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Walter Akerman, Jr.* for respondent. Reported below: 220 F. 2d 308.

No. 175. TITUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William W. Barron* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 221 F. 2d 571.

No. 176. WATERMAN STEAMSHIP CORP. *v.* TRIPLE A MACHINE SHOP, INC. C. A. 9th Cir. Certiorari denied. *Chalmers G. Graham* for petitioner. *Lloyd M. Tweedt* for respondent. Reported below: 221 F. 2d 916.

No. 177. AMES *v.* MENGEL COMPANY ET AL. C. A. 6th Cir. Certiorari denied. *Ernest Woodward* for petitioner. *Chas. G. Middleton* and *Leo T. Wolford* for respondents. Reported below: 219 F. 2d 704.

No. 178. VAUGHAN *v.* CITY BANK & TRUST CO. C. A. 5th Cir. Certiorari denied. Reported below: 218 F. 2d 802.

No. 179. MITCHELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Howard F. Sachs* for petitioner. *Solicitor General Sobeloff* and *Assistant Attorney General Holland* for the United States. Reported below: 221 F. 2d 554.

No. 180. MASTERCRAFTERS CLOCK & RADIO CO. *v.* VACHERON & CONSTANTIN-LE COULTRE WATCHES, INC. ET AL. C. A. 2d Cir. Certiorari denied. *Clarence E. Threedy* for petitioner. *W. Brown Morton* for respondents. Reported below: 221 F. 2d 464.

No. 181. BOOMHOWER, INC. *v.* AMERICAN AUTOMOBILE INSURANCE CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thaddeus G. Benton* and *Ben T. Rauber* for petitioner. *Alexander M. Heron* for the American Automobile Insurance Co. et al., and *Edward White* for Kane, respondents. Reported below: 95 U. S. App. D. C. 124, 220 F. 2d 488.

No. 182. MASSACHUSETTS PROTECTIVE ASSOCIATION, INC. *v.* BUCHANAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Louis M. Denit* and *Thomas S. Jackson* for petitioner. *Jo V. Morgan, Jr.* for respondent. Reported below: 96 U. S. App. D. C. 144, 223 F. 2d 609.

No. 183. PIGOTT ET AL. *v.* DETROIT, TOLEDO & IRONTON RAILROAD ET AL. C. A. 6th Cir. Certiorari denied. *William A. Rhodes* for petitioners. *Wayland K. Sullivan* for the Brotherhood of Railroad Trainmen, respondent. Reported below: 221 F. 2d 736.

No. 184. BISHOP *v.* REICHEL, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Laurence Sovik* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Morton K. Rothschild* for respondent. Reported below: 221 F. 2d 806.

No. 189. PIERCE *v.* HEWLETT-PACKARD CO. ET AL. C. A. 1st Cir. Certiorari denied. *David Rines* and *Robert H. Rines* for petitioner. *Hector M. Holmes* for respondents. Reported below: 220 F. 2d 531.

No. 190. RUBSAM *v.* HARLEY C. LONEY CO. C. A. 6th Cir. Certiorari denied. *Percy C. Heckendorf* for petitioner. *Casper W. Ooms* for respondent. Reported below: 217 F. 2d 353.

No. 191. AMERICAN MARKING CORP. ET AL. *v.* ADOLPH GOTTSCHO, INC. Supreme Court of New Jersey. Certiorari denied. *Ralph G. Mesce* for petitioners. *Jerome C. Eisenberg* for respondent. Reported below: 18 N. J. 467, 114 A. 2d 438.

No. 192. MARKU *v.* UNION & LEAGUE OF ROMANIAN SOCIETIES OF AMERICA, INC. ET AL. Supreme Court of Ohio. Certiorari denied. *Novak N. Marku, pro se. Joseph J. Craciun* and *Richard H. Woods* for respondents. Reported below: 162 Ohio St. 536, 124 N. E. 2d 155.

No. 193. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 221 F. 2d 809.

No. 194. KIRSCHENMANN ET AL. *v.* WESTOVER, COLLECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Llewellyn A. Luce* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 225 F. 2d 69.

No. 197. VASEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *James W. Cassedy, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 222 F. 2d 3.

No. 199. WILSON BROTHERS *v.* TEXTILE WORKERS UNION OF AMERICA, CIO, ET AL. C. A. 2d Cir. Certiorari denied. *Edward J. Ennis* for petitioner. *Arthur J. Goldberg* and *David E. Feller* for respondents. Reported below: 224 F. 2d 176.

No. 200. Shopmen's Local Union No. 733, International Association of Bridge, Structural & Ornamental Iron Workers, A. F. of L., *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Warren E. Hall, Jr.* and *Margaret Hills Fairleigh* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Robert G. Johnson* for respondent. Reported below: 219 F. 2d 874.

No. 202. Stella *v.* Kaiser et al. C. A. 2d Cir. Certiorari denied. *Lewis M. Dabney, Jr.* for petitioner. *Harold H. Corbin* for Kaiser et al., and *Louis F. Carroll* for the Kaiser-Frazer Corporation, respondents. Reported below: 221 F. 2d 115.

No. 203. Martin, Trustee, *v.* Johnston. Supreme Court of Florida. Certiorari denied. *Robert H. Anderson* for petitioner. *William C. Gaither* for respondent. Reported below: 79 So. 2d 419.

No. 204. Lurie et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Nathan M. Cohen* for Lurie, and *George F. Callaghan* for Dworett, petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 222 F. 2d 11.

No. 205. Wichman *v.* Allis Chalmers Manufacturing Co. C. A. 8th Cir. Certiorari denied. *Sam B. Sebree* for petitioner. *Walter A. Raymond* for respondent. Reported below: 220 F. 2d 426.

No. 206. Noel Estate, Inc. et al. *v.* Russell. C. A. 5th Cir. Certiorari denied. *Charles L. Barnett* for petitioners. Reported below: 218 F. 2d 958.

No. 207. HARRY ALEXANDER, INC. ET AL. *v.* FRIEND. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *G. A. Chadwick, Jr.* and *John A. Beck* for petitioners. *Henry F. Lerch* and *Wilton H. Wallace* for respondent. Reported below: 95 U. S. App. D. C. 139, 220 F. 2d 820.

No. 208. BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND *v.* TRUSTEES OF ENDOWMENT FUND OF THE UNIVERSITY OF MARYLAND ET AL. Court of Appeals of Maryland. Certiorari denied. *C. Ferdinand Sybert,* Attorney General of Maryland, and *David Kauffman,* Assistant Attorney General, for petitioner. *H. Vernon Eney* for the Trustees of the Endowment Fund of the University of Maryland, respondent. Reported below: 206 Md. 559, 112 A. 2d 678.

No. 214. TORRES *v.* WALSH, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Edward A. Martin* for petitioner. *Walter X. Connor* for respondent. Reported below: 221 F. 2d 319.

No. 215. PROCHASKA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 222 F. 2d 1.

No. 216. ITEM COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 220 F. 2d 956.

No. 219. STRAUCH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John J. Hooker* and *Bernard J.*

Long for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 223 F. 2d 377.

No. 220. LANDES *v.* KNIGHT, PRESIDENT JUDGE, ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 221. CAROLINA POWER & LIGHT CO. *v.* JERNIGAN, ADMINISTRATOR. C. A. 4th Cir. Certiorari denied. *Charles F. Rouse* and *A. Y. Arledge* for petitioner. *Warren E. Miller* for respondent. Reported below: 222 F. 2d 951.

No. 222. PREFERRED INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William H. Levit* and *George W. Murphy* for petitioners. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 222 F. 2d 942.

No. 224. TRINITY UNIVERSAL INSURANCE CO. *v.* SMITHWICK. C. A. 8th Cir. Certiorari denied. *Wm. Andress, Jr.* and *Jay W. Dickey* for petitioner. *W. H. Rector* for respondent. Reported below: 222 F. 2d 16.

No. 225. MCDOW ET AL. *v.* LOUISIANA SOUTHERN RAILWAY CO. C. A. 5th Cir. Certiorari denied. *Louis C. Guidry* for petitioners. *J. Blanc Monroe* for respondent. Reported below: 219 F. 2d 650.

No. 226. KAYE, ADMINISTRATOR, *v.* BECHLER ET AL. C. A. 10th Cir. Certiorari denied. *Peyton Ford, Alan Y. Cole, Travis I. Milsten* and *David R. Milsten* for petitioner. *James S. Twyford, Solon W. Smith* and *William J. Crowe* for respondents. Reported below: 222 F. 2d 216.

No. 228. SEXTON *v.* BARRY. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Thomas O. Nevison* for respondent. Reported below: 163 Ohio St. 124, 126 N. E. 2d 129.

No. 229. BEAUMONT *v.* PENNSYLVANIA RAILROAD CO. ET AL. Court of Appeals of New York. Certiorari denied. *Morrie Slifkin* for petitioner. *Edward F. Butler* for respondents. Reported below: 308 N. Y. 920, 127 N. E. 2d 80.

No. 230. FRACH ET AL. *v.* SCHOETTLER, DIRECTOR, DEPARTMENT OF FISHERIES, ET AL. Supreme Court of Washington. Certiorari denied. *John Spiller* and *Smith Troy* for petitioners. *Don Eastvold*, Attorney General of Washington, and *Joseph T. Mijich* and *E. P. Donnelly*, Assistant Attorneys General, for respondents. Reported below: 46 Wash. 2d 281, 280 P. 2d 1038.

No. 234. SEAWRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Rees H. Davis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 224 F. 2d 482.

No. 235. FAIRMONT ALUMINUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Earl Q. Kullman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 223 F. 2d 622.

No. 237. ARMCO DRAINAGE & METAL PRODUCTS, INC., FABRICATING DIVISION, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Carl M. Jacobs* for petitioner. *Solicitor General Sobeloff, Theo-*

phil C. Kammholz, David P. Findling, Dominick L. Manoli and *Nancy Sherman* for respondent. Reported below: 220 F. 2d 573.

No. 240. ALABAUGH ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. C. A. 4th Cir. Certiorari denied. *Walter H. Buck* for petitioners. *Bernard M. Savage* and *Harold N. McLaughlin* for the General Committee of Adjustment, Brotherhood of Locomotive Engineers on the Baltimore & Ohio Railroad, respondent. Reported below: 222 F. 2d 861.

No. 243. SCHWEGMANN BROTHERS GIANT SUPER MARKETS ET AL. *v.* HOFFMANN-LA ROCHE, INC. C. A. 5th Cir. Certiorari denied. *John Minor Wisdom* and *Saul Stone* for petitioners. *Joseph H. Stamler* and *Murray F. Cleveland* for respondent. Reported below: 221 F. 2d 326.

No. 245. TILBURY, DOING BUSINESS AS TILBURY'S SOUTHERN MEAT CO., *v.* ROGERS, REGIONAL DIRECTOR, WAGE, HOUR & PUBLIC CONTRACTS DIVISION, DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. *Otis W. Bullock* for petitioner. *Solicitor General Sobeloff, Stuart Rothman* and *Bessie Margolin* for the Secretary of Labor, respondent. Reported below: 220 F. 2d 757.

No. 246. CAPITAL TRANSIT CO., INC. *v.* FOSTER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank F. Roberson* for petitioner. *Benjamin F. Rossner* for respondents. Reported below: 96 U. S. App. D. C. 179, 223 F. 2d 644.

No. 247. YORK *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. *Herbert K. Hyde* and *Roy St. Lewis* for petitioner. Reported below: 283 P. 2d 567.

No. 248. MacKay *v.* Boyd, District Director, Immigration and Naturalization Service, et al. C. A. 9th Cir. Certiorari denied. *Norman Leonard* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for respondents. Reported below: 218 F. 2d 666.

No. 249. Shearer et ux. *v.* Smyth, Collector of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Willard C. Mills* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *John J. Kelley, Jr.* for respondent. Reported below: 221 F. 2d 478.

No. 252. Sagonias *v.* United States. C. A. 5th Cir. Certiorari denied. *Pat C. Whitaker* and *Tom P. Whitaker* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 223 F. 2d 146.

No. 253. Anson et al. *v.* Hiram Walker & Sons, Inc. C. A. 7th Cir. Certiorari denied. *David C. McCarthy* for petitioners. *Harold A. Smith* for respondent. Reported below: 222 F. 2d 100.

No. 259. Wieman & Ward Co. *v.* City of Pittsburgh et al. Supreme Court of Pennsylvania, Western District. Certiorari denied. *A. W. Henderson* for petitioner. *Oscar G. Peterson* for respondents. Reported below: 381 Pa. 535, 113 A. 2d 719.

No. 260. Detroit Stamping Co. *v.* West Point Manufacturing Co. C. A. 6th Cir. Certiorari denied. *Lloyd M. Forster* for petitioner. *Warren E. Miller* for respondent. Reported below: 222 F. 2d 581.

No. 263. UTAH ET AL. *v.* BRADLEY ESTATES, INC. ET AL. C. A. 10th Cir. Certiorari denied. *E. R. Callister, Jr.*, Attorney General of Utah, and *Peter W. Billings*, Special Assistant Attorney General, for petitioners. *Dennis McCarthy* for respondents. Reported below: 223 F. 2d 129.

No. 264. WISCONSIN EX REL. SAVELAND PARK HOLDING CORP. *v.* WIELAND, BUILDING INSPECTOR. Supreme Court of Wisconsin. Certiorari denied. *Emil Hersh* and *David V. Jennings, Jr.* for petitioner. *Maxwell H. Herriott* for respondent. Reported below: 269 Wis. 262, 69 N. W. 2d 217.

No. 266. HOEPKER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Hayden C. Covington* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 223 F. 2d 921.

No. 267. POMORSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 222 F. 2d 106.

No. 268. DIERCKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 223 F. 2d 12.

No. 270. LINDSTROM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Joseph F. McVeigh, Francis J. Myers* and *Cornelius C. O'Brien* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and

Joseph M. Howard for the United States. Reported below: 222 F. 2d 761.

No. 272. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Wayne L. Prim* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 227 F. 2d 561.

No. 274. BAKER ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Harold Dublirer* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *William W. Goodrich* for the United States. Reported below: 221 F. 2d 957.

No. 279. INGLE COAL CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *John E. McClure* and *William P. McClure* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Baum* for the United States. Reported below: 131 Ct. Cl. 121, 127 F. Supp. 573.

No. 280. UNITED STATES *v.* TANNER ET AL. Court of Claims. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. *Burr Tracy Ansell* for respondents. Reported below: 129 Ct. Cl. 792, 125 F. Supp. 240.

No. 283. TURNER, GUARDIAN, *v.* BELL ET AL. Supreme Court of Tennessee. Certiorari denied. *Bailey Walsh* for petitioner. *Cooper Turner, Jr.* for Gill, Trustee, et al., respondents. Reported below: 198 Tenn. 232, 279 S. W. 2d 71.

No. 285. E. REGENSBURG & SONS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur B. Hyman* for

petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *L. W. Post* for the United States. Reported below: 221 F. 2d 336.

No. 288. GILMORE, FORMERLY KNAUER, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *B. E. Hendricks* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *A. F. Prescott* for the United States. Reported below: 222 F. 2d 167.

No. 289. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL UNION NO. 1291 ET AL. *v.* PHILADELPHIA MARINE TRADE ASSOCIATION ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Abraham E. Freedman* and *Charles Lakatos* for petitioners. *Robert G. Kelly* and *Francis A. Scanlan* for the Philadelphia Marine Trade Association, *Owen B. Rhoads* and *Robert M. Landis* for the National Sugar Refining Co., and *Thomas F. Mount* for Dugan & McNamara, Inc., respondents. Reported below: 382 Pa. 326, 115 A. 2d 733.

No. 290. HERMAN *v.* NORTHWEST AIRLINES, INC. ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Edward J. Behrens* for respondents. Reported below: 222 F. 2d 326.

No. 291. KERMATH MANUFACTURING CO. *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 6th Cir. Certiorari denied. *Harry A. Carson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for respondent. Reported below: 222 F. 2d 577.

No. 293. Cosper *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *Herbert M. Wetzel, Arthur Frankel* and *Demetri M. Spiro* for petitioner. *Latham Castle,* Attorney General of Illinois, *John L. Davidson, Jr.*, First Assistant Attorney General, *Fred G. Leach* and *Murray F. Milne,* Assistant Attorneys General, and *John Gutknecht* for respondent. Reported below: 5 Ill. 2d 97, 125 N. E. 2d 60.

No. 295. Pierce *v.* American Communications Co., Inc. C. A. 1st Cir. Certiorari denied. *David Rines* and *Robert H. Rines* for petitioner. *Paul Kolisch, J. Pierre Kolisch* and *Robert L. Thompson* for respondent. Reported below: 221 F. 2d 959.

No. 299. Landell, Executor, et al. *v.* Northern Pacific Railway Co., formerly the Superior & St. Croix Railway Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry H. Fowler, Alexander B. Hawes, Robert W. Lishman, Marx Leva* and *Edward Brown Williams* for petitioners. *Porter R. Chandler, M. L. Countryman, Jr.* and *Bernard G. Ostmann* for respondent. Reported below: 96 U. S. App. D. C. 24, 223 F. 2d 316.

No. 302. United Gas Pipe Line Co. *v.* Federal Power Commission et al. C. A. 5th Cir. Certiorari denied. *W. Scott Wilkinson* and *C. Huffman Lewis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter, Herman Marcuse, Willard W. Gatchell* and *Lambert McAllister* for the Federal Power Commission, and *William A. Dougherty* and *James Lawrence White* for the Mississippi River Fuel Corporation, respondents. Reported below: 220 F. 2d 706.

No. 303. BRASWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Charles W. Tessmer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 224 F. 2d 706.

No. 304. ELLISON *v.* MUTUAL LIFE INSURANCE CO. OF NEW YORK. C. A. 5th Cir. Certiorari denied. *Walter G. Ramseur* and *Stuart B. Warren* for petitioner. *R. W. Shackleford* for respondent. Reported below: 223 F. 2d 686.

No. 305. VOGRIN *v.* HEDSTROM. C. A. 8th Cir. Certiorari denied. *Charles M. Miller* for petitioner. Reported below: 220 F. 2d 863.

No. 311. LIPSITZ ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Llewellyn A. Luce* and *Walter H. Maloney* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Robert N. Anderson* and *Walter Akerman, Jr.* for respondent. Reported below: 220 F. 2d 871.

No. 313. ALBANESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioner. Reported below: 224 F. 2d 879.

No. 325. PEONY PARK, INC. ET AL. *v.* O'MALLEY, COLLECTOR OF INTERNAL REVENUE, ET AL. C. A. 8th Cir. Certiorari denied. *William J. Hotz* and *William J. Hotz, Jr.* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, John R. Benney, Ellis N. Slack* and *Robert N. Anderson* for respondents. Reported below: 223 F. 2d 668.

No. 331. LANDES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 222 F. 2d 958.

No. 64. GOTFREDSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Nathaniel W. Gold* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Davis W. Morton, Jr.* for respondent. Reported below: 217 F. 2d 673.

No. 73. BEARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Michael Gould, Thomas J. Kenney* and *Samuel Efron* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Philip Elman, Ellis N. Slack* and *Fred G. Folsom* for the United States. *Russell D. Niles, William A. Schnader, Lofton L. Tatum, J. Cleo Thompson, E. Dixie Beggs, Boris Kostelanetz* and *Bruno Schachner* filed a brief for the American Bar Association, as *amicus curiae,* in support of the petition for a writ of certiorari. Reported below: 222 F. 2d 84.

No. 120. ZIENTEK *v.* READING COMPANY. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *B. Nathaniel Richter* for petitioner. *John R. McConnell* for respondent. Reported below: 220 F. 2d 183.

No. 262. PEGLER ET AL. *v.* REYNOLDS. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Milton Pollack* for petitioners. *Louis Nizer* for respondent. Reported below: 223 F. 2d 429.

No. 292. ECKER *v.* ATLANTIC REFINING CO. ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Kenneth C. Proctor* and *Francis D. Murnaghan, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for the United States et al., and *Robert D. Bartlett* and *Roy W. Johns* for the Atlantic Refining Co., respondents. Reported below: 222 F. 2d 618.

No. 319. HAISLIP BAKING CO., INC. *v.* UNITED CONSTRUCTION WORKERS ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Fred B. Greear* for petitioner. *M. E. Boiarsky* for respondents. Reported below: 223 F. 2d 872.

No. 140. DOTO *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *William H. Collins* and *Samuel Paige* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 96 U. S. App. D. C. 17, 223 F. 2d 309.

No. 144. DONG WING OTT ET AL. *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Elmer Fried* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for respondent. Reported below: 220 F. 2d 537.

No. 155. COSTELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in

the consideration or decision of this application. *Jack Wasserman* and *George Wolf* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 222 F. 2d 656.

No. 277. UNITED STATES *v.* OTOE AND MISSOURIA TRIBE OF INDIANS. Court of Claims. Certiorari denied. MR. JUSTICE BLACK would dismiss on the ground that no case or controversy is involved. MR. JUSTICE REED is of the opinion certiorari should be granted. *Solicitor General Sobeloff, Assistant Attorney General Morton, Marvin E. Frankel, Roger P. Marquis* and *John C. Harrington* for the United States. *Luther Bohanon* and *Marvin J. Sonosky* for respondent. Reported below: 131 Ct. Cl. 593, 131 F. Supp. 265.

No. 294. SAMISH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Harold C. Faulkner, Bartley C. Crum* and *Frederick J. Ludwig* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Joseph M. Howard* and *Harold S. Larsen* for the United States. Reported below: 223 F. 2d 358.

No. 300. CRUMMER COMPANY ET AL. *v.* DUPONT ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Francis P. Whitehair, Warren Hall* and *Chris Dixie* for petitioners. *Richard W. Ervin,* Attorney General of Florida, and *Ralph M. McLane,* Assistant Attorney General, for Clements et al., *Clarence G. Ashby* for DuPont et al., *Donald Russell* for Ball et al., *Charles R. Scott* for the St. Joe Paper Co., *William H. Rogers* for Pierce et al., *Asbury Sum-*

merlin for Gall, *John W. Donahoo* and *Chester Bedell* for the Cummer Sons Cypress Co., and *H. M. Voorhis* and *W. H. Poe* for Leedy, Wheeler & Alleman, Inc. et al., respondents. Reported below: 223 F. 2d 238.

No. 7, Misc. BANKS *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 8, Misc. CONROY *v.* CRIMINAL COURT OF COOK COUNTY. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 9, Misc. BROWN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 20, Misc. STUM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 24, Misc. WILLIAMS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 25, Misc. RITCHIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 26, Misc. GRIFFIN *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se*. *Robert Y. Thornton,* Attorney General of Oregon,

and *Wolf D. von Otterstedt,* Assistant Attorney General, for respondent.

No. 27, Misc. DI CHIARA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 33, Misc. GAMBINO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 34, Misc. AUSTIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 41, Misc. DAVIS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 42, Misc. SHOTKIN *v.* DUGGAN ET AL. Supreme Court of Florida. Certiorari denied.

No. 46, Misc. BLANTON *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 234 Ind. 142, 124 N. E. 2d 382.

No. 49, Misc. BERNSKI *v.* CUMMINGS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 50, Misc. DUKE *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 52, Misc. ROBINSON *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *John E. Perkins* and *George M. Johnson* for petitioner. Reported below: 223 Miss. 70, 77 So. 2d 265.

No. 53, Misc. ROUSSEAU *v.* HURTADO, EXECUTRIX, ET AL. Supreme Court of California. Certiorari denied.

No. 54, Misc. FERNINO *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 55, Misc. WASHINGTON *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 77 So. 2d 620.

No. 57, Misc. DOVICO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 285 App. Div. 997, 139 N. Y. S. 2d 279.

No. 59, Misc. MOLTON *v.* RANDOLPH, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 61, Misc. LEVY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 62, Misc. D'ANGELO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Dan J. Kelly* for respondent. Reported below: 308 N. Y. 883, 126 N. E. 2d 383.

No. 65, Misc. FLORIDA EX REL. COPELAND *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Cer-

tiorari denied. Petitioner *pro se*. *Releford McGriff* and *Joseph C. Waddy* for petitioner. Reported below: 78 So. 2d 399.

No. 66, Misc. GALLAS *v.* DENNEY, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 71, Misc. WINHOVEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 221 F. 2d 793.

No. 72, Misc. SMITH ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 73, Misc. THOMAS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 74, Misc. THOMAS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 78, Misc. WESTERFIELD *v.* MENARY, SHERIFF. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 79, Misc. SIDENER *v.* RANDOLPH, WARDEN. Circuit Court of Adams County, Illinois. Certiorari denied.

No. 81, Misc. BELL *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 207 Md. 618, 113 A. 2d 482.

No. 84, Misc. FEENEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *William G. Grande* for petitioners. *Solicitor General Sobeloff, Assistant Attorney*

General Olney, Beatrice Rosenberg and *Isabelle Cappello* for the United States. Reported below: 221 F. 2d 959.

No. 85, Misc. VOLA *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 87, Misc. VAN PELT *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 88, Misc. ROUZER *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 90, Misc. LAVERA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 92, Misc. LABOSTRIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 93, Misc. PENNSYLVANIA EX REL. LANE *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Robert E. Redding* for petitioner. Reported below: 380 Pa. 201, 110 A. 2d 409.

No. 94, Misc. MILANO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 95, Misc. MARKS *v.* RANDOLPH, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 97, Misc. HOOPER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 98, Misc. SMITH *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 103, Misc. LAZZARA *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 131 Cal. App. 2d 663, 281 P. 2d 4.

No. 105, Misc. MATTHEWS *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 381 Pa. 617, 114 A. 2d 122.

No. 108, Misc. FARRAR *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Woodrow Seals* for petitioner. Reported below: 162 Tex. Cr. R. ——, 277 S. W. 2d 114.

No. 109, Misc. BRABSON *v.* NEW YORK. Court of General Sessions, New York County, New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Charles W. Manning* for respondent.

No. 112, Misc. VAUGHAN *v.* FIRST NATIONAL BANK OF GREENVILLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 218 F. 2d 804.

No. 117, Misc. EVANS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 118, Misc. KEITHLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 143, Misc. MITCHELL *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied.

Rehearing Denied.

No. 340, Misc., October Term, 1954. BOZELL *v.* LINDSAY ET AL., 348 U. S. 973. Motion for leave to file petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application.

No. 20, October Term, 1954. ELLIS *v.* DIXON ET AL., MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF YONKERS, 349 U. S. 458;

No. 654, October Term, 1954. PAPALARDO ET AL. *v.* UNITED STATES, 349 U. S. 920;

No. 694, October Term, 1954. IN RE RINES, ADMINISTRATOR, 349 U. S. 935;

No. 703, October Term, 1954. SCHWARTZ, ADMINISTRATRIX, *v.* KANSAS CITY SOUTHERN RAILWAY CO., 349 U. S. 931;

No. 728, October Term, 1954. BEECHER *v.* LEAVENWORTH STATE BANK ET AL., 349 U. S. 945;

No. 161, Misc., October Term, 1954. BEECHER *v.* LEAVENWORTH STATE BANK ET AL., 349 U. S. 947;

No. 730, October Term, 1954. ALKER *v.* FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE, ET AL., 349 U. S. 939;

No. 740, October Term, 1954. BEATY *v.* UNITED STATES, 349 U. S. 946;

No. 746, October Term, 1954. THYS COMPANY ET AL. *v.* ANGLO-CALIFORNIA NATIONAL BANK, EXECUTOR, 349 U. S. 946;

No. 761, October Term, 1954. COCO *v.* FLORIDA, 349 U. S. 931;

No. 764, October Term, 1954. HUPMAN *v.* UNITED STATES, 349 U. S. 953;

No. 444, Misc., October Term, 1954. KOSTAL *v.* CALIFORNIA, 349 U. S. 923;

No. 464, Misc., October Term, 1954. HEIRENS *v.* ILLINOIS, 349 U. S. 947;

No. 611, Misc., October Term, 1954. RODRIGUEZ *v.* JACKSON, WARDEN, 349 U. S. 963;

No. 613, Misc., October Term, 1954. WILSON *v.* DISTRICT OF COLUMBIA, 349 U. S. 963; and

No. 623, Misc., October Term, 1954. HILL *v.* UNITED STATES, 349 U. S. 964. Petitions for rehearing denied.

No. 626, Misc., October Term, 1954. DAVIS *v.* SUMMERFIELD, POSTMASTER GENERAL, 349 U. S. 965;

No. 628, Misc., October Term, 1954. LENZ *v.* LOONEY, WARDEN, 349 U. S. 965;

No. 629, Misc., October Term, 1954. HARVEY *v.* MAYO, PRISON CUSTODIAN, 349 U. S. 965;

No. 635, Misc., October Term, 1954. BYRNES *v.* ILLINOIS, 349 U. S. 966;

No. 649, Misc., October Term, 1954. WALLACE *v.* COPIAH COUNTY LUMBER CO. ET AL., 349 U. S. 966;

No. 669, Misc., October Term, 1954. NEWSTEAD *v.* BAYNES, 349 U. S. 950; and

No. 684, Misc., October Term, 1954. HUDSON *v.* UNITED STATES, 349 U. S. 968. Petitions for rehearing denied.

No. 145, October Term, 1954. MARCELLO *v.* BONDS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, 349 U. S. 302; and

No. 714, October Term, 1954. DICTOGRAPH PRODUCTS, INC. *v.* FEDERAL TRADE COMMISSION, 349 U. S. 940. Petitions for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of these applications.

No. 677, October Term, 1954. MEYER ET AL. *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. ET AL., 349 U. S. 942. Rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 742, October Term, 1954. COMBS ET AL. *v.* ILLINOIS STATE TOLL HIGHWAY COMMISSION ET AL., 349 U. S. 942. Motion for leave to file second petition for rehearing denied.

October 17, 1955.

Decisions Per Curiam.

No. 24. Williams *v.* United States. Certiorari, 348 U. S. 926, to the United States Court of Appeals for the Ninth Circuit. Argued October 13, 1955. Decided October 17, 1955. *Per Curiam:* This case is controlled by the California doctrine of *respondeat superior*. The judgment is vacated and the case is remanded for consideration in the light of that governing principle. *Henry C. Clausen* argued the cause and filed a brief for petitioner. *Morton Hollander* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney*. Reported below: 215 F. 2d 800.

No. 195. United States *v.* Provoo. Appeal from the United States District Court for the District of Maryland. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Mr. Justice Clark took no part in the consideration or decision of this case. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Gray Thoron* and *Philip R. Monahan* for the United States. *Frederick J. Green, Jr.* and *Theodore C. Waters, Jr.* for appellee. Reported below: 17 F. R. D. 183.

No. 265. M. & M. Transportation Co. et al. *v.* United States et al. Appeal from the United States District Court for the District of Massachusetts. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Herbert Burstein* for appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Samuel R. Howell* and *Leo H. Pou* for the United States and the Interstate Commerce Commission, and *S. Harrison Kahn* for the St.

Johnsbury Trucking Co., Inc. et al., appellees. Reported below: 128 F. Supp 296.

No. 284. PEAIRS *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles W. Tessmer* for appellant. *John Ben Shepperd,* Attorney General of Texas, and *Katherine W. Conti,* Assistant Attorney General, for appellee. Reported below: 162 Tex. Cr. R. —, 283 S. W. 2d 755.

No. 314. SMITH, EXECUTRIX, *v.* WISSLER, PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, ET AL. Appeal from the Supreme Court of Pennsylvania, Eastern District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Robert Ruppin* for appellant. *Paul A. Mueller* for appellees. Reported below: 381 Pa. 223, 112 A. 2d 625.

Miscellaneous Orders.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. The Government is invited to set forth its views on the question of indispensability of the United States as a party at this time in light of the Report of the Special Master dated January 31, 1955, and the proposed Amendments of the State of Texas.

No. 1. SILESIAN HOLDING CO. ET AL. *v.* UNION BANK OF SWITZERLAND ET AL.; and

No. 2. BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* UNION BANK OF SWITZERLAND ET AL. On petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit. The motion to defer consideration of the petitions for writs of certiorari until March 1, 1956, is granted.

Ralph D. Ray filed the motion for the Silesian Holding Company. *Solicitor General Sobeloff* for petitioner in No. 2, *William Gilligan* for the Silesian-American Corporation, *Charles E. Scribner* for the Bondholders Protective Committee, and *Lawrence J. McKay* for respondents, consented to the motion. See also 348 U. S. 881, 948.

No. 48. COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. Certiorari, 349 U. S. 943, to the United States Court of Appeals for the District of Columbia Circuit. The motion for leave to file brief of Frank Aydelotte et al., as *amici curiae,* is granted. *Royal W. France* for movants.

No. 74. UNITED STATES *v.* LESLIE SALT CO. Certiorari, 349 U. S. 951, to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file brief of Plymouth Oil Co., as *amicus curiae,* is denied.

No. 3, Misc. EATON *v.* SCHEINEMAN ET AL.; and

No. 129, Misc. STEWART *v.* ALVIS, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Latham Castle,* Attorney General, for the State of Illinois, respondent in No. 3.

No. 100, Misc. HACKETT *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 128, Misc. PECKHAM *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of certiorari out of time denied.

Certiorari Granted. (*See also No. 196, ante, p. 3.*)

No. 278. MITCHELL, SECRETARY OF LABOR, *v.* BUDD ET AL., DOING BUSINESS AS J. T. BUDD, JR., & CO., ET AL. C. A.

5th Cir. Certiorari granted. *Solicitor General Sobeloff, Stuart Rothman* and *Bessie Margolin* for petitioner. *Milton C. Denbo* for respondents. Reported below: 221 F. 2d 406.

No. 227. UNITED MINE WORKERS OF AMERICA ET AL. *v.* ARKANSAS OAK FLOORING CO. Supreme Court of Louisiana. Certiorari granted. The Solicitor General is invited to file a brief setting forth the views of the National Labor Relations Board. *Crampton Harris* and *Yelverton Cowherd* for petitioners. *Grove Stafford* for respondent. Reported below: 227 La. 1109, 81 So. 2d 413.

No. 281. UNITED STATES *v.* RYAN. C. A. 2d Cir. Certiorari granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. *Louis Waldman* for respondent. Reported below: 225 F. 2d 417.

No. 308. YATES ET AL. *v.* UNITED STATES;

No. 309. SCHNEIDERMAN *v.* UNITED STATES; and

No. 310. RICHMOND ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. The motions for leave to file briefs of American Civil Liberties Union and International Longshoremen's & Warehousemen's Union, as *amici curiae,* are denied. *Norman Leonard, Ben Margolis, Alexander H. Schullman* and *A. L. Wirin* for petitioners in No. 308. *Robert W. Kenny* for petitioner in No. 309. *Augustin Donovan* for petitioners in No. 310. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Robert W. Ginnane, Harold D. Koffsky* and *Lawrence K. Bailey* for the United States. Reported below: 225 F. 2d 146.

No. 320. PARR *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted and the case will be heard on the merits and on the question of appealability. *Thurman Arnold, Abe Fortas, Marvin K. Collie, Thomas E. James* and *Everett L. Looney* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 225 F. 2d 329.

Certiorari Denied. (*See also Misc. Nos. 100 and 128, supra.*)

No. 210. AZTEC LAND & CATTLE CO. *v.* NAVAJO REALTY CO. ET AL. Supreme Court of Arizona. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Robert Morrison,* Attorney General, and *R. G. Langmade,* Assistant Attorney General, for the State of Arizona, respondent. Reported below: 79 Ariz. 55, 65, 283 P. 2d 227, 234.

No. 211. EDWARD B. MARKS MUSIC CORP. *v.* CONTINENTAL RECORD CO., INC. ET AL. C. A. 2d Cir. Certiorari denied. *Fulton Brylawski* for petitioner. *Maxwell Okun* for respondents. Reported below: 222 F. 2d 488.

No. 218. WHITENER *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *C. T. Graydon* for petitioner. *T. C. Callison,* Attorney General of South Carolina, and *William A. Dallis,* Assistant Attorney General, for respondent. Reported below: 228 S. C. 244, 89 S. E. 2d 701.

No. 239. WARRING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *G. C. A. Anderson* and *Charles E. Ford* for petitioner. *Solicitor General Sobeloff, Assistant*

Attorney General Holland and *Joseph M. Howard* for the United States. Reported below: 222 F. 2d 906.

No. 256. CALLANAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Thurman Arnold, Morris A. Shenker* and *Sidney M. Glazer* for Callanan, and *Harry H. Craig* for Thompson, petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 223 F. 2d 171.

No. 275. ORLANDO *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Laurence Sovik* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 222 F. 2d 537.

No. 276. IN RE NARRAGANSETT PIER AMUSEMENT CORP. ET AL. C. A. 1st Cir. Certiorari denied. *George S. Ryan* and *Max Winograd* for petitioner. *Jacob J. Kaplan* for respondents. Reported below: 224 F. 2d 231.

No. 306. WIELAND ET AL. *v.* C. A. SWANSON & SONS. C. A. 2d Cir. Certiorari denied. *Arthur F. Driscoll* and *George A. Raftery* for petitioners. *Sumner Ford* for respondent. Reported below: 223 F. 2d 26.

No. 312. UNITED STATES *v.* OHIO POWER CO. Court of Claims. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for the United States. *J. Marvin Haynes, N. Barr Miller, F. Eberhart Haynes* and *Oscar L. Tyree* for respondent. Reported below: 131 Ct. Cl. 95, 129 F. Supp. 215.

No. 315. LAQUE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *I. Duke Avnet* for petitioner. *C. Ferdinand Sybert,* Attorney General of Maryland, and *Norman P. Ramsey,* Deputy Attorney General, for respondent. Reported below: 207 Md. 242, 113 A. 2d 893.

No. 317. ESTEP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert H. Hughes* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 223 F. 2d 19.

No. 318. DEHARDIT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Richard L. Williams* and *David Nelson Sutton* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 224 F. 2d 673.

No. 236. REYNOLDS *v.* TEXAS. Court of Criminal Appeals of Texas. Motion to strike petition denied. Certiorari denied. *Charles W. Tessmer* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *John A. Wild,* Assistant Attorney General, for respondent. Reported below: 162 Tex. Cr. R. ——, 276 S. W. 2d 279.

No. 273. AMERICAN-HAWAIIAN STEAMSHIP CO. *v.* UNITED STATES; and

No. 361. UNITED STATES *v.* AMERICAN-HAWAIIAN STEAMSHIP CO. Court of Claims. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of these applications. *Clement C. Rinehart* for the American-Hawaiian Steamship Co. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for the United States.

Gray Thoron was with them in No. 361. Reported below: 129 Ct. Cl. 365, 124 F. Supp. 378.

No. 29, Misc. MONAGHAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 308 N. Y. 701, 124 N. E. 2d 328.

No. 38, Misc. NEAL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 40, Misc. VERCELES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle,* Attorney General of Illinois, for respondent.

No. 51, Misc. VERRICO *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied. *Ralph L. Fusco, Julius A. Feinberg* and *Philip J. Mylod,* Deputy Attorneys General, for respondents.

No. 77, Misc. LANGER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 80, Misc. DELEVAY *v.* MILLER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 83, Misc. IN RE FLETCHER. C. A. 4th Cir. Certiorari denied.

No. 99, Misc. FARMER *v.* SKEEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 222 F. 2d 948.

No. 110, Misc. THOMASON *v.* ALESTER G. FURMAN, INC. ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *C. F. Haynsworth, Jr.* for respondents. Reported below: 222 F. 2d 421.

No. 113, Misc. AUSTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 224 F. 2d 273.

No. 114, Misc. MURPHY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 120, Misc. BURLESON *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 121, Misc. WIX *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 204 Ore. 597, 284 P. 2d 356.

No. 122, Misc. SANGUIGNI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 123, Misc. HADLEY *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 124, Misc. LYNCH *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 125, Misc. BURKLEY *v.* JOHNSTON, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 127, Misc. REID *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

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No. 130, Misc. BLOXOM *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 131, Misc. HARVELL *v.* INDIANA. Circuit Court of St. Joseph County, Indiana. Certiorari denied.

No. 132, Misc. MAHLER *v.* MICHIGAN. Circuit Court of Branch County, Michigan. Certiorari denied.

No. 134, Misc. REICKAUER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 141, Misc. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 142, Misc. HORODECKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 147, Misc. GALLAGHER *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 153, Misc. RUSSEK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 154, Misc. SIMMONS *v.* NEW YORK. Court of Appeals of New York and Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: See 285 App. Div. 470, 138 N. Y. S. 2d 97.

No. 155, Misc. PLUE *v.* CUMMINGS, WARDEN. C. A. 2d Cir. and United States District Court for the District of Connecticut. Certiorari denied. Reported below: 224 F. 2d 276.

No. 158, Misc. IN RE FLETCHER. C. A. 4th Cir. Certiorari denied. Reported below: 221 F. 2d 477.

No. 159, Misc. JOHNSON *v.* RAGEN, WARDEN. C. A. 7th Cir. and United States District Court for the Northern District of Illinois, Eastern Division. Certiorari denied.

No. 162, Misc. DIXON *v.* BOVEY, WARDEN. Supreme Court of Nebraska. Certiorari denied. Reported below: 160 Neb. 316, 70 N. W. 2d 80.

No. 163, Misc. MORGAN *v.* SYLVESTER ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Jacob K. Javits,* Attorney General of New York, *James O. Moore, Jr.,* Solicitor General, and *Samuel A. Hirshowitz* and *Daniel M. Cohen,* Assistant Attorneys General, for respondents. Reported below: 220 F. 2d 758.

No. 164, Misc. CRABTREE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 224 F. 2d 282.

No. 166, Misc. THOMPSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 175, Misc. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 223 F. 2d 699.

No. 180, Misc. WATSON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District, Division Three. Certiorari denied. Reported below: 130 Cal. App. 2d 430, 278 P. 2d 933.

No. 182, Misc. HURT *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Eugene Cook,* Attorney General of Georgia, *Robert H. Hall,* Deputy Assistant Attorney General, and *E. Freeman Leverett,* Assistant Attorney General, for respondent. Reported below: 224 F. 2d 21.

Rehearing Denied.

No. 712, October Term, 1954. JUNGERSEN *v.* AXEL BROS., INC. ET AL., 349 U. S. 940. Rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application.

No. 737, October Term, 1954. PANHANDLE EASTERN PIPE LINE CO. *v.* FEDERAL POWER COMMISSION ET AL., 349 U. S. 945. Rehearing denied.

No. 758, October Term, 1954. NATIONAL AIRLINES, INC. *v.* SCHOLNIK, 349 U. S. 956. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

OCTOBER 24, 1955.

Decisions Per Curiam.

No. 16. WALTON *v.* CALIFORNIA. Certiorari, 348 U. S. 894, to the Superior Court of California, Appellate Department, County of Santa Clara. Argued October 17, 1955. Decided October 24, 1955. *Per Curiam:* A majority of the Court are of opinion that the record in this case fails to establish that a federal question is presented and for that reason the writ of certiorari is dismissed. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent. THE CHIEF JUSTICE did not participate in the consideration or decision of this case. *Robert F. Peckham* and *Jay A. Darwin* argued the cause and filed a brief for petitioner. *Clarence A. Linn,* Assistant Attorney General of Cali-

fornia, argued the cause for respondent. With him on the brief were *Edmund G. Brown,* Attorney General, and *Arlo E. Smith,* Deputy Attorney General.

No. 25. Liquid Carbonic Corp. *v.* United States. Appeal from the United States District Court for the Eastern District of New York. Argued October 19–20, 1955. Decided October 24, 1955. *Per Curiam:* The judgment is reversed and the case is remanded for a hearing on modification of the consent decree. *Hughes* v. *United States,* 342 U. S. 353. Mr. Justice Reed and Mr. Justice Burton dissent. Mr. Justice Clark took no part in the consideration or decision of this case. *James F. Dwyer* argued the cause and filed a brief for appellant. *John F. Davis* argued the cause for the United States. On the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman.* Reported below: 123 F. Supp. 653.

No. 29. Nukk et al. *v.* Shaughnessy, District Director, Immigration and Naturalization Service. Appeal from the United States District Court for the Southern District of New York. Argued October 19, 1955. Decided October 24, 1955. *Per Curiam:* The Court is of opinion that the complaints do present a case and controversy. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125. The judgment is reversed and the case is remanded for consideration on the merits. *Gloria Agrin* and *Blanch Freedman* argued the cause and filed a brief for appellants. *Gray Thoron* argued the cause for appellee. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg, J. F. Bishop* and *L. Paul Winings.* Reported below: 125 F. Supp. 498.

No. 327. Jones *v.* Mississippi. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal

is dismissed and the petition for writ of certiorari is denied. *Forrest B. Jackson* for appellant-petitioner. Reported below: —— Miss. ——, 79 So. 2d 273.

No. 336. STACEY ET AL. *v.* PAPPAS. Appeal from the Supreme Judicial Court of Maine. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would note probable jurisdiction. *Sidney W. Wernick* for appellants. *Israel Bernstein* for appellee. Reported below: 151 Me. 36, 116 A. 2d 497.

No. 338. HOLMBY PRODUCTIONS, INC. ET AL. *v.* VAUGHN ET AL., CONSTITUTING THE KANSAS STATE BOARD OF REVIEW, ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495; *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587. *James C. Wilson* for appellants. *Harold R. Fatzer,* Attorney General of Kansas, and *Paul E. Wilson,* Assistant Attorney General, for appellees. Reported below: 177 Kan. 728, 282 P. 2d 412.

No. 48, Misc. WETZEL *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed and the petition for writ of certiorari is denied. *Albert Sidney Johnston, Jr.* for appellant-petitioner. Reported below: —— Miss. ——, 76 So. 2d 188.

Miscellaneous Orders.

No. 308. YATES ET AL. *v.* UNITED STATES;

No. 309. SCHNEIDERMAN *v.* UNITED STATES; and

No. 310. RICHMOND ET AL. *v.* UNITED STATES. Certiorari, 350 U. S. 860, to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file brief of Linus Pauling et al., as *amici curiae,* is denied.

No. 310. RICHMOND ET AL. *v.* UNITED STATES. Certiorari, 350 U. S. 860, to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file brief of Howard R. Carey et al., as *amici curiae,* is denied.

Probable Jurisdiction Noted.

No. 117. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* UNION PACIFIC RAILROAD CO. ET AL.;

No. 118. UNION PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 119. UNITED STATES ET AL. *v.* UNION PACIFIC RAILROAD CO. ET AL. Appeals from the United States District Court for the District of Nebraska; and

No. 332. WASHINGTON PUBLIC SERVICE COMMISSION ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.;

No. 333. UNION PACIFIC RAILROAD CO. ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL.; and

No. 334. UNITED STATES ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. Appeals from the United States District Court for the District of Colorado. In these cases probable jurisdiction is noted.

Frank E. Holman, Dennis McCarthy and *Robert E. Quirk* for the Denver & Rio Grande Western Railroad Co. *Don Eastvold,* Attorney General of Washington, *Clarence S. Beck,* Attorney General of Nebraska, *Bert L. Overcash, C. W. Ferguson* and *George F. Guy* for the Washington Public Service Commission et al., appellants in Nos. 118 and 332 and appellees in Nos. 117 and 119; also with them in No. 118 was *Howard B. Black,* Attorney General of Wyoming. *Elmer B. Collins, L. E. Torinus, Roland J. Lehman* and *James C. Wilson* for the Union Pacific Railroad Co. et al., appellants in Nos. 118 and 333 and appel-

lees in Nos. 117 and 119. *Solicitor General Sobeloff* for appellants in Nos. 119 and 334, with whom were *Edward M. Reidy* and *Neil Brooks* in No. 119 and *Assistant Attorney General Barnes, Daniel M. Friedman* and *Samuel R. Howell* in No. 334. *John R. Barry* for the Public Service Commission of Utah et al., *William J. Hickey* for the American Short Line Railroad Association, and *Lee J. Quasey* for the National Live Stock Producers Association et al., appellees in Nos. 332 and 333. Reported below: Nos. 117, 118 and 119, 132 F. Supp. 72; Nos. 332, 333 and 334, 131 F. Supp. 372.

Certiorari Granted.

No. 323. UNITED STATES EX REL. DARCY *v.* HANDY, WARDEN, ET AL. C. A. 3d Cir. Certiorari granted. *Charles J. Margiotti* for petitioner. Reported below: 224 F. 2d 504.

No. 342. CZAPLICKI *v.* THE HOEGH SILVERCLOUD ET AL. C. A. 2d Cir. Certiorari granted. *Nathan Baker* for petitioner. *James M. Estabrook* and *Francis X. Byrn* for The Hoegh Silvercloud et al., and *Raymond J. Scully* for the Hamilton Marine Contracting Co., Inc., respondents. Reported below: 223 F. 2d 189.

No. 351. ARCHAWSKI ET AL. *v.* HANIOTI. C. A. 2d Cir. Certiorari granted. *Harry D. Graham* for petitioners. Respondent *pro se.* Reported below: 223 F. 2d 406.

No. 37, Misc. DURLEY *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari granted. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

Certiorari Denied. (*See also No. 327 and Misc. No. 48, supra.*)

No. 326. THOMPSON, TRUSTEE, *v.* MOORE; and

No. 339. MOORE *v.* THOMPSON, TRUSTEE. C. A. 5th Cir. Certiorari denied. *Palmer Hutcheson* for Thompson. *David H. Nutt* for Moore. Reported below: 223 F. 2d 91.

No. 328. PALMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *John W. MacDonald* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 223 F. 2d 893.

No. 330. EATON *v.* EATON. Supreme Court of Louisiana. Certiorari denied. *Maurice R. Woulfe* for petitioner. Reported below: 227 La. 992, 81 So. 2d 371.

No. 335. DOUDS, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, *v.* INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, INDEPENDENT, ET AL. C. A. 2d Cir. Certiorari denied. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for petitioner. *Vine H. Smith* and *John T. Sullivan* for the International Longshoremen's Association, Independent, et al., *Seymour D. Lewis* for Bowers et al., *Ambrose V. McCall* for Lynch, and *Edward V. Broderick* and *Joseph H. Broderick* for Ackalitis, respondents. Reported below: 224 F. 2d 455.

No. 340. BUCHMAN *v.* MORSE. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. *George I. Devor* for respondent. Reported below: 132 Cal. App. 2d 81, 281 P. 2d 608.

No. 341. D'IMPERIO *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. C. A. 1st Cir. Certiorari denied. *Orlando J. Antonsanti* for petitioner. *José Trías Monge,* Attorney General of Puerto Rico, and *Manuel J. Medina Aymat,* Assistant Attorney General, for respondent. Reported below: 223 F. 2d 413.

No. 344. ELCHIBEGOFF *v.* DULLES, SECRETARY OF STATE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for respondents. Reported below: 95 U. S. App. D. C. 362, 222 F. 2d 53.

No. 346. TADIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William B. Mahoney, Hyman Karnofsky* and *Arnold Weiss* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 223 F. 2d 759.

No. 347. BLACKMAN *v.* BALABAN & KATZ CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Edward Blackman, pro se. Edward R. Johnston* and *Wesley G. Hall* for Balaban & Katz Corporation et al., *John F. Caskey* and *Francis E. Matthews* for Twentieth Century-Fox Film Corporation, *Miles G. Seeley* for Loew's Incorporated et al., and *Irving Goodman* and *John S. Miller* for the 32 West Randolph Corporation, respondents. Reported below: 222 F. 2d 54.

No. 349. GREAT NORTHERN RAILWAY CO. *v.* HALLADA. Supreme Court of Minnesota. Certiorari denied. *Edwin C. Matthias* and *Anthony Kane* for petitioner. *Carl L. Yaeger* for respondent. Reported below: 245 Minn. 581, 72 N. W. 2d 74.

No. 350. BROWN, DOING BUSINESS AS BROWN ENGINEERING CO., *v.* MITCHELL, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. *Edgar Musgrave* and *Allen Whitfield* for petitioner. *Solicitor General Sobeloff, Stuart Rothman, Bessie Margolin* and *Harry M. Leet* for respondent. *Milton I. Baldinger* filed a brief for the National Society of Professional Engineers, as *amicus curiae,* in support of the petition. Reported below: 224 F. 2d 359.

No. 353. PENNSYLVANIA *v.* UNITED STATES EX REL. THOMPSON. C. A. 3d Cir. Certiorari denied. *Herbert B. Cohen,* Attorney General of Pennsylvania, *Frank P. Lawley, Jr.,* Deputy Attorney General, and *Albert A. Fiok* for petitioner. *Louis C. Glasso* and *Zeno Fritz* for respondent. Reported below: 221 F. 2d 763.

No. 324. WARREN COUNTY, MISSISSIPPI, *v.* HESTER ET AL. Supreme Court of Louisiana. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *L. W. Brooks* for petitioner. *Fred S. LeBlanc,* Attorney General, *Carroll Buck,* Special Assistant Attorney General, *Victor A. Sachse, Chas. J. Rivet* and *Fred G. Hudson, Jr.* for respondents. Reported below: 227 La. 1022, 81 So. 2d 381.

No. 345. STERLING *v.* LOCAL 438, LIBERTY ASSOCIATION OF STEAM & POWER PIPE FITTERS & HELPERS ASSOCIATION, ET AL. Court of Appeals of Maryland. Certiorari denied. *Louis R. Milio* for petitioner. *Max Sokol, Emanuel H. Horn, Martin F. O'Donoghue* and *Thomas X. Dunn* for respondents. Reported below: 207 Md. 132, 113 A. 2d 389.

No. 36, Misc. WHITE *v.* CALIFORNIA. Supreme Court of California. Motion for leave to file brief of National

Lawyers Guild, as *amicus curiae,* denied. Certiorari denied. *William B. Esterman* for petitioner. *Edmund G. Brown,* Attorney General of California, *William V. O'Connor,* Chief Deputy Attorney General, and *Elizabeth Miller,* Deputy Attorney General, for respondent. Reported below: 43 Cal. 2d 740, 278 P. 2d 9.

No. 64, Misc. SISK *v.* OVERLADE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 220 F. 2d 68.

No. 135, Misc. LYONS *v.* SUPREME COURT OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Reported below: 43 Cal. 2d 755, 278 P. 2d 681.

No. 139, Misc. LEBRON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham M. Dubno* for Otero Otero, petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Philip R. Monahan* for the United States. Reported below: 222 F. 2d 531.

No. 186, Misc. PRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Charles H. Davis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 224 F. 2d 604.

No. 208, Misc. MCBEE *v.* TENNESSEE. Supreme Court of Tennessee, Eastern Division. Certiorari denied. *William Earl Badgett* for petitioner. *Knox Bigham,* Assistant Attorney General of Tennessee, for respondent.

Rehearing Denied.

No. 586, Misc., October Term, 1954. SORBER *v.* MISSISSIPPI, 349 U. S. 948. Rehearing denied.

NOVEMBER 7, 1955.

Decisions Per Curiam.

No. 232. MAYOR AND CITY COUNCIL OF BALTIMORE CITY ET AL. *v.* DAWSON ET AL. Appeal from the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *C. Ferdinand Sybert,* Attorney General of Maryland, *Norman P. Ramsey,* Deputy Attorney General, and *Ambrose T. Hartman,* Assistant Attorney General, for appellants. *Robert L. Carter, Thurgood Marshall* and *Jack Greenberg* for appellees. Reported below: 220 F. 2d 386.

No. 348. RINES, ADMINISTRATOR, *v.* JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS ET AL. Appeal from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *David Rines* and *Robert H. Rines* for appellant. Reported below: 332 Mass. 527, 126 N. E. 2d 124.

No. 364. PENDER *v.* CLARK COUNTY. Appeal from the Supreme Court of Nevada. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Charles S. Rhyne* and *Eugene F. Mullin, Jr.* for appellant. *Edmund D. Campbell* for appellee. Reported below: 71 Nev. 47, 279 P. 2d 659.

No. 352. MILWAUKEE & SUBURBAN TRANSPORT CORP. *v.* PUBLIC SERVICE COMMISSION OF WISCONSIN ET AL. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. Treating the papers whereon the appeal was taken as a

petition for writ of certiorari, certiorari is denied. *Maxwell H. Herriott* for appellant. *Vernon W. Thomson*, Attorney General of Wisconsin, *Stewart G. Honeck*, Deputy Attorney General, and *William E. Torkelson* for the Public Service Commission, and *Walter J. Mattison* and *Harry G. Slater* for the City of Milwaukee et al., appellees. Reported below: 268 Wis. 573, 68 N. W. 2d 552.

No. 385. DUNN BROS., INC. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *C. B. Snow, Junior O'Mara* and *George H. Butler* for appellant. *John E. Stone* for appellee. Reported below: —— Miss. ——, ——, 80 So. 2d 802, 81 So. 2d 712.

No. 394. BERRYMAN *v.* OKLAHOMA. Appeal from the Criminal Court of Appeals of Oklahoma. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Sid White* for appellant. Reported below: 283 P. 2d 558.

No. 301. CHIU BUT HAO *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause is moot. *Joseph S. Hertogs* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 222 F. 2d 821.

No. 395. GIANFALA ET AL. *v.* TEXAS COMPANY. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to reinstate its judgment. *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *Summerlin* v. *Massman Const. Co.,* 199 F. 2d 715; *Wilkes* v. *Mississippi River Sand & Gravel Co.,* 202 F. 2d 383; *Gahagan Const. Corp.* v. *Armao,* 165 F. 2d 301, 305. *Raymond H. Kierr* for petitioners. Reported below: 222 F. 2d 382.

No. 396. HOLMES ET AL. *v.* CITY OF ATLANTA ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted, the judgments both of the Court of Appeals and the District Court are vacated and the case is remanded to the District Court with directions to enter a decree for petitioners in conformity with *Mayor & City Council of Baltimore City* v. *Dawson, ante,* p. 877, decided this day. *Robert L. Carter, Thurgood Marshall* and *E. E. Moore* for petitioners. *J. C. Murphy* and *Henry L. Bowden* for respondents. Reported below: 223 F. 2d 93.

No. 82, Misc. DE LUCIA *v.* NEW JERSEY. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing concerning the circumstances surrounding petitioner's plea of guilty. Petitioner *pro se. Grover C. Richman, Jr.,* Attorney General of New Jersey, and *Eugene T. Urbaniak,* Deputy Attorney General, for respondent. Reported below: 221 F. 2d 957.

No. 206, Misc. YAEGER *v.* DIRECTOR, DEPARTMENT OF WELFARE OF VIRGINIA, ET AL. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The appeal is dismissed.

Miscellaneous Orders.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. This case is set for argument on the exceptions to the report of the Special Master and is assigned for hearing at the end of the call for the week beginning December 5. A total of four hours is allowed for oral argument. The motion of the United States for determination of certain legal points is denied. THE CHIEF JUSTICE took no part in the consideration or decision of these questions. *Robert Morrison,* Attorney General, *John H. Moeur, John P. Frank, John Geoffrey Will, Burr Sutter, Perry Ling, Theodore Kiendl* and *Franklin M. Schultz* for the State of Arizona, complainant. *Edmund G. Brown,* Attorney General, *Northcutt Ely, Robert L. McCarty, Prentiss Moore* and *Gilbert F. Nelson,* Assistant Attorneys General, *Charles E. Corker, Howard L. Friedman, Burton J. Gindler, James B. McKenney, John R. Alexander* and *George Brody,* Deputy Attorneys General, for the State of California, *Francis E. Jenney* for the Palo Verde Irrigation District, *Harry W. Horton* and *R. L. Knox, Jr.* for the Imperial Irrigation District, *Earl Redwine* for the Coachella Valley County Water District, *James H. Howard, Charles C. Cooper, Jr., Donald M. Keith, Alan Patten* and *Frank P. Doherty* for the Metropolitan Water District of Southern California, *Roger Arnebergh* for the City of Los Angeles, and *T. B. Cosgrove* for the City of San Diego, defendants. *Attorney General Brownell* for the United States, and *Harvey Dickerson,* Attorney General, and *W. T. Mathews* and *Wm. J. Kane,* Special Assistant Attorneys General, for the State of Nevada, interveners. *Duke W. Dunbar,* Attorney General, and

Hatfield Chilson, Special Assistant Attorney General, for the State of Colorado et al., *Richard Robinson,* Attorney General, and *Fred E. Wilson* for the State of New Mexico, *E. R. Callister,* Attorney General, and *Dennis McCarthy,* Special Assistant Attorney General, for the State of Utah, and *George F. Guy,* Attorney General, for the State of Wyoming.

No. 10. PENNSYLVANIA *v.* NELSON. Certiorari, 348 U. S. 814, to the Supreme Court of Pennsylvania, Western District. The motion for leave to appear and present oral argument on behalf of Phil Feldman and others, as *amici curiae,* is denied.

No. 15, Misc. BONGIORNO *v.* RAGEN, WARDEN, ET AL.;
No. 119, Misc. FARRELL *v.* TINSLEY, WARDEN;
No. 167, Misc. SPENCER *v.* STEINER, WARDEN;
No. 173, Misc. ANDERSON *v.* RANDOLPH, WARDEN;
No. 190, Misc. ZIPKIN *v.* MARTIN, WARDEN, ET AL.;
No. 197, Misc. HILDEBRANDT *v.* MADIGAN, WARDEN; and
No. 214, Misc. PETERS *v.* JOHNSTON, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se. Latham Castle,* Attorney General of Illinois, for respondents in No. 15, Misc.

No. 43, Misc. WANAMAKER *v.* SUPREME COURT OF OHIO ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 184, Misc. MCDOWELL *v.* SHERIFF OF LINN COUNTY, IOWA, ET AL. Petition for writ of injunction denied.

No. 212, Misc. SESSIONS *v.* MANNING, SUPERINTENDENT, SOUTH CAROLINA PENITENTIARY. Application denied.

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Probable Jurisdiction Noted.

No. 380. COVEY *v.* TOWN OF SOMERS. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Adolph I. King, Samuel M. Sprafkin* and *Mandel Matthew Einhorn* for appellant. *Otto E. Koegel* for appellee. Reported below: 308 N. Y. 798, 941, 125 N. E. 2d 862, 127 N. E. 2d 90.

Certiorari Granted. (*See also Nos. 301, 395, 396 and Misc. No. 82, supra.*)

No. 282. SCHULZ, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari granted. *Nathan Baker* for petitioner. *Joseph P. Allen* for respondent. Reported below: 222 F. 2d 540.

No. 383. GENERAL BOX CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Fred G. Benton* and *Edward Donald Moseley* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *S. Billingsley Hill* for the United States. Reported below: 224 F. 2d 7.

Certiorari Denied. (*See also No. 352, supra.*)

No. 329. HEASLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Peyton Ford* and *Alan Y. Cole* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 218 F. 2d 86.

No. 354. HOUSING AUTHORITY OF THE CITY OF MILWAUKEE ET AL. *v.* LAWSON ET UX. Supreme Court of Wisconsin. Certiorari denied. *Walter J. Mattison* for petitioners. *Osmond K. Fraenkel* and *Paul L. Ross* for respondents. Reported below: 270 Wis. 269, 70 N. W. 2d 605.

No. 355. BARDIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Wesley G. Hall* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 224 F. 2d 255.

No. 356. LEWIS ET UX. *v.* CARVER, TRUSTEE. C. A. 5th Cir. Certiorari denied. *John B. Ogden* for petitioners. Reported below: 223 F. 2d 867.

No. 357. WOLFE ET AL., DOING BUSINESS AS DUTCH PAINT CO. ETC., *v.* NATIONAL LEAD CO. C. A. 9th Cir. Certiorari denied. *Joseph L. Alioto* for petitioners. *Robert E. Burns, Milton Handler* and *John B. Henrich* for respondent. Reported below: 223 F. 2d 195.

No. 358. SUBIN *v.* GOLDSMITH ET AL.; and

No. 362. GOLDSMITH ET AL. *v.* SUBIN. C. A. 2d Cir. Certiorari denied. *Osmond K. Fraenkel* for Subin. *Samuel M. Chapin* and *Samuel Gottlieb* for Goldsmith et al. Reported below: 224 F. 2d 753.

No. 359. BRIDE, TRANSFEREE, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Clarence C. Chilcott* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 224 F. 2d 39.

No. 360. UNITED STATES *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Court of Claims. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. *Lawrence Cake* for respondent. Reported below: 132 Ct. Cl. 753, 130 F. Supp. 593.

No. 365. T. A. LOVING & CO. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Paul W. Steer* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Lionel Kestenbaum* for the United States. Reported below: 132 Ct. Cl. 378, 132 F. Supp. 250.

No. 367. LAROSE *v.* WYMAN, COMMANDING OFFICER. C. A. 9th Cir. Certiorari denied. *Wayne M. Collins* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for respondent. Reported below: 223 F. 2d 849.

No. 368. NEW YORK CENTRAL RAILROAD CO. *v.* RUDDY ET AL. C. A. 2d Cir. Certiorari denied. *Thomas S. Kernan* for petitioner. *William Paul Allen* for Ruddy, respondent. Reported below: 224 F. 2d 96.

No. 369. PAGANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Bernard Tompkins* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 224 F. 2d 682.

No. 370. KANSAS CITY POWER & LIGHT CO. ET AL. *v.* MCKAY, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raymond T. Jackson, John R. Baskin, Richard L. Arnold, E. Fontaine Broun* and *Henry T. Rathbun* for petitioners. *Irvin Fane* for the Kansas City Light & Power Co., *A. Z. Patterson* for the Missouri Public Service Co. et al., *J. D. James* for the Missouri Power & Light Co., and *Robert B. Oliver, Jr.* for the Missouri Utilities Co., petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Morton Liftin* for respondents. Reported below: 96 U. S. App. D. C. 273, 225 F. 2d 924.

No. 371. HOWARD FOUNDRY CO. *v.* HARTFORD FIRE INS. CO. C. A. 7th Cir. Certiorari denied. *Lawrence C. Mills* for petitioner. *A. M. Anderson* for respondent. Reported below: 222 F. 2d 767.

No. 372. CHINA DAILY NEWS, INC. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Paul L. Ross* and *Martin Popper* for the China Daily News et al., and *Thomas Russell Jones* for Chin You Gon et al., petitioners. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 224 F. 2d 670.

No. 375. AUTOMOBILE INSURANCE CO. ET AL. *v.* UNITED FRUIT CO. C. A. 2d Cir. Certiorari denied. *Henry N. Longley* for petitioners. *Burton H. White* and *Hervey C. Allen* for respondent. Reported below: 224 F. 2d 72.

No. 376. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 224 F. 2d 58.

No. 382. EDWARDS ET AL. *v.* SHELL OIL CO. ET AL. Supreme Court of Alabama. Certiorari denied. *E. C. Yokley* and *Morton B. Howell, Jr.* for petitioners. *Douglas Arant* for respondents. Reported below: 263 Ala. 4, 81 So. 2d 535.

No. 384. PACHMAYR ET AL., DOING BUSINESS AS PACHMAYR GUN WORKS, *v.* MERSHON CO., INC. C. A. 9th Cir. Certiorari denied. *Donald W. Hamblin* for petitioners. *Collins Mason* for respondent. Reported below: 220 F. 2d 879.

No. 386. INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF AMERICA, AFL, LOCAL UNION No. 294, *v.* WESTERN FOUNDRY CO. C. A. 5th Cir. Certiorari denied. *L. N. D. Wells, Jr.* and *Ruth Weyand* for petitioner. *Ben F. Johnson* and *Thomas W. Hathaway* for respondent.

No. 387. GANNON *v.* BRITTON. Supreme Court of Oklahoma. Certiorari denied. *John Blaine Gilbreath* and *Walter J. Klockau, Jr.* for petitioner. *Jeff Busby* for respondent. Reported below: 285 P. 2d 407.

No. 388. URCIOLO ET AL. *v.* FULLER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raphael G. Urciolo* and *Joseph J. Urciolo* for petitioners. Reported below: 96 U. S. App. D. C. 14, 222 F. 2d 806.

No. 391. CALIFORNIA EX REL. BARTON *v.* AMERICAN AUTOMOBILE INSURANCE CO. ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Edmund G. Brown,* Attorney General, and *Charles A. Barrett,* Deputy Attorney General, for the State of California, petitioner, and *Henry G. Bodkin* for relator. *A. B. Tanner, Francis R. Kirkham* and *Raymond G. Stanbury* for respondents. Reported below: 132 Cal. App. 2d 317, 282 P. 2d 559.

No. 392. COLLINS ET AL. *v.* CITY OF WICHITA, KANSAS. C. A. 10th Cir. Certiorari denied. *Kenneth G. Speir* and *Herbert H. Sizemore* for petitioners. *Robt. B. Morton* and *Paul J. Donaldson* for respondent. Reported below: 225 F. 2d 132.

No. 393. LAZAROV ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Gerber, L. E. Gwinn*

and *Irving M. Strauch* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 225 F. 2d 319.

No. 398. DAVIDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 225 F. 2d 836.

No. 399. ATLANTIC COAST LINE RAILROAD CO. *v.* GEORGIA, ASHBURN, SYLVESTER & CAMILLA RAILROAD CO. Supreme Court of Georgia. Certiorari denied. *Norman C. Shepard* and *Frank G. Kurka* for petitioner. *Julian Webb* for respondent. Reported below: See 91 Ga. App. 698, 897, 87 S. E. 2d 92.

No. 401. BOARD OF SUPERVISORS OF MONROE COUNTY *v.* WALKER ET AL. Supreme Court of Mississippi. Certiorari denied. *William A. Bacon* and *Thomas Fite Paine* for petitioner. *Garner W. Green* for respondents. Reported below: —— Miss. ——, 81 So. 2d 225.

No. 378. FIRST NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this petition. *John A. Reed* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 221 F. 2d 959.

No. 397. TOFT *v.* KETCHUM. Supreme Court of New Jersey. Motion for leave to file brief of New Jersey State Bar Association, as *amicus curiae*, granted. Certiorari

denied. *Peyton Ford* and *Alan Y. Cole* for petitioner. *Harry Green, Lionel P. Kristeller, Emma E. Dillon, Peyton Ford* and *Alan Y. Cole* for the New Jersey State Bar Association, in support of the petition. Reported below: 18 N. J. 280, 611, 113 A. 2d 671, 114 A. 2d 863.

No. 17, Misc. CIHA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 126, Misc. GOLDSTEIN *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 131 Ct. Cl. 228, 130 F. Supp. 330.

No. 148, Misc. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 223 F. 2d 674.

No. 161, Misc. MARRON *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 171, Misc. JAMES *v.* UFFELMAN, SUPERINTENDENT, SECURITY HOSPITAL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 176, Misc. MOORE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 177, Misc. BOBO *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 178, Misc. COLEMAN *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 187, Misc. RANDOLPH *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 234 Ind. 57, 122 N. E. 2d 860.

No. 188, Misc. WEITZ *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 189, Misc. MEEKS *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied. Reported below: 246 Iowa 1237, 71 N. W. 2d 446.

No. 192, Misc. BUTLER *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 286 P. 2d 281.

No. 193, Misc. ILLINOIS EX REL. MAYES *v.* RANDOLPH, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 194, Misc. UNITED STATES EX REL. LAWSON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 195, Misc. MCNEAL *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 198, Misc. EL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 285 App. Div. 930, 141 N. Y. S. 2d 527.

No. 199, Misc. WALTON *v.* EIDSON, WARDEN, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 205, Misc. LEWIS *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 209, Misc. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 215, Misc. HUBER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 18 N. J. 447, 114 A. 2d 260.

No. 241, Misc. WATSON *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Frank N. Bratton* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Nat Tipton,* Advocate General, for respondent.

No. 255, Misc. KNIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 225 F. 2d 55.

Rehearing Denied.

No. 126. HALFEN *v.* UNITED STATES, *ante,* p. 827; and

No. 307. PURITAN CHURCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 810. Petitions for rehearing denied.

NOVEMBER 9, 1955.

Case Dismissed Under Rule 60.

No. 312, Misc. TABOR *v.* HARDWICK, WARDEN. On motion for a rule nisi. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court.

November 14, 1955.

Decisions Per Curiam.

No. 44. Mitchell, Secretary of Labor, *v.* Myrtle Grove Packing Co. Certiorari, 349 U. S. 937, to the United States Court of Appeals for the Fifth Circuit. Argued November 10, 1955. Decided November 14, 1955. *Per Curiam:* The Court, agreeing with the construction of the Fair Labor Standards Act given it by the Fourth Circuit Court of Appeals in *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, reverses the judgments below. *Bessie Margolin* argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Gray Thoron, Stuart Rothman* and *Harold S. Saxe. W. L. Guice* argued the cause and filed a brief for respondent. Reported below: 217 F. 2d 952.

No. 366. Naim *v.* Naim. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered "in clean-cut and concrete form, unclouded" by such problems. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 584. The judgment is vacated and the case remanded to the Supreme Court of Appeals in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion. *David Carliner, Herbert Monte Levy, Will Maslow, Arthur Lazarus, Richard Schifter, Jack Wasserman* and *Edward Ennis* for appellant. *A. A. Bangel* for appellee. Reported below: 197 Va. 80, 87 S. E. 2d 749.

No. 390. SYRES ET AL. *v.* OIL WORKERS INTERNATIONAL UNION, LOCAL No. 23, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. *Steele* v. *L. & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood,* 323 U. S. 210; *Railroad Trainmen* v. *Howard,* 343 U. S. 768. *Roberson L. King* for petitioners. *Chris Dixie* for the Oil Workers International Union, Local 23, et al., and *Quentin Keith, David Proctor* and *Archie D. Gray* for the Gulf Oil Corporation, respondents. Reported below: 223 F. 2d 739.

No. 400. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Missouri. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE DOUGLAS would note probable jurisdiction and set the case for argument. *Joseph H. Hays, Amos M. Mathews* and *Carl Helmetag, Jr.* for appellants. *Robert W. Ginnane* and *Isaac K. Hay* for the Interstate Commerce Commission, and *Floyd F. Shields, Ernest L. Rushmer* and *Arthur D. Condon* for the Fruehauf Trailer Co. et al., appellees. Reported below: 130 F. Supp. 76.

No. 409. WILSON, EXECUTOR, ET AL. *v.* SIMLER. 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 judgments of the Court of Appeals are vacated and the judgments of the District Court reinstated. *Sutton* v. *English,* 246 U. S. 199. See *Markham* v. *Allen,* 326 U. S. 490, 494; *Pufahl* v. *Estate of Parks,* 299 U. S. 217, 226. MR. JUS-

TICE BLACK dissents. *Porter R. Chandler, Fred E. Suits* and *John B. Dudley* for petitioners. *Leslie L. Conner* and *Charles W. Conner* for respondent.

No. 415. OWENS ET AL. *v.* OKLAHOMA TURNPIKE AUTHORITY. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Harry D. Moreland, Harold C. Stuart* and *Sam Clammer* for appellants. Reported below: 283 P. 2d 827.

No. 425. STRICKLAND *v.* SEABOARD AIR LINE RAILROAD CO. On petition for writ of certiorari to the Supreme Court of Florida. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350. *William C. Gaither* for petitioner. *Charles R. Scott* and *James B. McDonough, Jr.* for respondent. Reported below: 80 So. 2d 914.

Certiorari Granted. (*See also Nos. 390, 409 and 425, supra.*)

No. 404. OFFUTT HOUSING CO. *v.* COUNTY OF SARPY ET AL. Supreme Court of Nebraska. Certiorari granted. *Robert L. Stern* and *Charles S. Reed* for petitioner. *Clarence S. Beck,* Attorney General of Nebraska, for respondents. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Lyle M. Turner* filed a memorandum for the United States, as *amicus curiae,* in support of the petition. Reported below: 160 Neb. 320, 70 N. W. 2d 382.

No. 373. COMMISSIONER OF INTERNAL REVENUE *v.* LOBUE. C. A. 3d Cir. Certiorari granted. *Solicitor*

General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky and *Joseph F. Goetten* for petitioner. *Melville F. Weston* for respondent. Reported below: 223 F. 2d 367.

No. 410. AMERICAN AIRLINES, INC. *v.* NORTH AMERICAN AIRLINES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Howard C. Westwood* and *J. Randolph Wilson* for petitioner. *Hardy K. Maclay* for respondent. Reported below: 97 U. S. App. D. C. —, 228 F. 2d 432.

No. 422. RANCO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari granted. *Harry E. Smoyer* for petitioner. *Solicitor General Sobeloff* and *Theophil C. Kammholz* for respondent. Reported below: 222 F. 2d 543.

Certiorari Denied.

No. 321. J. J. DIX, INC. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 363. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF DIX. C. A. 2d Cir. Certiorari denied. *Bernard Weiss* for petitioner in No. 321 and respondent in No. 363. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *S. Dee Hanson* for the Commissioner. Reported below: 223 F. 2d 436.

No. 402. CLIFTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Henry Hammer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 224 F. 2d 329.

No. 403. FREEDMAN *v.* DONOVAN & SCHUENKE ET AL. C. A. 9th Cir. Certiorari denied. *Charles E. Taintor* for petitioner. *Benjamin W. Shipman* for respondents. Reported below: 226 F. 2d 804.

No. 406. WICHITA FALLS & SOUTHERN RAILWAY CO. *v.* GIFFORD. C. A. 5th Cir. Certiorari denied. *Leslie Humphrey* and *John B. Pope* for petitioner. *Phillip S. Kouri* for respondent. Reported below: 224 F. 2d 374.

No. 407. KEY ET AL. *v.* MCDONALD. C. A. 10th Cir. Certiorari denied. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Edward M. Box* and *James P. Garrett,* Assistant Attorneys General, for petitioners. Reported below: 224 F. 2d 608.

No. 408. SEMINOLE NATION *v.* WHITE ET AL. C. A. 10th Cir. Certiorari denied. *W. F. Semple* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States, respondent. Reported below: 224 F. 2d 173.

No. 411. TEXAS CONSTRUCTION CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF CALDWELL FOUNDRY & MACHINE CO., INC. C. A. 5th Cir. Certiorari denied. *John Plath Green* for petitioners. *Hawkins Golden* and *William Burrow* for the Caldwell Foundry & Machine Co., Inc., respondent. Reported below: 224 F. 2d 289.

No. 412. HANOVER FIRE INSURANCE CO. *v.* HOLCOMBE. C. A. 5th Cir. Certiorari denied. *Henry N. Longley, David W. Dyer* and *Douglas D. Batchelor* for petitioner. Reported below: 223 F. 2d 844.

No. 413. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION ET AL. C. A. 6th Cir. Certiorari denied. *James*

H. Lee, Philip A. McHugh and *Albert E. Champney* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Lyle M. Turner* for the United States, respondent.

No. 414. SONKEN-GALAMBA CORP. *v.* THOMPSON, TRUSTEE. C. A. 10th Cir. Certiorari denied. *Harry L. Jacobs* and *N. E. Snyder* for petitioner. *Thos. M. Van Cleave, Jr.* for respondent. Reported below: 225 F. 2d 608.

No. 416. MURPHY, WARDEN, ET AL. *v.* UNITED STATES EX REL. CAMINITO. C. A. 2d Cir. Certiorari denied. *Jacob K. Javits,* Attorney General of New York, *James O. Moore, Jr.,* Solicitor General, *Edward S. Silver* and *William I. Siegel* for petitioners. *Maurice Edelbaum* for respondent. Reported below: 222 F. 2d 698.

No. 417. GRADY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John J. Kelly, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 225 F. 2d 410.

No. 418. WAITERS & WAITRESSES UNION, LOCAL 301, AFL, ET AL. *v.* SANSOM HOUSE ENTERPRISES, INC. ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Charles A. Rothman* for petitioners. *I. Herbert Rothenberg* for respondents. Reported below: 382 Pa. 476, 115 A. 2d 746.

No. 419. PACCIONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 224 F. 2d 801.

No. 420. JACOBSON *v.* MALANDRA. C. A. 3d Cir. Certiorari denied. *Sam Weiss* for petitioner. *Walter S. Anderson* for respondent. Reported below: 224 F. 2d 786.

No. 421. SCULLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herman L. Falk* and *Edward Friedman* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 225 F. 2d 113.

No. 423. CHINBURG, DOING BUSINESS AS FREMONT PLUMBING SHOP, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *A. G. McClintock* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 224 F. 2d 177.

No. 424. ALLEN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *George R. Hargreaves* for petitioner. Reported below: 163 Ohio St. 531, 127 N. E. 2d 368.

Rehearing Denied.

No. 294. SAMISH *v.* UNITED STATES, *ante*, p. 848. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 88. NEWMAN *v.* UNITED STATES, *ante*, p. 824;

No. 122. GLEESON ET UX. *v.* CARR, TRUSTEE IN BANKRUPTCY, *ante*, p. 827;

No. 180. MASTERCRAFTERS CLOCK & RADIO CO. *v.* VACHERON & CONSTANTIN-LE COULTRE WATCHES, INC. ET AL., *ante*, p. 832;

No. 189. PIERCE *v.* HEWLETT-PACKARD CO. ET AL., *ante*, p. 833; and

No. 295. PIERCE *v.* AMERICAN COMMUNICATIONS CO., INC., *ante*, p. 844. Petitions for rehearing denied.

No. 190. RUBSAM *v.* HARLEY C. LONEY CO., *ante*, p. 833;

No. 193. TAYLOR *v.* UNITED STATES, *ante*, p. 834;

No. 204. LURIE ET AL. *v.* UNITED STATES, *ante*, p. 835;

No. 261. SWAFFORD *v.* ATLANTIC COAST LINE RAILROAD CO., *ante*, p. 807;

No. 325. PEONY PARK, INC. ET AL. *v.* O'MALLEY, COLLECTOR OF INTERNAL REVENUE, ET AL., *ante*, p. 845;

No. 345. STERLING *v.* LOCAL 438, LIBERTY ASSOCIATION OF STEAM & POWER PIPE FITTERS & HELPERS ASSOCIATION, ET AL., *ante*, p. 875;

No. 40, Misc. VERCELES *v.* ILLINOIS, *ante*, p. 864; and

No. 109, Misc. BRABSON *v.* NEW YORK, *ante*, p. 854. Petitions for rehearing denied.

NOVEMBER 21, 1955.

Decisions Per Curiam.

No. 18. JEW SING *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 348 U. S. 910, to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause is moot. *Joseph S. Hertogs* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 215 F. 2d 906.

No. 436. CAHILL *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed.* MR. JUSTICE REED believes certiorari should have been denied and dissents from the judgment of reversal. MR. JUSTICE

*Amended May 14, 1956. 351 U. S. 183.

FRANKFURTER, MR. JUSTICE BURTON and MR. JUSTICE HARLAN are of the opinion that the petition for writ of certiorari should have been denied. *Randolph J. Seifert* and *William A. Blank* for petitioner. *Robert M. Peet* for respondent. Reported below: 224 F. 2d 637.

No. 31, Misc. BRAMBLE *v.* HEINZE, WARDEN, ET AL. On petition for writ of certiorari to the Supreme Court of California. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Since the record in this case fails to show whether denial of petitioner's application for habeas corpus rests on an adequate state ground or exclusively on a federal ground, the judgment of the Supreme Court of California is vacated and the cause is remanded to that court for further proceedings. THE CHIEF JUSTICE took no part in the consideration or decision of this case. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondents.

No. 47, Misc. CHAISSON ET AL. *v.* SOUTHCOAST CORPORATION ET AL. On petition for writ of certiorari to the Supreme Court of Louisiana. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. It appearing that the cause has become moot, the judgment of the Supreme Court of Louisiana is vacated and the cause is remanded for such proceedings as by that court may be deemed appropriate. *Harris* v. *Battle,* 348 U. S. 803. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that the case is not moot and would grant certiorari and hear argument. *Joseph L. Rauh, Jr.* and *Daniel H. Pollitt* for petitioners. *Milton C. Denbo, Rufus G. Poole* and *Conrad Meyer III* for respondents. Reported below: 227 La. 146, 78 So. 2d 673.

Miscellaneous Orders.

No. 489. DURLEY *v.* MAYO, PRISON CUSTODIAN. Certiorari, 350 U. S. 872, to the Supreme Court of Florida. It is ordered that *Neal Rutledge, Esquire,* of Miami, Florida, be appointed to serve as counsel for the petitioner in this case.

No. 439. JOSLYN *v.* FISHER. C. A. 7th Cir. Certiorari denied. Motion for damages also denied. *Alvin Glen Hubbard* for petitioner. *Gerald G. Barry* for respondent. Reported below: 223 F. 2d 184.

Certiorari Granted. (*See also No. 436 and Misc. Nos. 31 and 47, supra.*)

No. 442. COLE *v.* YOUNG ET AL., MEMBERS OF THE U. S. CIVIL SERVICE COMMISSION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Folsom, present Secretary of Health, Education, and Welfare, substituted for Hobby, resigned. Certiorari granted. *Osmond K. Fraenkel, David I. Shapiro* and *James H. Heller* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for respondents. Reported below: 96 U. S. App. D. C. 379, 226 F. 2d 337.

Certiorari Denied. (*See also No. 439, supra.*)

No. 377. EASTERN SUGAR ASSOCIATES (A TRUST) *v.* PEÑA. C. A. 1st Cir. Certiorari denied. *Earle T. Fiddler* for petitioner. Reported below: 222 F. 2d 934.

No. 405. GRIMES & HAUER, INC. *v.* POLLOCK ET AL. Supreme Court of Ohio. Certiorari denied. *Welles K. Stanley* for petitioner. *Mortimer Riemer* for respondents. Reported below: 163 Ohio St. 372, 127 N. E. 2d 203.

No. 426. NORTHERN FUR CO., INC. ET AL. *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO. ET AL.

C. A. 7th Cir. Certiorari denied. *John M. Aherne* for petitioners. *R. J. Fletcher* for respondents. Reported below: 224 F. 2d 181.

No. 427. A/S J. Ludwig Mowinckels Rederi *v.* Amador et al. C. A. 2d Cir. Certiorari denied. *James M. Estabrook* and *Francis X. Byrn* for petitioner. *Philip F. Di Costanzo* and *Robert Klonsky* for Amador, respondent. Reported below: 224 F. 2d 437.

No. 428. Cadillac Publishing Co., Inc. *v.* Summerfield, Postmaster General. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Horace J. Donnelly, Jr.* and *Arthur V. Sullivan, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for respondent. Reported below: 97 U. S. App. D. C. —, 227 F. 2d 29.

No. 429. Cenedella *v.* United States. C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 224 F. 2d 778.

No. 431. Morris *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 225 F. 2d 91.

No. 432. Brewer *v.* United States. C. A. 5th Cir. Certiorari denied. *David H. Cannon* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 224 F. 2d 189.

No. 434. FIREMEN'S INSURANCE CO. ET AL. *v.* EDLIN. C. A. 7th Cir. Certiorari denied. *Donald N. Clausen* and *Herbert W. Hirsh* for petitioners. *John E. Cassidy* for respondent. Reported below: 225 F. 2d 80.

No. 435. GAGLIANO *v.* BONDS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. *Jack Wasserman* and *G. Wray Gill* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 222 F. 2d 958.

No. 440. STANDARD COIL PRODUCTS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Arthur Richenthal* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 224 F. 2d 465.

No. 441. WALKER ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY ET AL. Court of Appeals of Maryland. Certiorari denied. *Hyman A. Pressman* and *Herbert H. Balch* for petitioners. *T. Hughlett Henry, Jr.* and *Charles Elliot Wheeler* for respondents. Reported below: 208 Md. 72, 116 A. 2d 393.

No. 443. NORMAN LUMBER CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Walter R. Jones, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 223 F. 2d 868.

No. 445. FIRST NATIONAL BANK IN HOUSTON *v.* UNITED STATES ET AL. Court of Claims. Certiorari denied. *Edward S. Boyles* for petitioner. *Solicitor*

General Sobeloff, Assistant Attorney General Burger, Melvin Richter and *Herman Marcuse* for the United States, and *Emanuel Harris* for the National Surety Corporation et al., respondents. Reported below: 132 Ct. Cl. 724, 133 F. Supp. 381.

No. 447. CITY AND COUNTY OF SAN FRANCISCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Dion R. Holm, Thomas M. O'Connor* and *Frank J. Needles* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for the United States. Reported below: 223 F. 2d 737.

No. 449. KELLOGG COMPANY ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *William H. Dillon* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Louise Foster* for the United States. Reported below: 132 Ct. Cl. 507, 133 F. Supp. 387.

No. 450. NORRIS *v.* NORRIS. Supreme Court of Michigan. Certiorari denied. *John McIntosh* for petitioner. *Frederick C. Hailer* for respondent. Reported below: 342 Mich. 83, 69 N. W. 2d 208.

No. 453. WM. H. MULLER & CO., INC. *v.* SWEDISH AMERICAN LINE, LTD. ET AL. C. A. 2d Cir. Certiorari denied. *George B. Warburton* for petitioner. *Charles S. Haight* for respondents. Reported below: 224 F. 2d 806.

No. 464. CHICAGO GREAT WESTERN RAILWAY CO. *v.* KENNEY. Supreme Court of Minnesota. Certiorari denied. *David L. Grannis* and *Bryce L. Hamilton* for petitioner. *Donald A. Chapman* for respondent. Reported below: 245 Minn. 284, 71 N. W. 2d 669.

No. 475. CENTRAL HUDSON GAS & ELECTRIC CORP. *v.* BANKS ET AL. C. A. 2d Cir. Certiorari denied. *George A. Garvey* for petitioner. *Melvin Sacks* for Banks, and *Clarence E. Mellen* for Ninnie Brothers, respondents. Reported below: 224 F. 2d 631.

No. 484. PAYNE ET AL. *v.* KOEHLER, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Kurt W. Melchior* for respondent. Reported below: 225 F. 2d 103.

No. 493. CLACKAMAS COUNTY, OREGON, *v.* MCKAY, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard L. Merrick* for petitioner. *Solicitor General Sobeloff* for respondents. Reported below: 96 U. S. App. D. C. 385, 226 F. 2d 343.

No. 463. CAPITAL TRANSIT CO. *v.* SPIEGEL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edmund L. Jones, F. Gloyd Awalt, W. V. T. Justis* and *F. Keith Kelly* for petitioner. Respondent *pro se*. Reported below: 96 U. S. App. D. C. 307, 226 F. 2d 29.

Rehearing Denied.

No. 73. BEARD *v.* UNITED STATES, *ante*, p. 846. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 238. COTA *v.* COFFMAN, *ante*, p. 806. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 11, Original. MISSISSIPPI *v.* LOUISIANA, *ante*, p. 5;

No. 43. WADE ET UX. *v.* MICHIGAN, *ante*, p. 802;

No. 77. WOLCHER *v.* UNITED STATES, *ante*, p. 822;

No. 86. CRIST *v.* WASHINGTON, VIRGINIA & MARYLAND COACH CO., INC., *ante*, p. 823;

No. 106. LEIGHTON *v.* SECURITIES & EXCHANGE COMMISSION, *ante*, p. 825;

No. 113. JEOFFROY MFG., INC. *v.* GRAHAM, *ante*, p. 826;

No. 127. SICKLES *v.* GRAYBAR ELECTRIC CO., *ante*, p. 827;

No. 135. ECHELES ET AL. *v.* UNITED STATES, *ante*, p. 828;

No. 143. ANDERSON, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO., *ante*, p. 807;

No. 173. PACE *v.* TOMLINSON, DIRECTOR OF INTERNAL REVENUE, *ante*, p. 832;

No. 179. MITCHELL *v.* UNITED STATES, *ante*, p. 832;

No. 212. BURKHALTER *v.* LIBERTY MUTUAL INSURANCE COMPANIES, INC. ET AL., *ante*, p. 805;

No. 216. ITEM COMPANY *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 836;

No. 235. FAIRMONT ALUMINUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 838;

No. 293. COSPER *v.* ILLINOIS, *ante*, p. 844;

No. 299. LANDELL, EXECUTOR, ET AL. *v.* NORTHERN PACIFIC RAILWAY CO., FORMERLY THE SUPERIOR & ST. CROIX RAILWAY CO., *ante*, p. 844;

No. 53, Misc. ROUSSEAU *v.* HURTADO, EXECUTRIX, ET AL., *ante*, p. 851;

No. 118, Misc. KEITHLEY *v.* ILLINOIS, *ante*, p. 854; and

No. 164, Misc. CRABTREE *v.* UNITED STATES, *ante*, p. 867. Petitions for rehearing denied.

NOVEMBER 30, 1955.

Case Dismissed Under Rule 60.

No. 363, Misc. HARRIS *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. Reported below: 150 Tex. Cr. R. 137, 199 S. W. 2d 522.

DECEMBER 5, 1955.

Decisions Per Curiam.

No. 9. INTERSTATE COMMERCE COMMISSION *v.* STONE'S EXPRESS, INC.; and

No. 14. ST. JOHNSBURY TRUCKING CO., INC. ET AL. *v.* STONE'S EXPRESS, INC. Appeals from the United States District Court for the District of Massachusetts. Probable jurisdiction noted, 348 U. S. 886. *Per Curiam:* The judgments are vacated and the cases are remanded to the District Court for dismissal of the proceedings in accordance with the stipulation of the parties as to mootness. *Robert W. Ginnane* for appellant in No. 9. *S. Harrison Kahn* for appellants in No. 14. *Herbert Burstein* for appellee. Reported below: 122 F. Supp. 955.

No. 37. DILLON *v.* UNITED STATES. Certiorari, 349 U. S. 914, to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The writ of certiorari is dismissed and the case is remanded to the Court of Appeals for such further action as law and justice may require. *Solicitor General Sobeloff* filed a Suggestion of Mootness. Reported below: 218 F. 2d 97.

No. 40. SNYDER, ADMINISTRATOR, *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the

judgment of the District Court reinstated. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN would deny certiorari. *John Geyer Tausig* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 218 F. 2d 266.

No. 296. UNITED STATES *v.* UNION TRUST CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is affirmed. *Indian Towing Co.* v. *United States,* 350 U. S. 61. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Lester S. Jayson* for the United States. *David G. Bress, Sheldon E. Bernstein, Alvin L. Newmyer* and *Jo V. Morgan, Jr.* for respondents. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.

No. 298. UNION TRUST CO. ET AL. *v.* EASTERN AIR LINES, INC. 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 and the judgment is reversed.* MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN would not grant certiorari. *David G. Bress, Sheldon E. Bernstein, Alvin L. Newmyer* and *Jo V. Morgan, Jr.* for petitioners. *Joseph W. Henderson, Richard W. Galiher* and *John M. Aherne* for respondent. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.

No. 389. FEDERAL TRADE COMMISSION *v.* AMERICAN CRAYON CO. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Solicitor General Sobeloff,*

*Modified, *post,* p. 962.

Assistant Attorney General Barnes, Daniel M. Friedman, Earl W. Kintner and *Robert B. Dawkins* for petitioner. *Thomas F. Butler, Jr.* for respondent. Reported below: 223 F. 2d 264.

No. 433. KANSAS EX REL. BROWN, COUNTY ATTORNEY, ET AL. *v.* HEDRICK, COUNTY CLERK, ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Kenneth G. Speir* for appellants. *Robt. B. Morton* and *Paul J. Donaldson* for the City of Wichita, Kansas, appellee. Reported below: 178 Kan. 135, 283 P. 2d 437.

No. 438. WHITE ET AL. *v.* ANSON ET AL., MEMBERS OF BOARD OF EDUCATION OF KANAWHA COUNTY. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Hayden C. Covington* for appellants. *John O. Kizer* and *W. M. Woodroe* for appellees.

No. 461. DRAWDY INVESTMENT CO. *v.* LEONARD ET UX. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *John P. Booth* and *Charles M. Trammell* for appellant. Reported below: 77 So. 2d 855.

No. 191, Misc. UNITED STATES EX REL. HENDRICKSON *v.* HENDRICK, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON. Appeal from the United States District Court for the Eastern District of Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Appellant *pro se*. *Samuel Dash* and *Victor Wright* for appellee.

No. 256, Misc. UNITED STATES EX REL. NICHOLS *v.* WESTERN UNION TELEGRAPH CO. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Appellant *pro se*. *Howard W. Smith, Jr.* for appellee.

Miscellaneous Orders.

No. 85. MARTIN BROTHERS BOX CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. The motion to set aside the order denying certiorari, 350 U. S. 823, is denied. *George L. Quinn, Jr.* and *Donald A. Schafer* for petitioner. *Robert W. Ginnane* and *Samuel R. Howell* for the Interstate Commerce Commission, and *James C. Dezendorf, James E. Lyons* and *Charles W. Burkett, Jr.* for the Southern Pacific Co., respondents. Reported below: 219 F. 2d 811.

No. 224, Misc. JOHNSON *v.* WARDEN, EASTERN STATE PENITENTIARY;

No. 230, Misc. FORESTIER *v.* UNITED STATES;

No. 233, Misc. PATTERSON *v.* TINSLEY, WARDEN; and

No. 252, Misc. HOWLERY *v.* RANDOLPH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 238, Misc. EX PARTE MARTIN;

No. 239, Misc. SPRYE *v.* BROWNELL, ATTORNEY GENERAL, ET AL.;

No. 248, Misc. PULLIAM *v.* U. S. COURT OF APPEALS FOR THE TENTH CIRCUIT; and

No. 254, Misc. MARSHALL *v.* UNITED STATES. Motions for leave to file petitions for writs of mandamus denied.

No. 271, Misc. O'HALLORAN *v.* DAY, WARDEN. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Samuel Dash* and *Victor Wright* for respondent.

No. 301, Misc. GREEN *v.* CLANCY, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writs of prohibition and mandamus denied. *Blanch Freedman* and *Gloria Agrin* for petitioner. *Jacob K. Javits*, Attorney General of New York, *James O. Moore, Jr.*, Solicitor General, and *Daniel M. Cohen* and *Irving L. Rollins*, Assistant Attorneys General, for Javits et al., respondents.

Probable Jurisdiction Noted.

No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL. Appeal from the Supreme Court of Nebraska. Probable jurisdiction noted. *Lester P. Schoene* for appellants. *Edson Smith* for Hanson et al., appellees. Reported below: 160 Neb. 669, 71 N. W. 2d 526.

Certiorari Granted. (*See also Nos. 40, 296, 298 and 389, supra.*)

No. 469. PETROWSKI ET AL. *v.* HAWKEYE-SECURITY INSURANCE CO. C. A. 7th Cir. Certiorari granted. *Richard P. Tinkham, Jr.* for petitioners. *Herbert C. Hirschboeck* and *Victor M. Harding* for respondent. Reported below: 226 F. 2d 126.

No. 60. BERRA *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted, limited to question (2) presented by the petition for the writ, which reads as follows:

"(2) Whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939

Internal Revenue Code, the trial court is required by Rule 31 of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense."

Stanley M. Rosenblum and *Mark M. Hennelly* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Dickinson Thatcher* for the United States. Reported below: 221 F. 2d 590.

Certiorari Denied. (*See also No. 438 and Misc. No. 271, supra.*)

No. 297. UNION TRUST CO. ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David G. Bress, Sheldon E. Bernstein, Alvin L. Newmyer* and *Jo V. Morgan, Jr.* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Lester S. Jayson* for the United States. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.

No. 379. BAUSCH & LOMB OPTICAL CO. *v.* LYON. C. A. 2d Cir. Certiorari denied. *Edward H. Cumpston* and *G. A. Ellestad* for petitioner. *John W. Malley* and *C. Willard Hayes* for respondent. Reported below: 224 F. 2d 530.

No. 430. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George E. Danielson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 227 F. 2d 667.

No. 446. TYMANN, ADMINISTRATRIX, *v.* WRIGHT, EXECUTOR, ET AL. Court of Appeals of New York. Cer-

tiorari denied. *William B. Hoffman* for petitioner. Wright, Executor, respondent, *pro se*. Reported below: 308 N. Y. 517, 127 N. E. 2d 316.

No. 452. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles E. Ford* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 224 F. 2d 561.

No. 454. AMERICAN CRAYON CO. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. *Thomas F. Butler, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 223 F. 2d 264.

No. 455. AGRICULTURAL INSURANCE CO. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walter P. Hickey* and *L. deGrove Potter* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 132 Ct. Cl. 807, 132 F. Supp. 479.

No. 458. PECKHAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 96 U. S. App. D. C. 312, 226 F. 2d 34.

No. 459. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Lee S. Jones* and *Helen R. Graft* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 224 F. 2d 845.

No. 462. KOHN *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Eugene Stanley* for petitioner.

No. 465. IRA S. BUSHEY & SONS, INC. ET AL. *v.* CARDILLO, DEPUTY COMMISSIONER, SECOND COMPENSATION DISTRICT, ET AL. C. A. 2d Cir. Certiorari denied. *Bernard Katzen* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the Deputy Commissioner, and *Paul Koch* for the Hartford Accident & Indemnity Co., respondents. Johansen, respondent, *pro se*. *Sidney A. Schwartz* for Ira S. Bushey & Sons, Inc. and the American Mutual Liability Insurance Co. Reported below: 225 F. 2d 137.

No. 466. BRASIER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. *Herbert W. Baird* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for the United States et al., and *Clarence S. Beck,* Attorney General of Nebraska, and *Robert V. Hoagland,* Assistant Attorney General, for Decker et al., respondents. Reported below: 223 F. 2d 762.

No. 467. KAYE ET AL. *v.* SMITHERMAN ET AL. C. A. 10th Cir. Certiorari denied. *Howard T. Fleeson* and *Dale M. Stucky* for petitioners. *John F. Eberhardt* for respondents. Reported below: 225 F. 2d 583.

No. 468. TYLER BANK & TRUST CO. *v.* CARDER ET AL. C. A. 5th Cir. Certiorari denied. *W. Dewey Lawrence* for petitioner. *Chas. F. Potter* for respondents. Reported below: 224 F. 2d 687.

No. 473. BENES *v.* CANARY, U. S. ATTORNEY. C. A. 6th Cir. Certiorari denied. *William Patrick Clyne* for

petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for respondent. Reported below: 224 F. 2d 470.

No. 474. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* and *Crampton Harris* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 225 F. 2d 123.

No. 476. NATIONAL LABOR RELATIONS BOARD *v.* GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Samuel M. Singer* for petitioner. *Chris Dixie* for respondents. Reported below: 225 F. 2d 205.

No. 477. HAFFA *v.* IOWA. Supreme Court of Iowa. Certiorari denied. *William L. Beecher* for petitioner. *Dayton Countryman,* Attorney General of Iowa, *Raphael R. R. Dvorak,* Assistant Attorney General, and *Neill Garrett* for respondent. Reported below: 246 Iowa 1275, 71 N. W. 2d 35.

No. 479. SHIRLINGTON SUPERMARKET, INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Joseph F. Castiello* for petitioners. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Fannie M. Boyls* for respondent. Reported below: 224 F. 2d 649.

No. 483. EARY ET AL. *v.* WEST VIRGINIA TURNPIKE COMMISSION. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 480. WOLFE ET AL., DOING BUSINESS AS DUTCH PAINT CO. ETC., *v.* NATIONAL LEAD CO. ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Joseph L. Alioto* and *Elwood S. Kendrick* for petitioners. *Robert E. Burns, Milton Handler* and *John B. Henrich* for the National Lead Co., and *Eugene D. Bennett* and *Francis R. Kirkham* for E. I. du Pont de Nemours & Co., respondents. Reported below: 225 F. 2d 427.

No. 487. ELLIOTT *v.* PACIFIC FAR EAST LINE, INC. C. A. 9th Cir. Certiorari denied. *David A. Fall* for petitioner. *Lasher B. Gallagher* for respondent. Reported below: 230 F. 2d 238.

No. 14, Misc. EATON *v.* BIBB ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 217 F. 2d 446.

No. 19, Misc. GREEAR *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *John G. Fox,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent.

No. 32, Misc. MOHLER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Thomas M. Kavanagh,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent.

No. 140, Misc. SELBY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 145, Misc. BAILEY *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. C. A. 4th Cir. Certiorari denied. *Samuel W. Tucker* and *William Davis Butts* for petitioner. Reported below: 220 F. 2d 954.

No. 152, Misc. WHITING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 223 F. 2d 924.

No. 165, Misc. SPEDITZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 169, Misc. FLETCHER *v.* YOUNG ET UX. C. A. 4th Cir. Certiorari denied. Reported below: 222 F. 2d 222.

No. 170, Misc. WINSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 224 F. 2d 337.

No. 183, Misc. BISSON *v.* HOWARD, POST COMMANDER, ET AL. C. A. 5th Cir. Certiorari denied. *Stanley M. Rosenblum* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: 224 F. 2d 586.

No. 185, Misc. RINGER *v.* MARONEY, ACTING WARDEN, ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 210, Misc. COLLINS *v.* WEBB, WARDEN. Supreme Court of California. Certiorari denied.

No. 216, Misc. PEDERSEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 217, Misc. GOODE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 219, Misc. RUTH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 220, Misc. MITCHELL *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 280 S. W. 2d 189.

No. 221, Misc. DI GIOVANNI *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 96 U. S. App. D. C. 65, 223 F. 2d 357.

No. 222, Misc. WYERS ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 223, Misc. BISHOP *v.* MARONEY, ACTING WARDEN. Supreme Court of Pennsylvania, Middle District. Certiorari denied. Reported below: 382 Pa. 324, 114 A. 2d 906.

No. 226, Misc. LISTER *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 285 P. 2d 1046.

No. 228, Misc. SMITH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 286 App. Div. 915, 142 N. Y. S. 2d 51.

No. 229, Misc. WILLIAMS *v.* DELMORE, WARDEN. Supreme Court of Washington. Certiorari denied.

No. 232, Misc. BUCHANAN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 234, Misc. JOHNS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 207 Md. 624, 113 A. 2d 891.

No. 235, Misc. PETILLO *v.* INDIANA ET AL. Supreme Court of Indiana. Certiorari denied. Reported below: 234 Ind. 385, 126 N. E. 2d 895.

No. 242, Misc. RICCO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 308 N. Y. 1036, 127 N. E. 2d 869.

No. 244, Misc. BAUMGART *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 245, Misc. ERDMANN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 246, Misc. PERKINS ET UX. *v.* BACH. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* for petitioners. *Hudson B. Cox* for respondent. Reported below: 223 F. 2d 251.

No. 247, Misc. SAXON *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 131 Ct. Cl. 408, 125 F. Supp. 953.

No. 249, Misc. GOLDING *v.* WEEKS, SECRETARY OF COMMERCE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Homer Brooks* and *Edmund Hill, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for respondent. Reported below: 96 U. S. App. D. C. 192, 225 F. 2d 31.

No. 250, Misc. NELSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 259, Misc. MASI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 223 F. 2d 132.

No. 268, Misc. BRAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 225 F. 2d 664.

Rehearing Denied.

No. 259. WIEMAN & WARD CO. *v.* CITY OF PITTSBURGH ET AL., *ante*, p. 840;

No. 312. UNITED STATES *v.* OHIO POWER CO., *ante*, p. 862;

No. 327. JONES *v.* MISSISSIPPI, *ante*, p. 869;

No. 338. HOLMBY PRODUCTIONS, INC. ET AL. *v.* VAUGHN ET AL., CONSTITUTING THE KANSAS STATE BOARD OF REVIEW, ET AL., *ante*, p. 870;

No. 344. ELCHIBEGOFF *v.* DULLES, SECRETARY OF STATE, ET AL., *ante*, p. 874;

No. 355. BARDIN *v.* UNITED STATES, *ante*, p. 883;

No. 64, Misc. SISK *v.* OVERLADE, WARDEN, *ante*, p. 876; and

No. 163, Misc. MORGAN *v.* SYLVESTER ET AL., *ante*, p. 867. Petitions for rehearing denied.

No. 217, Misc., October Term, 1954. MEDICH *v.* UNITED STATES, 348 U. S. 925. Motion for leave to file petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion.

No. 48, Misc. WETZEL *v.* MISSISSIPPI, *ante*, p. 870. Motion for leave to file petition for rehearing denied.

DECEMBER 6, 1955.

Case Dismissed Under Rule 60.

No. 509. LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, *v.* NATIONAL SCREEN SERVICE CORPORATION ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Francis T. Anderson* for petitioners. *Louis Nizer* for the National Screen Service Corporation, *Wm. A. Schnader, Bernard G. Segal* and *Edward W. Mullinix* for the Columbia Pictures Corporation et al., and *Louis J. Goffman* for the Warner Bros. Pictures Distributing Corporation, respondents.

DECEMBER 12, 1955.

Decisions Per Curiam.

No. 111. GONZALES *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. Certiorari, 349 U. S. 943, to the United States Court of Appeals for the Ninth Circuit. Argued December 7–8, 1955. Decided December 12, 1955. *Per Curiam:* The Court is of the view that the standard of proof required in denaturalization cases (see *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665) is applicable to expatriation cases arising under § 401 (j) of the Nationality Act of 1940, 54 Stat. 1137, as amended, and has not been satisfied in this case. Accordingly the judgment below is reversed without reaching the constitutional questions that have been presented. *A. L. Wirin* argued the cause for petitioner. With him on the brief was *Fred Okrand*. *Oscar H. Davis* argued the cause for respondents. With him on the brief were

Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg and *J. F. Bishop.* Briefs of *amici curiae* were filed by *John W. Willis* for Mendoza-Martinez, and by *Osmond K. Fraenkel* and *Loren Miller* for the American Civil Liberties Union. Reported below: 215 F. 2d 955.

No. 444. Bingler Vacation Tours, Inc. *v.* United States et al. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Wilmer A. Hill* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *James F. X. O'Brien* and *Jack R. Turney, Jr.* for the Asbury Park-New York Transit Corporation et al., appellees. Reported below: 132 F. Supp. 793.

Miscellaneous Orders.

No. 14, Original. In re State of Louisiana. The motion for leave to file and the petition to perpetuate testimony are granted. The Chief Justice took no part in the consideration or decision of this motion. *Fred S. LeBlanc,* Attorney General, *John L. Madden,* Assistant Attorney General, *Bailey Walsh,* Special Assistant Attorney General, *W. Scott Wilkinson, L. H. Perez, Frank J. Looney* and *Grove Stafford* for the State of Louisiana, petitioner. *Solicitor General Sobeloff* and *Assistant Attorney General Rankin* filed a brief for the United States in opposition to the petition.

No. 258, Misc. Golden *v.* McNeill, Prison Superintendent, et al.;

No. 267, Misc. Seward *v.* Denny; and

No. 278, Misc. Gibbs *v.* United States. Motions for leave to file petitions for writs of habeas corpus denied.

No. 266, Misc. DAVIS *v.* SHERIFF OF FINNEY COUNTY, KANSAS. Petition for writ of injunction denied.

No. 269, Misc. ALLEN *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Application denied.

No. 281, Misc. WHITE *v.* UNITED STATES; and

No. 307, Misc. WALLER, SHERIFF, *v.* UNITED STATES EX REL. SHEFFIELD. Motions for leave to file petitions for writs of certiorari denied. Petitioners *pro se*. *Fred S. LeBlanc,* Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *Hugh M. Wilkinson,* Special Assistant Attorney General, for petitioner in No. 307, Misc. Reported below: No. 307, Misc., 224 F. 2d 280.

Probable Jurisdiction Noted.

No. 448. UNITED STATES *v.* McKESSON & ROBBINS, INC. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States. *John P. McGrath, Laurence C. Ehrhardt* and *Marland Gale* for appellee.

Certiorari Granted.

No. 486. NATIONAL LABOR RELATIONS BOARD *v.* TRUITT MANUFACTURING CO. C. A. 4th Cir. Certiorari granted. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for petitioner. *Whiteford S. Blakeney* for respondent. Reported below: 224 F. 2d 869.

No. 295, Misc. MESAROSH ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Frank J. Donner,*

Arthur Kinoy and *Marshall Perlin* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Charles F. Barber* and *Harold D. Koffsky* for the United States. Reported below: 223 F. 2d 449.

Certiorari Denied. (*See also Misc. Nos. 281 and 307, supra.*)

No. 481. BLACK ET AL. *v.* UTAH. Supreme Court of Utah. Certiorari denied. *Frank E. Flynn* for petitioners. Reported below: 3 Utah 2d 315, 283 P. 2d 887.

No. 482. WHEC, INC. ET AL. *v.* FEDERAL BROADCASTING SYSTEM, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas H. Wall* for WHEC, Inc., and *Frank Roberson* and *Frank U. Fletcher* for the Veterans Broadcasting Co., Inc., petitioners. *William A. Roberts* and *Edgar Turlington* for respondent. Reported below: 96 U. S. App. D. C. 260, 225 F. 2d 560.

No. 488. ENKE *v.* BAUCUS. Supreme Court of Montana. Certiorari denied. *James R. Browning* and *Lyman A. Garber* for petitioner. *Dean Acheson, Charles A. Horsky* and *James J. Bierbower* for respondent. Reported below: 129 Mont. ——, 287 P. 2d 19.

Nos. 258 and 498. DURST, ASSIGNEE, *v.* KALPAKOFF ET AL. C. A. 9th Cir. Motion for leave to file respondent's brief in No. 258 granted. Certiorari denied. *Morris Lavine* for petitioner. *Philip F. Herrick* for Chernabaeff, respondent.

No. 495. THROPP *v.* FARNUM ET AL. United States Court of Appeals for the District of Columbia Circuit. Motion to strike respondents' brief denied. Certiorari denied. *Earl J. Lombard* for petitioner. *Arthur G.*

Lambert and *John Holt Myers* for Farnum et al., respondents. Reported below: 96 U. S. App. D. C. 175, 223 F. 2d 640.

No. 35, Misc. TEAL *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Thomas M. Kavanagh,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent.

No. 44, Misc. DERENIEWSKI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Thomas M. Kavanagh,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent.

No. 91, Misc. FALLEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 220 F. 2d 946.

No. 111, Misc. WILLIAMS *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 284 P. 2d 1034.

No. 240, Misc. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 224 F. 2d 556.

No. 243, Misc. GALLAGHER *v.* MCCULLOUGH, SHERIFF, ET AL. Supreme Court of Washington. Certiorari denied.

No. 257, Misc. GORDON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Roberson L. King* for petitioner. Reported below: 161 Tex. Cr. R. 594, 280 S. W. 2d 267.

No. 263, Misc. BYERS *v.* STEELE. C. A. 8th Cir. Certiorari denied. Reported below: 225 F. 2d 481.

No. 265, Misc. HEIMOWITZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 309 N. Y. 679, 128 N. E. 2d 323.

No. 270, Misc. MEDLEY *v.* STEINER, WARDEN. Circuit Court of Anne Arundel County and Court of Appeals of Maryland. Certiorari denied. Reported below: 207 Md. 634, 115 A. 2d 287.

No. 272, Misc. CICENIA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 274, Misc. SMITH *v.* STEINER, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 207 Md. 628, 114 A. 2d 892.

No. 275, Misc. NEWSTEAD *v.* MISSOURI. Circuit Court of Cole County, Missouri. Certiorari denied.

No. 276, Misc. CRABTREE *v.* BROWNELL ET AL. C. A. 10th Cir. Certiorari denied.

No. 279, Misc. GOLDSBY *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Loring B. Moore* and *William R. Ming, Jr.* for petitioner. Reported below: —— Miss. ——.

No. 280, Misc. EX PARTE DOOLEY. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 162 Tex. Cr. R. ——, 279 S. W. 2d 872.

No. 282, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC. C. A. 1st Cir. Certiorari denied.

Rehearing Denied.

No. 256. CALLANAN ET AL. *v.* UNITED STATES, *ante*, p. 862;

No. 356. LEWIS ET UX. *v.* CARVER, TRUSTEE, *ante*, p. 883; and

No. 177, Misc. BOBO *v.* CALIFORNIA ET AL., *ante*, p. 888. Petitions for rehearing denied.

DECEMBER 16, 1955.

Case Dismissed Under Rule 60.

No. 68, Misc. SANTO ET AL. *v.* TEETS, WARDEN, ET AL. On petition for writ of certiorari to the Supreme Court of California. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. *Allan L. Sapiro* for petitioners.

JANUARY 5, 1956.

Case Dismissed Under Rule 60.

No. 372, Misc. WAGNER *v.* STRATTON, GOVERNOR OF ILLINOIS. Dismissed on motion of applicant pursuant to Rule 60 of the Rules of this Court.

JANUARY 9, 1956.

Decisions Per Curiam.

No. 437. BOSTON & PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motion of Boston & Providence Railroad Corporation Stockholders Committee for leave to intervene or, in the alternative, to file brief as *amicus curiae* is denied. The motions to affirm are granted and the judgment is affirmed. *Armistead B. Rood, Joseph B. Hyman,*

Cassius M. Clay and *Sidney H. Willner* for appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Robert W. Ginnane* and *Isaac K. Hay* for the United States and the Interstate Commerce Commission, and *William T. Griffin* and *Herbert Burstein* for the New York, New Haven & Hartford Railroad Co., appellees. Reported below: 133 F. Supp. 488.

No. 490. UNITED STATES ET AL. *v.* WATSON BROS. TRANSPORTATION CO., INC. Appeal from the United States District Court for the District of Nebraska. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE REED, MR. JUSTICE DOUGLAS, and MR. JUSTICE BURTON would note probable jurisdiction. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, William J. Lamont, Robert W. Ginnane* and *Leo H. Pou* for appellants. *Harold G. Hernly* and *Beverley S. Simms* for appellee. Reported below: 132 F. Supp. 905.

No. 501. HOLMAN *v.* MATTHEWS, COMMISSIONER OF BANKS OF WISCONSIN. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Frank P. Barker* and *Ray M. Stroud* for appellant. *Vernon W. Thomson,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for appellee. *Urban A. Lavery* filed a brief for the Interstate Collectors Association, as *amicus curiae,* in support of appellant. Reported below: 270 Wis. 453, 71 N. W. 2d 368.

No. 516. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW HAVEN *v.* CONNELLY, TAX COMMISSIONER OF CONNECTICUT. Appeal from the Supreme Court of

Errors of Connecticut. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Edward F. Becker, Charles M. Lyman* and *James Wm. Moore* for appellant. *John J. Bracken,* Attorney General of Connecticut, and *Louis Weinstein,* Assistant Attorney General, for appellee. Reported below: 142 Conn. 483, 115 A. 2d 455.

No. 231, Misc. LARSEN *v.* CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The appeal in this case is dismissed. Reported below: 44 Cal. 2d 642, 283 P. 2d 1043.

No. 290, Misc. SHOTKIN *v.* TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF FLORIDA ET AL. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal in this case is dismissed. Reported below: 81 So. 2d 814.

No. 309, Misc. FULLER ET AL. *v.* MULLINS. Appeal from the Supreme Court of Texas. *Per Curiam:* The appeal in this case is dismissed. *I. H. Spears* for appellants.

No. 457. CARTER *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. On consideration of the entire record and confession of error by the Solicitor General of the United States the judgment of the Court of Appeals is vacated and the case is remanded to the District Court. *John Y. Merrell* and *Daniel S. Ring* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 224 F. 2d 563.

Miscellaneous Orders.

No. 134. SQUIRE, COLLECTOR OF INTERNAL REVENUE, *v.* CAPOEMAN ET UX. Certiorari, 350 U. S. 816, to the United States Court of Appeals for the Ninth Circuit. Motion for leave to file brief of George H. Brasier, as *amicus curiae*, denied.

No. 474. REYNOLDS *v.* UNITED STATES, *ante*, p. 914. The application for a stay referred to the entire Court by MR. JUSTICE BLACK is denied. The petition for rehearing is also denied.

No. 133, Misc. EX PARTE LIPSCOMB;
No. 168, Misc. EX PARTE BANNING;
No. 179, Misc. SKINNER *v.* ILLINOIS;
No. 196, Misc. IN RE SMITH;
No. 299, Misc. COLEMON *v.* RAGEN, WARDEN;
No. 320, Misc. UNITED STATES EX REL. BERRY *v.* MARTIN, WARDEN;
No. 321, Misc. UNITED STATES EX REL. THOMAS *v.* PENNSYLVANIA ET AL.;
No. 327, Misc. SHEPHERD *v.* BROWNELL, ATTORNEY GENERAL;
No. 340, Misc. ELKINS *v.* SWOPE, WARDEN; and
No. 343, Misc. MCGUINN *v.* PEGELOW, SUPERINTENDENT, DISTRICT OF COLUMBIA REFORMATORY, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 337, Misc. MARTIN *v.* UNITED STATES; and
No. 338, Misc. DAVIS *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus and certiorari denied.

No. 324, Misc. UTTAL *v.* O'DONNELL, DIRECTOR, HARLEM VALLEY STATE HOSPITAL. Application denied.

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No. 149, Misc. GRIFFIN *v.* U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ET AL.;

No. 289, Misc. SMITH *v.* ROVER, U. S. ATTORNEY;

No. 335, Misc. MCDOWELL *v.* GRAVEN, U. S. DISTRICT JUDGE, ET AL.; and

No. 369, Misc. WELCH *v.* CRIMINAL DISTRICT COURT OF REEVES COUNTY, TEXAS. Motions for leave to file petitions for writs of mandamus denied.

No. 300, Misc. MAHURIN *v.* EIDSON, WARDEN; and

No. 334, Misc. LOPEZ *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari denied.

Probable Jurisdiction Noted.

No. 491. UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION ET AL. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States. *Robert W. Ginnane* and *Samuel R. Howell* for the Interstate Commerce Commission, *Charles P. Reynolds* and *James B. McDonough, Jr.* for the Seaboard Air Line Railroad Co., *Richard B. Gwathmey* for the Atlantic Coast Line Railroad Co., *A. J. Dixon* and *William B. Jones* for the Southern Railway Co., *John P. Fishwick* for the Norfolk & Western Railway Co., *Martin A. Meyer, Jr.* for the Virginian Railway Co., and *Hugh B. Cox* and *Windsor F. Cousins* for the Pennsylvania Railroad Co., appellees. Reported below: 132 F. Supp. 34.

No. 507. WALKER *v.* CITY OF HUTCHINSON ET AL. Appeal from the Supreme Court of Kansas. Probable jurisdiction noted. *A. Lewis Oswald* and *Herbert Monte Levy* for appellant. Reported below: 178 Kan. 263, 284 P. 2d 1073.

Certiorari Granted. (*See also No. 457, supra.*)

No. 503. JAY *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *Norman Leonard* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for respondent. Reported below: 222 F. 2d 820, 224 F. 2d 957.

No. 523. COLLINS ET AL. *v.* AMERICAN BUSLINES, INC. ET AL. Supreme Court of Arizona. Certiorari granted. *John P. Frank* for petitioners. *John R. Franks* for the Industrial Commission of Arizona, respondent. Reported below: 79 Ariz. 220, 286 P. 2d 214.

No. 529. DESYLVA *v.* BALLENTINE, GUARDIAN. C. A. 9th Cir. Certiorari granted. Motions for leave to file briefs of Music Publishers' Protective Association, Inc.; American Society of Composers, Authors and Publishers; Songwriters' Protective Association; and Motion Picture Association of America, Inc., as *amici curiae,* granted. *Pat A. McCormick* for petitioner. *Milton A. Rudin* for respondent. *Sidney Wm. Wattenberg* for the Music Publishers' Protective Association, Inc., *Herman Finkelstein* for the American Society of Composers, Authors and Publishers, *John Schulman* and *Solomon A. Klein* for the Songwriters' Protective Association, and *Sidney A. Schreiber* for the Motion Picture Association of America, Inc., movants. Reported below: 226 F. 2d 623.

Certiorari Denied. (*See also Misc. Nos. 300, 334, 337 and 338, supra.*)

No. 374. WALKER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *W. J. Durham* and *U. Simpson Tate* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Will D. Davis,* Assistant Attorney General, for respondent. Reported below: 162 Tex. Cr. R. ——, 286 S. W. 2d 144.

No. 456. LASKEY BROS. OF WEST VIRGINIA, INC. ET AL. *v.* WARNER BROS. PICTURES, INC. ET AL.; and

No. 512. PARAMOUNT FILM DISTRIBUTING CORP. ET AL. *v.* AUSTIN THEATRE, INC. ET AL. C. A. 2d Cir. Certiorari denied. *Bruno Schachner* and *Arnold Malkan* for petitioners in No. 456. *Bruce Bromley* for Paramount Film Distributing Corporation et al., *George A. Raftery* for RKO Keith-Orpheum Theatres, Inc. et al., and *Myles J. Lane* for Stanley Warner Management Corporation et al., petitioners in No. 512 and respondents in No. 456. Reported below: 224 F. 2d 824.

No. 478. NATIONAL ALUMINATE CORP. *v.* HALL LABORATORIES, INC. ET AL.; and

No. 508. HALL LABORATORIES, INC. ET AL. *v.* NATIONAL ALUMINATE CORP. C. A. 3d Cir. Certiorari denied. *John T. Chadwell, Arthur G. Connolly* and *Richard L. Johnston* for the National Aluminate Corporation. *Walter J. Blenko, Aaron Finger, James K. Everhart, Jr.* and *Eugene F. Buell* for Hall Laboratories, Inc. et al. Reported below: 224 F. 2d 303.

No. 497. ZIMMERMAN *v.* EMMONS. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter, Marvin C. Taylor* and *Herman Marcuse* for respondent. Reported below: 225 F. 2d 97.

No. 502. DANIELS ET AL. *v.* THOMAS. C. A. 10th Cir. Certiorari denied. *Bentley M. McMullin* for petitioners. *William V. Hodges* for respondent. Reported below: 225 F. 2d 795.

No. 506. GULF, MOBILE & OHIO RAILROAD CO. *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 5th Cir. Certiorari

denied. *Carl Fox, Y. D. Lott, Jr., E. L. All, Douglas Arant* and *B. A. Monaghan* for petitioner. *John W. Freels, Harold E. Spencer, D. K. McKamy, Joseph H. Wright* and *Chas. A. Helsell* for respondent. Reported below: 225 F. 2d 816.

No. 505. MALOY *v.* CITY OF MULBERRY. Supreme Court of Florida. Certiorari denied. Reported below: 80 So. 2d 609.

No. 514. E–I–M COMPANY *v.* PHILADELPHIA GEAR WORKS, INC. C. A. 5th Cir. Certiorari denied. *Walter J. Blenko* and *John H. F. Leonard* for petitioner. *Henry N. Paul, Jr., Douglas W. McGregor* and *Francis W. Sullivan* for respondent. Reported below: 223 F. 2d 36.

No. 515. WEINBERG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Mitchell Jenkins* for petitioners, and *Max Rosenn* for Bird, petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 226 F. 2d 161.

No. 518. KIEFER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: —— U. S. App. D. C. ——, 228 F. 2d 448.

No. 519. MEAGHER ET AL. *v.* EASTERN IRON & METAL CO., LTD. ET AL. C. A. 9th Cir. Certiorari denied. *Lloyd W. Dinkelspiel* and *Bernard H. Levinson* for petitioners. *A. Joseph Sherwood* for the Eastern Iron & Metal Co., Ltd., respondent. Reported below: 225 F. 2d 841.

No. 520. LENTIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Henry H. Koven* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Lee A. Jackson* and *Joseph F. Goetten* for respondent. Reported below: 226 F. 2d 695.

No. 521. BROWN LAND & ROYALTY CO. *v.* GREEN ET AL. C. A. 5th Cir. Certiorari denied. *Robert G. Chandler* for petitioner. *Richard C. Cadwallader* for Green et al., respondents.

No. 522. MCBRIDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* and *Isaac N. Groner* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 225 F. 2d 249.

No. 524. TERRY *v.* SEEGMILLER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Irving Wilner* for respondent.

No. 526. RAWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Howard P. Arnest* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 225 F. 2d 855.

No. 527. ESTATE OF MARKS ET AL. *v.* MACKINTOSH ET AL. C. A. 5th Cir. Certiorari denied. *Harry B. Kelleher, Thomas F. Jordan, George M. Snellings, Jr., W. Dan Files, E. Leland Richardson, Wood H. Thompson* and *George Gunby* for petitioners. *Samuel J. Tennant, Jr.* for Mackintosh et al., respondents. Reported below: 225 F. 2d 211.

No. 528. WALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Myer H. Gladstone* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 225 F. 2d 905.

No. 531. CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, *v.* GONZALES. C. A. 9th Cir. Certiorari denied. *Don Eastvold,* Attorney General of Washington, and *Cyrus A. Dimmick, Michael R. Alfieri* and *E. P. Donnelly,* Assistant Attorneys General, for petitioner. Reported below: 226 F. 2d 83.

No. 532. VON OPEL, RECEIVER, *v.* UEBERSEE FINANZ-KORPORATION, A. G., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Russell Hardy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill, George B. Searls* and *Myron C. Baum* for Brownell, Attorney General, and *Edward J. Ennis* for Fritz von Opel, respondents. Reported below: 96 U. S. App. D. C. 230, 225 F. 2d 530.

No. 534. ROBERTS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *L. E. Gwinn* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 226 F. 2d 464.

No. 536. LADY NELSON, LTD. ET AL. *v.* CREOLE PETROLEUM CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Eugene Underwood* for petitioners. *Ira A. Campbell* and *Raymond T. Greene* for respondents. Reported below: 224 F. 2d 591.

No. 540. WEISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Sidney Morse* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 227 F. 2d 72.

No. 541. BROCKMAN BUILDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *A. Calder Mackay* and *Stafford R. Grady* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Lee A. Jackson* and *A. F. Prescott* for respondent. Reported below: 231 F. 2d 145.

No. 542. BAXTER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edwin J. McDermott* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 129 Ct. Cl. 254.

No. 546. MARIO MERCADO E HIJOS *v.* PASARELL ET AL. C. A. 1st Cir. Certiorari denied. *Pedro M. Porrata* for petitioner. *Jose Guillermo Vivas* for respondents. Reported below: 225 F. 2d 715.

No. 549. WISMILLER *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff* for the United States. Reported below: 133 Ct. Cl. —, 135 F. Supp. 438.

No. 472. PRODUCTIVE INVENTIONS, INC. *v.* TRICO PRODUCTS CORP. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Herbert A. Bergson* and *Daniel J. Freed* for petitioner. *Frank G. Raichle* and *Arnold Weiss* for respondent. Reported below: 224 F. 2d 678.

No. 500. Societe Internationale Pour Participations Industrielles et Commerciales, S. A., *v.* Brownell, Attorney General, Successor to the Alien Property Custodian, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Roger J. Whiteford, John J. Wilson* and *Philip S. Peyser* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, Ralph S. Spritzer, James D. Hill, George B. Searls, Sidney B. Jacoby* and *Ernest S. Carsten* for respondents. Reported below: 96 U. S. App. D. C. 232, 225 F. 2d 532.

No. 513. United States ex rel. McCarthy *v.* Cook, Commanding Officer, et al. C. A. 3d Cir. Certiorari denied. The motion to substitute Brucker, present Secretary of the Army, as a party respondent in the place of Stevens, resigned, is granted. *Thomas D. McBride* and *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondents. Reported below: 225 F. 2d 71.

No. 538. Glenn L. Martin Co. *v.* Northwest Airlines, Inc. et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas would grant the petition for certiorari. Mr. Justice Burton took no part in the consideration or decision of this application. *C. M. Horn, Thomas V. Koykka* and *Edward D. Crocker* for petitioner. *Francis D. Butler* for respondents. Reported below: 224 F. 2d 120.

No. 101, Misc. Devorse *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, for respondent.

No. 16, Misc. TIPTON ET UX. *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied. Petitioners *pro se*. *Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 45, Misc. HERRING *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *John A. Wild,* Assistant Attorney General of Texas, for respondent.

No. 104, Misc. GRAEBER ET AL. *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Reported below: 46 Wash. 2d 602, 283 P. 2d 974.

No. 106, Misc. SCHINDLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 221 F. 2d 743.

No. 115, Misc. ANDERSON *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 136, Misc. BRINKLEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Preston Pope Reynolds* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *John A. Wild,* Assistant Attorney General, for respondent. Reported below: 161 Tex. Cr. R. 413, 277 S. W. 2d 704.

No. 144, Misc. CARRADO *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 157, Misc. INTERSIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Menahem Stim* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 222 F. 2d 888.

No. 181, Misc. NEIGUT *v.* KEARNEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 221 F. 2d 803.

No. 211, Misc. LIPSCOMB *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 224 F. 2d 410.

No. 213, Misc. UNITED STATES EX REL. LILYROTH *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. *Wesley G. Hall* for petitioner. Reported below: 222 F. 2d 654.

No. 227, Misc. WOODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 237, Misc. MORGAN *v.* CITY OF NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Peter Campbell Brown, Seymour B. Quel* and *John A. Murray* for respondent. Reported below: 285 App. Div. 1044, 141 N. Y. S. 2d 526.

No. 260, Misc. FOSTON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *William R. Ellis* for petitioner. Reported below: 162 Ohio St. 602, 124 N. E. 2d 724.

No. 264, Misc. HENDREX *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 285, Misc. O'BRIEN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 287, Misc. O'BRIEN *v.* HURLEY. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 331 Mass. 172, 117 N. E. 2d 922.

No. 291, Misc. RIOLA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 292, Misc. SATCHELL *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 296, Misc. SCASSERRA *v.* MARONEY, ACTING WARDEN. Supreme Court of Pennsylvania, Middle District. Certiorari denied.

No. 298, Misc. WIGGINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 302, Misc. MEEK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 305, Misc. MAHURIN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 306, Misc. HORTON *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 308, Misc. RHEIM *v.* MURPHY, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 286 App. Div. 957, 143 N. Y. S. 2d 666.

No. 310, Misc. WRIGHT *v.* INDIANA. Circuit Court of St. Joseph County, Indiana. Certiorari denied.

No. 314, Misc. LAMBERT *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 316, Misc. BAERCHUS *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 318, Misc. LAMB *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. *Edmund G. Brown,* Attorney General of California, *Frank J. Mackin,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 133 Cal. App. 2d 179, 283 P. 2d 727.

No. 319, Misc. UNITED STATES EX REL. HELLINGER *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: See 178 Pa. Super. 232, 116 A. 2d 76.

No. 322, Misc. CAVINESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 226 F. 2d 216.

No. 325, Misc. HOLLOWAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 323, Misc. TILGHMAN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Reported below: 82 So. 2d 136.

No. 326, Misc. UNITED STATES EX REL. CUNDIFF *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 331, Misc. ILLINOIS EX REL. PETRESS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 332, Misc. JACKSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 333, Misc. JOHNSON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 18 N. J. 422, 114 A. 2d 1.

No. 347, Misc. DIAMOND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 348, Misc. MAHURIN *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 349, Misc. WRIGHT *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 350, Misc. HACKETT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 354, Misc. DIAMOND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied. (*See also No. 474, ante, p. 929.*)

No. 60. BERRA *v.* UNITED STATES, *ante,* p. 910;

No. 112. REECE *v.* GEORGIA, *ante,* p. 85;

No. 165. LEADMAN *v.* GREYHOUND CORPORATION, *ante,* p. 831;

No. 348. RINES, ADMINISTRATOR, *v.* JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS ET AL., *ante,* p. 877;

No. 385. DUNN BROS., INC. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION, *ante,* p. 878;

No. 390. SYRES ET AL. *v.* OIL WORKERS INTERNATIONAL UNION, LOCAL NO. 23, ET AL., *ante,* p. 892;

No. 400. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL., *ante,* p. 892;

No. 409. WILSON, EXECUTOR, ET AL. *v.* SIMLER, *ante,* p. 892;

No. 415. OWENS ET AL. *v.* OKLAHOMA TURNPIKE AUTHORITY, *ante,* p. 893;

No. 431. MORRIS *v.* UNITED STATES, *ante,* p. 901;

No. 436. CAHILL *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., *ante,* p. 898;

No. 466. BRASIER *v.* UNITED STATES ET AL., *ante,* p. 913; and

No. 249, Misc. GOLDING *v.* WEEKS, SECRETARY OF COMMERCE, *ante,* p. 918. Petitions for rehearing denied.

No. 257. SOUTHERN PACIFIC CO. *v.* GILEO ET AL., *ante,* p. 818; and

No. 345. STERLING *v.* LOCAL 438, LIBERTY ASSOCIATION OF STEAM & POWER PIPE FITTERS & HELPERS ASSOCIATION, ET AL., *ante,* p. 875. Motions for leave to file petitions for rehearing denied.

No. 20. CORN PRODUCTS REFINING CO. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 46. Rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 31, Misc. BRAMBLE *v.* HEINZE, WARDEN, ET AL., *ante*, p. 899. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

JANUARY 10, 1956.

Case Dismissed Under Rule 60.

No. 242. INTER-STATE NATIONAL BANK OF KANSAS CITY ET AL. *v.* LUTHER, TRUSTEE. Certiorari, 350 U. S. 810, to the United States Court of Appeals for the Tenth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Frank H. Terrell* for petitioners. *John F. Eberhardt* for respondent. Reported below: 221 F. 2d 382.

JANUARY 16, 1956.

Decisions Per Curiam.

No. 504. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* PALMER. 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 and the judgment is reversed. *Hoiness* v. *United States*, 335 U. S. 297; *United States* v. *Ellicott*, 223 U. S. 524. *Harold R. Scoville* for petitioner. *James R. Moore* for respondent. Reported below: 225 F. 2d 876.

No. 525. BAUDHUIN *v.* WISCONSIN EX REL. MATTISON. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Lawrence G. Wickert* and *Harold H. Fuhrman* for appellant. *Walter H. Bender* for appellee. Reported below: 270 Wis. 249, 70 N. W. 2d 674.

No. 28, Misc. HOUSE *v.* SWOPE, WARDEN. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in light of new information. Petitioner *pro se.* *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 219 F. 2d 538.

Miscellaneous Orders.

No. 460. GREENWOOD *v.* UNITED STATES. Certiorari, 350 U. S. 821, to the United States Court of Appeals for the Eighth Circuit. It is ordered that *William J. Burrell, Esquire,* of Kansas City, Missouri, be appointed to serve as counsel for the petitioner in this case.

No. 13, Original. WISCONSIN *v.* TENNESSEE. This case is set for hearing during the week of January 23 on the motion for leave to file the complaint. *Vernon W. Thomson,* Attorney General, *Stewart G. Honeck,* Deputy Attorney General, and *Roy G. Tulane* and *George F. Sieker,* Assistant Attorneys General, for the State of Wisconsin, plaintiff. *George F. McCanless,* Attorney General, *Allison B. Humphreys, Jr.,* Solicitor General, and *Knox Bingham* and *James M. Glasgow,* Assistant Attorneys General, for the State of Tennessee, defendant.

No. 303, Misc. MCGAHAN *v.* ALVIS, WARDEN. Motion for leave to file petition for writ of certiorari and habeas corpus denied.

No. 315, Misc. BOZELL *v.* LINDSAY ET AL. Motion for leave to file petition for writ of injunction or mandamus denied.

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No. 304, Misc. TRAMAGLINO *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL.;

No. 358, Misc. ROBINSON *v.* UNITED STATES; and

No. 367, Misc. GRIMM *v.* WASHINGTON. Motions for leave to file petitions for writs of mandamus denied.

No. 317, Misc. EASON *v.* ELLIS, GENERAL MANAGER, STATE PENITENTIARY OF TEXAS;

No. 364, Misc. ALVIN *v.* BANNAN, WARDEN; and

No. 373, Misc. HILL *v.* UNITED STATES ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 339, Misc. HOWELL *v.* UNITED STATES. Motion for leave to file petition for writ of *coram nobis* denied.

No. 346, Misc. QUEEN *v.* U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE; and

No. 361, Misc. IN RE DE MERIT. Applications denied.

Probable Jurisdiction Noted.

No. 485. UNITED STATES GYPSUM CO. *v.* NATIONAL GYPSUM CO. ET AL. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. MR. JUSTICE CLARK took no part in the consideration or decision of this question. *Bruce Bromley, Cranston Spray, Robert C. Keck* and *Hugh Lynch, Jr.* for appellant. *Elmer Finck, Samuel I. Rosenman, Seymour D. Lewis, Malcolm A. Hoffmann* and *Seymour Krieger* for the National Gypsum Co., *Herbert W. Hirsh, Norman A. Miller* and *Ganson Purcell* for the Certain-Teed Products Corporation, *Benjamin P. DeWitt* and *Sidney Pepper* for the Newark Plaster Co., and *Joseph S. Rippey* for the Ebsary Gypsum Co., Inc., appellees. Reported below: See 124 F. Supp. 573.

Certiorari Granted. (*See also No. 504 and Misc. No. 28, supra.*)

No. 547. YATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Ben Margolis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 227 F. 2d 851.

Certiorari Denied. (*See also No. 303, Misc., supra.*)

No. 533. WESTERN UNION TELEGRAPH CO. *v.* KAUFMAN. C. A. 5th Cir. Certiorari denied. *John H. Waters* and *Ashton Phelps* for petitioner. Reported below: 224 F. 2d 723.

No. 535. UNITED STATES *v.* LUTHER, TRUSTEE. C. A. 10th Cir. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. *John F. Eberhardt* for respondent. Reported below: 225 F. 2d 499.

No. 539. WEBER, DOING BUSINESS AS WEBER-MILLICAN & CO., *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. *Aaron L. Danzig* for petitioner. *Solicitor General Sobeloff, William H. Timbers, Arden L. Andresen* and *Elizabeth B. A. Rogers* for respondent. Reported below: 222 F. 2d 822.

No. 544. JACKSON, TRUSTEE IN BANKRUPTCY, *v.* FLOHR ET AL., DOING BUSINESS AS FLOHR & CO. C. A. 9th Cir. Certiorari denied. *Ofell H. Johnson* for petitioner. *Francis E. Holman* for respondents. Reported below: 227 F. 2d 607.

No. 551. WELLS FARGO BANK & UNION TRUST CO., EXECUTOR, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur H. Kent* and *Valentine Brookes* for peti-

tioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Robert N. Anderson, Hilbert P. Zarky* and *Grant W. Wiprud* for the United States. Reported below: 225 F. 2d 298.

No. 552. HABERMAN, EXECUTOR, *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. *Fritz K. Knust* for petitioner. *F. G. Coates* for respondent. Reported below: 224 F. 2d 401.

No. 554. BLOCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Frank E. Flynn* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 226 F. 2d 185.

No. 561. NATIONAL AIRLINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John W. Cross* and *Clayton L. Burwell* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Franklin M. Stone, O. D. Ozment* and *Gerald F. Krassa* for the Civil Aeronautics Board, *E. Smythe Gambrell* and *W. Glen Harlan* for Eastern Air Lines, Inc., and *Stephen Ailes* for Colonial Airlines, Inc., respondents.

No. 571. KEIPER, ADMINISTRATRIX, *v.* NORTHWESTERN PACIFIC RAILROAD CO. District Court of Appeal of California, Third Appellate District. Certiorari denied. *Sidney Feinberg* for petitioner. *Arthur B. Dunne* for respondent. Reported below: 134 Cal. App. 2d 702, 286 P. 2d 47.

No. 576. SIMONS, EXECUTOR, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *George Trosk* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Lee A. Jackson* for the United States. Reported below: 227 F. 2d 168.

No. 577. HOWARD ET UX. *v.* WHEELER ET UX. Court of Appeals of Georgia. Certiorari denied. *Marvin G. Russell* for petitioners. *Carl A. Herbig* for respondents. Reported below: 92 Ga. App. 547, 88 S. E. 2d 699.

No. 138, Misc. HINES ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 96 U. S. App. D. C. 162, 223 F. 2d 627.

No. 146, Misc. WADE ET AL. *v.* CONASAUGA RIVER LUMBER CO. C. A. 6th Cir. Certiorari denied. *Frank N. Bratton* for petitioners. *Aubrey F. Folts* and *W. Neil Thomas, Jr.* for respondent. Reported below: 221 F. 2d 312.

No. 160, Misc. CARTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Fred Somkin* and *Thomas M. David* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 96 U. S. App. D. C. 40, 223 F. 2d 332.

No. 172, Misc. BOWMAN *v.* ALVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 224 F. 2d 275.

No. 225, Misc. MARCH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 261, Misc. SALEMI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Osmond K. Fraenkel* for petitioner. *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 309 N. Y. 208, 128 N. E. 2d 377.

No. 297, Misc. CAVANAUGH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Charles R. Garry* for petitioner. Reported below: 44 Cal. 2d 252, 282 P. 2d 53.

No. 328, Misc. WILLIAMS *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Carter Goode* and *Eugene Gressman* for petitioner. *Eugene Cook,* Attorney General of Georgia, *Robert H. Hall, E. Freeman Leverett,* Assistant Attorneys General, and *Paul Webb* for respondent. Reported below: 211 Ga. 763, 88 S. E. 2d 376.

No. 330, Misc. THOMAS *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se. Robert Morrison,* Attorney General of Arizona, *James H. Green, Jr.,* Special Assistant Attorney General, and *Earl Anderson* for respondent. Reported below: 79 Ariz. 158, 285 P. 2d 612.

No. 341, Misc. SPEARS *v.* TRANSCONTINENTAL BUS SYSTEM, INC. C. A. 9th Cir. Certiorari denied. *I. H. Spears, pro se.* Reported below: 226 F. 2d 94.

No. 345, Misc. ILLINOIS EX REL. SMITH *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 351, Misc. MULLINS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 353, Misc. JACKSON *v.* NEW YORK STATE PAROLE BOARD ET AL. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 286 App. Div. 939, 143 N. Y. S. 2d 280.

No. 355, Misc. CLUTE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 356, Misc. FARNHAM *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 357, Misc. HORN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 359, Misc. GWYTHER *v.* TALBOTT, SECRETARY OF THE AIR FORCE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for respondents.

No. 360, Misc. BUKORSKY *v.* UFFELMAN, SUPERINTENDENT, ILLINOIS SECURITY HOSPITAL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 362, Misc. JORDAN *v.* NEW YORK. County Court of Wyoming County, New York. Certiorari denied.

No. 395, Misc. ESTEP *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

JANUARY 19, 1956.

Case Dismissed Under Rule 60.

No. 471, Misc. ROBERTS *v.* MICHIGAN. On petition for writ of certiorari to the Supreme Court of Michigan. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court.

JANUARY 23, 1956.

Decision Per Curiam.

No. 100. LANSKY ET AL. *v.* SAVORETTI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *United States* v. *Minker*, 350 U. S. 179. *David W. Walters* for petitioners. *Solicitor General Sobeloff* for respondent. Reported below: 220 F. 2d 906.

Miscellaneous Orders.

No. 387, Misc. HICE *v.* JOHNSTON, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 393, Misc. CASTELLANOS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 404, Misc. JORDAN *v.* PEGELOW, SUPERINTENDENT, DISTRICT OF COLUMBIA REFORMATORY. Motion for leave to file petition for writs of mandamus and prohibition denied.

Certiorari Granted. (*See also No. 100, supra.*)

No. 555. SUGDEN ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Frank L. Snell* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 226 F. 2d 281.

No. 553. UNITED STATES *v.* BERGH ET AL. Court of Claims. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. *J. Albert Woll* and *Herbert S. Thatcher* for respondents. Reported below: 132 Ct. Cl. 564, 132 F. Supp. 462.

No. 559. UNITED STATES *v.* WESTERN PACIFIC RAILROAD CO. ET AL. Court of Claims. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter* and *Morton Hollander* for the United States. *Lawrence Cake* for respondents. Reported below: 132 Ct. Cl. 115, 131 F. Supp. 919.

No. 560. UNITED STATES *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 4th Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter* and *Alan S. Rosenthal* for the United States. *Strother Hynes* and *Meade T. Spicer, Jr.* for respondent. Reported below: 224 F. 2d 443.

Certiorari Denied. (*See also Misc. Nos. 387 and 393, supra.*)

No. 322. VIVIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Pearl M. Hart* and *Edmund Hatfield* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 224 F. 2d 53.

No. 563. NASH *v.* INTERSTATE COMMERCE COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Simon J. Nash, pro se. Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter* and *Lionel Kestenbaum* for respondents. Reported below: 96 U. S. App. D. C. 203, 225 F. 2d 42.

No. 537. SPRIGGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Carolyn E. Agger* and *Eugene Gressman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Joseph M. Howard* and *Dickinson Thatcher* for the United States. Reported below: 225 F. 2d 865.

No. 550. ARENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Alfonso J. Zirpoli* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 226 F. 2d 227.

No. 377, Misc. OWENS *v.* SWOPE ET AL. Supreme Court of New Mexico. Certiorari denied. Reported below: 60 N. M. 71, 287 P. 2d 605.

No. 383, Misc. MIDDLETON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 394, Misc. THOMPSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 398, Misc. MANARO *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 401, Misc. RICHARDSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 406, Misc. KIRK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 208 Md. 659, 117 A. 2d 912.

Rehearing Denied.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL., *ante*, p. 114. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 484. PAYNE ET AL. *v.* KOEHLER, DISTRICT DIRECTOR OF INTERNAL REVENUE, *ante*, p. 904. Motion for leave to file petition for rehearing denied.

No. 32. MICHEL *v.* LOUISIANA, *ante*, p. 91;

No. 36. PORET ET AL. *v.* LOUISIANA, *ante*, p. 91;

No. 379. BAUSCH & LOMB OPTICAL CO. *v.* LYON, *ante*, p. 911;

No. 393. LAZAROV ET AL. *v.* UNITED STATES, *ante*, p. 886;

No. 458. PECKHAM *v.* UNITED STATES, *ante*, p. 912;

No. 461. DRAWDY INVESTMENT CO. *v.* LEONARD ET UX., *ante*, p. 908; and

No. 282, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC., *ante*, p. 925. Petitions for rehearing denied.

JANUARY 30, 1956.

Decisions Per Curiam.

No. 13, Original. WISCONSIN *v.* TENNESSEE. On motion for leave to file complaint. Argued January 23, 1956. Decided January 30, 1956. *Per Curiam:* The motion for leave to file the complaint is denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Vernon W. Thomson,* Attorney General, argued the cause for the State of Wisconsin, plaintiff. With him on the brief were *Stewart G. Honeck,* Deputy Attorney General, and *Roy G. Tulane* and *George F. Sieker,* Assistant Attorneys General. *Knox Bigham,* Assistant Attorney General, argued the cause for the State of Tennessee, defendant. With him on the brief

were *George F. McCanless,* Attorney General, *Allison B. Humphreys, Jr.,* Solicitor General, and *James M. Glasgow,* Assistant Attorney General.

No. 105. THOMPSON *v.* COASTAL OIL CO. Certiorari, 350 U. S. 817, to the United States Court of Appeals for the Third Circuit. Argued January 24, 1956. Decided January 30, 1956. *Per Curiam:* The judgment is affirmed by an equally divided Court.* MR. JUSTICE HARLAN took no part in the consideration or decision of this case. *Charles Andrews Ellis* argued the cause for petitioner. With him on the brief was *Silas Blake Axtell. Michael E. Hanrahan* argued the cause and filed a brief for respondent. Reported below: 221 F. 2d 559.

No. 41. UNITED STATES *v.* VIRGINIA ELECTRIC & POWER CO. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *United States* v. *Twin City Power Co.,* 350 U. S. 222. *Solicitor General Sobeloff* for the United States. *Ralph H. Ferrell, Jr.* and *Francis V. Lowden, Jr.* for respondent. Reported below: 218 F. 2d 524.

No. 209. UNITED STATES *v.* TWIN CITY POWER COMPANY OF GEORGIA ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *United States* v. *Twin City Power Co.,* 350 U. S. 222. MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, MR. JUSTICE MINTON, and MR. JUSTICE HARLAN dissent for the reasons stated in MR. JUSTICE BURTON'S dissent in *United States* v. *Twin City*

*This judgment vacated and case restored to docket for reargument, *post,* p. 985.

Power Co., 350 U. S., at 229. *Solicitor General Sobeloff* for the United States. *David W. Robinson* for respondents. Reported below: 221 F. 2d 299.

No. 494. CROWDER ET AL. *v.* VIRGINIA EX REL. STATE CORPORATION COMMISSION. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Alexander H. Sands, Sr.* and *Frank A. S. Wright* for appellants. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *C. F. Hicks*, Assistant Attorney General, for appellee. Reported below: 197 Va. 96, 87 S. E. 2d 745.

Miscellaneous Orders.

No. 244. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. On petition for writ of certiorari to the Supreme Court of California. The motion for leave to file brief of National Lawyers Guild et al., as *amici curiae*, is denied.

No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL. Appeal from the Supreme Court of Nebraska. (Probable jurisdiction noted, 350 U. S. 910.) The motions of the State of Texas, the Commonwealth of Virginia, and M. E. Sandsberry, Jr. et al. for leave to appear and present oral argument, as *amici curiae*, are denied.

No. 516, Misc. COOPER *v.* UNITED STATES. Application for bail denied. *George C. Dyer* and *Ross O'Donoghue* for petitioner. *Solicitor General Sobeloff* for the United States.

Probable Jurisdiction Noted.

No. 530. UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. Appeal from

the Supreme Court of Wisconsin. Probable jurisdiction noted. *Harold A. Cranefield* and *Max Raskin* for appellant. *Vernon W. Thomson,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *Beatrice Lampert,* Assistant Attorney General, for the Wisconsin Employment Relations Board, and *John F. Lane* for the Kohler Co., appellees. *J. Albert Woll, Arthur J. Goldberg* and *David E. Feller* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging that probable jurisdiction be noted. Reported below: 269 Wis. 578, 70 N. W. 2d 191.

Certiorari Granted. (*See Nos. 41 and 209, supra.*)

Certiorari Denied.

No. 570. RABIN, DOING BUSINESS AS JACK RABIN FARMS, *v.* LAKE WORTH DRAINAGE DISTRICT. Supreme Court of Florida. Certiorari denied. *William E. Miller* for petitioner. *Hal H. McCaghren* and *C. D. Blackwell* for respondent. Reported below: 82 So. 2d 353.

No. 572. TRADERS & GENERAL INSURANCE CO. *v.* CHAMP ET AL. C. A. 9th Cir. Certiorari denied. *William H. Abrams* for petitioner. *John W. Montgomery* for respondents. Reported below: 225 F. 2d 802, 226 F. 2d 829.

No. 574. WARD *v.* THOMAS, SECRETARY OF THE NAVY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Marcus Borchardt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter* and *Alan S. Rosenthal* for respondent. Reported below: 96 U. S. App. D. C. 302, 225 F. 2d 953.

No. 567. ALBERS ET AL. *v.* THOMPSON, TRUSTEE, ET AL.; and

No. 568. MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE ET AL. *v.* THOMPSON, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of these applications. *Harry B. Sutter* and *Samuel H. Horne* for petitioners in No. 567. *William H. Biggs* for the Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee, and *Frederick M. Myers* for Huston et al., petitioners in No. 568. *Russell L. Dearmont* and *Thos. T. Railey* for Thompson et al. *Clair B. Hughes* for the Manufacturers Trust Co. *DeLancey C. Smith* for the Protective Committee for Secured Serial 5¼% Gold Bonds of Missouri Pacific Railroad Co. et al. *David M. Potts* and *Abraham Wilson* for the Empire Trust Co. *Douglas B. Steimle* for the Bondholders Protective Committee for Missouri Pacific Railroad Company General Mortgage Bonds. *William P. Palmer* for the Bankers Trust Co. *Robert H. McRoberts* for the St. Louis Union Trust Co. *John M. MacGregor* for the Protective Committee for Holders of Preferred Stock of the Missouri Pacific Railroad Co. *Harold C. McCollom* for the Irving Trust Co. *Leonard D. Adkins* and *S. Mayner Wallace* for the Savings Banks Trust Co. *Hugh L. M. Cole* for the City Bank Farmers Trust Co. *Edward F. Colladay* and *Everett Paul Griffin* for Wright et al. *Walter H. Brown, Jr.* for the New York Trust Co. *Abraham K. Weber* for Rosenberger et al. *Burton K. Wheeler, Edward K. Wheeler* and *Eldon S. Olson* for the Missouri Pacific Railroad Co. *Percival E. Jackson* for Jackson et al. *Emmet McCaffery* for the Chemical Corn Exchange Bank. *John L. J. Hart* for the Alleghany Corporation. Reported below: 225 F. 2d 761.

No. 582. TIDEWATER ASSOCIATED OIL CO. *v.* WILLIAMS. C. A. 9th Cir. Certiorari denied. *Edw. S. Franklin* for petitioner. *E. J. Friedman* for respondent. Reported below: 227 F. 2d 791.

No. 592. LIGHT *v.* MURPHY, GUARDIAN. C. A. 5th Cir. Certiorari denied. *Daniel Neal Heller* for petitioner. *Jacob Rassner* for respondent. Reported below: 224 F. 2d 944.

Rehearing Denied.

No. 120. ZIENTEK *v.* READING COMPANY, *ante*, p. 846. Motion for leave to file petition for rehearing denied.

No. 395. GIANFALA ET AL. *v.* TEXAS COMPANY, *ante*, p. 879. Rehearing denied.

FEBRUARY 27, 1956.

Decisions Per Curiam.

No. 558. MAC INVESTMENT CO. *v.* UNITED STATES. Appeal from the United States District Court for the Eastern District of Michigan. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Rockwell T. Gust, Bruce Griswold* and *James T. Hoffmann* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles H. Weston* and *Baddia J. Rashid* for the United States. Reported below: 134 F. Supp. 74.

No. 578. DOPCUS *v.* CITY OF WEST PALM BEACH ET AL. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Peter J. Cunningham* for appellant. *Egbert Beall, C. Robert Burns* and *Robie L. Mitchell* for appellees. Reported below: 82 So. 2d 756.

No. 589. V. P. SERODINO, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would note probable jurisdiction and set the case for argument. *John S. Burchmore* and *Robert N. Burchmore* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles H. Weston, Robert W. Ginnane* and *H. Neil Garson* for the United States and the Interstate Commerce Commission, *Donald Macleay* for the Inland Water Carriers Freight Association, *John H. Eisenhart, Jr.* for the Great Lakes Ship Owners Association, *Harry C. Ames, Jr.* for the American Barge Line Co. et al., *R. Granville Curry* and *Frederick M. Dolan* for the Union Barge Line Corporation, and *James H. McGlothlin* for the Baltimore & Ohio Railroad Co. et al., appellees.

No. 22, Misc. BISHOP *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 motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court for a hearing on the sanity of the petitioner at the time of his trial. *Edward John Skeens* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 96 U. S. App. D. C. 117, 223 F. 2d 582.

Miscellaneous Orders.

No. 345. STERLING *v.* LOCAL 438, LIBERTY ASSOCIATION OF STEAM & POWER PIPE FITTERS & HELPERS ASSOCIATION, ET AL. The motion for leave to file petition for writ of mandamus is denied. *Louis R. Milio* for petitioner.

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No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL. Appeal from the Supreme Court of Nebraska. (Probable jurisdiction noted, 350 U. S. 910.) The motions of the State of Utah and Chamber of Commerce of the United States for leave to appear and present oral argument, as *amici curiae,* are denied.

No. 298. UNION TRUST CO. ET AL. *v.* EASTERN AIR LINES, INC. On consideration of the petition for rehearing, the order of December 5, 1955, *ante,* p. 907, is reopened and is modified by directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment.

No. 204, Misc. HILL *v.* UNITED STATES;
No. 388, Misc. NEWSTEAD *v.* MISSOURI;
No. 402, Misc. EX PARTE LEVY;
No. 403, Misc. EX PARTE EMANUEL;
No. 409, Misc. LENZ *v.* LOONEY, WARDEN, ET AL.;
No. 413, Misc. SAM *v.* DELMORE, WARDEN;
No. 423, Misc. BINKLEY *v.* ALVIS, WARDEN;
No. 476, Misc. CHAPMAN *v.* GALLAGHER, SHERIFF;
No. 477, Misc. CONNOR *v.* MAYO; and
No. 478, Misc. BENTON *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States in No. 204, Misc.

No. 415, Misc. HARRISON *v.* SKEEN, WARDEN. Application for injunction and motion for leave to file petition for writ of mandamus denied.

No. 447, Misc. YACHT *v.* MURPHY, U. S. DISTRICT JUDGE. Petition for mandatory writ of injunction denied.

No. 420, Misc. WASHINGTON *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 475, Misc. BRYANT *v.* MAILLER, CHAIRMAN, NEW YORK STATE PAROLE BOARD, ET AL. Application denied.

No. 484, Misc. GOODSON *v.* VIRGINIA. Motion for leave to file petition for declaratory judgment denied.

Probable Jurisdiction Noted.

No. 548. BUTLER *v.* MICHIGAN. Appeal from the Recorder's Court of the City of Detroit, Michigan. Probable jurisdiction noted. *Manuel Lee Robbins* and *William G. Comb* for appellant. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellee. Briefs of *amici curiae* urging that probable jurisdiction be noted were filed by *Horace S. Manges* for the American Book Publishers Council, Inc., and *Osmond K. Fraenkel* for the Authors League of America, Inc.

Certiorari Granted. (*See also No. 22, Misc., supra.*)

No. 579. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* PARNELL; and

No. 580. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* FIRST NATIONAL BANK IN INDIANA, PENNSYLVANIA. C. A. 3d Cir. Certiorari granted. *Robert L. Kirkpatrick, John G. Buchanan* and *Erwin N. Griswold* for petitioner. *B. B. McGinnis* for respondent in No. 579. *Harvey A. Miller, Harvey A. Miller, Jr.* and *J. Lee Miller* for respondent in No. 580. Reported below: 226 F. 2d 297.

No. 616. Leiter Minerals, Inc. *v.* United States. C. A. 5th Cir. Certiorari granted. *Vance Plauche* and *Samuel W. Plauche, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 224 F. 2d 381.

No. 622. La Buy *v.* Howes Leather Co., Inc. et al. C. A. 7th Cir. Certiorari granted. *Edward R. Johnston* and *James A. Sprowl* for petitioner. *Jack I. Levy* for the Howes Leather Co., Inc., and *David L. Dickson* for Montgomery Ward & Co., Inc., respondents. Reported below: 226 F. 2d 703.

No. 625. Rogers *v.* Thompson, Trustee. Supreme Court of Missouri. Certiorari granted. *Mark D. Eagleton* for petitioner. *Thomas T. Railey* for respondent. Reported below: 284 S. W. 2d 467.

No. 601. Brownell, Attorney General, Successor to the Alien Property Custodian, *v.* Chase National Bank of New York, Trustee, et al. Appellate Division of the Supreme Court of New York, First Department. Certiorari granted. Mr. Justice Clark and Mr. Justice Harlan took no part in the consideration or decision of this application. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for petitioner. *Thomas A. Ryan* for the Chase National Bank of New York, *Samuel Anatole Lourie* for Schaefer et al., and *Arthur J. O'Leary* and *Kenneth J. Mullane* for Schwarzburger et al., respondents. Reported below: 1 Misc. 2d 558.

No. 610. Putnam et ux. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari granted. *A. Lyman Beardsley* for petitioners. *Solicitor General Sobeloff* for respondent. Reported below: 224 F. 2d 947.

No. 621. REED *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari granted. *Joseph S. Lord, III,* for petitioner. *Philip Price* for respondent. Reported below: 227 F. 2d 810.

No. 137, Misc. POLLARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

Certiorari Denied.

No. 557. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Randolph E. Paul* and *Louis Eisenstein* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 226 F. 2d 331.

No. 564. CANTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Hayner N. Larson* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Dickinson Thatcher* for the United States. Reported below: 226 F. 2d 313.

No. 569. RISSER ET AL. *v.* CITY OF LITTLE ROCK, ARK., ET AL. Supreme Court of Arkansas. Certiorari denied. *Bernal Seamster* for petitioners. *Pat Mehaffy* and *O. D. Longstreth, Jr.* for respondents. Reported below: —— Ark. ——, 281 S. W. 2d 949.

No. 583. THOMPSON, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Clarence E. Dawson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ralph S. Spritzer, Robert N. Anderson* and *Carolyn R. Just* for respondent. Reported below: 225 F. 2d 621.

No. 586. O'MALLEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *William Shaw McCallum* for O'Malley, petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 227 F. 2d 332.

No. 588. MOORE ET AL. *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Abraham Chaifetz* for petitioners. *George D. Horning, Jr.* for respondent. Reported below: 96 U. S. App. D. C. 335, 226 F. 2d 57.

No. 590. BIRD *v.* BIRD. Circuit Court of Washtenaw County, Michigan. Certiorari denied. *Douglas K. Reading* for petitioner.

No. 591. IACULLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 226 F. 2d 788.

No. 593. LOVELL MANUFACTURING CO. *v.* ETTEN ET AL.; and

No. 594. ETTEN ET AL. *v.* KAUFFMAN ET AL. C. A. 3d Cir. Certiorari denied. *Ralph Hammar* for petitioner in No. 593 and respondents in No. 594. *Charles F. Meroni* and *Isaac J. Silin* for petitioners in No. 594 and respondents in No. 593. Reported below: 225 F. 2d 844.

No. 597. DE MARIE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 226 F. 2d 783.

No. 595. SANDERS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 10th Cir. Certiorari denied. *Herman J. Galloway, Dan Moody* and *John E. Marshall* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *I. Henry Kutz* for respondents. Reported below: 225 F. 2d 629.

No. 599. LEE *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. *Charles Upton Shreve* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 225 F. 2d 674.

No. 600. GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* MOUNT. C. A. 6th Cir. Certiorari denied. *Clarence E. Weisell, Harold N. McLaughlin* and *Pierce Winningham, Jr.* for petitioner. *Russell Rice* for respondent. Reported below: 226 F. 2d 604.

No. 602. ASHLAND OIL & REFINING CO. *v.* BEAL. C. A. 5th Cir. Certiorari denied. *W. B. Browder, Jr.* for petitioner. *D. L. Case* and *A. W. Walker, Jr.* for respondent. Reported below: 224 F. 2d 731.

No. 605. PACIFIC AFFILIATE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George H. Koster* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice, A. F. Prescott* and *Melva M. Graney* for respondent. Reported below: 224 F. 2d 578.

No. 607. RICHLAND IRRIGATION DISTRICT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Kennard Cheadle* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 222 F. 2d 112.

No. 608. SCOTT PUBLISHING CO. ET AL. *v.* OWENS. Supreme Court of Washington. Certiorari denied. *C. W. Halverson* for petitioners. Reported below: 46 Wash. 2d 666, 284 P. 2d 296.

No. 609. KELLEY, GLOVER & VALE, INC., TRUSTEE, *v.* COFFING, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Albert H. Gavit* for respondents. Reported below: 226 F. 2d 113.

No. 611. MALLONEE ET AL., SHAREHOLDERS' PROTECTIVE COMMITTEE, ET AL. *v.* FEDERAL HOME LOAN BANK OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. *Wyckoff Westover* for Mallonee et al., *Charles K. Chapman* for the Long Beach Federal Savings & Loan Assn. et al., *F. Henry NeCasek* for the Home Investment Co., *Raymond Tremaine* for Wallis, and *Emmett E. Doherty* for Willhoit, petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade, Donald B. MacGuineas* and *Sylvester Hoffmann* for respondents. *J. E. Simpson, Charles S. Rhyne* and *Eugene F. Mullin, Jr.* filed a brief for Hall, as *amicus curiae,* urging the writ of certiorari be granted. Reported below: 225 F. 2d 349.

No. 618. CITY OF LOS ANGELES ET AL. *v.* NATIONAL SCHOOLS ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Roger Arnebergh, Bourke Jones* and *James A. Doherty* for petitioners. *Henry F. Walker* for respondents. Reported below: 135 Cal. App. 2d 311, 287 P. 2d 151.

No. 615. GARRISON *v.* WARNER BROTHERS PICTURES, INC. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Eugene D. Williams* for respondent. Reported below: 226 F. 2d 354.

No. 617. L & M Realty Corp. *v.* Leo, Executrix. C. A. 4th Cir. Certiorari denied. *Norris E. Halpern* for petitioner. *Samuel Goldblatt* and *Paul M. Lipkin* for respondent. Reported below: 228 F. 2d 89.

No. 612. Claypoole *v.* United States. C. A. 3d Cir. Certiorari denied. *James M. Davis, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Capello* for the United States. Reported below: 227 F. 2d 752.

No. 619. Brownell, Attorney General, *v.* Wong Kay Suey et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for petitioner. *Charles R. Richey* for respondents. Reported below: 97 U. S. App. D. C. —, 227 F. 2d 41.

No. 623. Travelers Insurance Co. *v.* Pennsylvania Railroad Co. C. A. 6th Cir. Certiorari denied. *Wayne E. Stichter* for petitioner. *Ross W. Shumaker* for respondent. Reported below: 226 F. 2d 520.

No. 628. Housing Authority of the City of Los Angeles *v.* Cordova et al. Superior Court of Los Angeles County, California, Appellate Department. Certiorari denied. *James J. Arditto* for petitioner. *A. L. Wirin* and *Fred Okrand* for respondents. Reported below: See 130 Cal. App. 2d 883, 279 P. 2d 215.

No. 575. Algemene Kunstzijde Unie N. V. *v.* United States. C. A. 4th Cir. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *George E. Cleary, Gaylord Davis* and *Silas G. Bernard* for petitioner. *Solicitor*

General Sobeloff, Assistant Attorney General Holland, Marvin E. Frankel, Harry Baum and *Joseph F. Goetten* for the United States. Reported below: 226 F. 2d 115.

No. 604. REYNOLDS METALS CO. *v.* MULTNOMAH COUNTY ET AL. Supreme Court of Oregon. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *C. Allan Hart, Jr.* for petitioner. *Robert F. Maguire* for respondents. Reported below: 206 Ore. 602, 287 P. 2d 921.

No. 18, Misc. MITCHELL *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. Petitioner *pro se. Clarence S. Beck,* Attorney General of Nebraska, *Clarence A. H. Meyer,* Deputy Attorney General, and *Robert V. Hoagland,* Assistant Attorney General, for respondent. Reported below: 159 Neb. 638, 68 N. W. 2d 184.

No. 69, Misc. NORMAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se. Charles W. Manning* for respondent.

No. 156, Misc. FRANKLIN *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Petitioner *pro se. Edwin K. Steers,* Attorney General of Indiana, and *Owen S. Boling,* Deputy Attorney General, for respondent. Reported below: 234 Ind. 418, 126 N. E. 2d 768.

No. 203, Misc. HOLLMAN *v.* CLARY, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff* for respondents.

No. 236, Misc. FRIERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor*

General Sobeloff, Assistant Attorney General Olney and *Beatrice Rosenberg* for the United States. Reported below: 223 F. 2d 255.

No. 253, Misc. DOW, ADMINISTRATRIX, *v.* CARNEGIE-ILLINOIS STEEL CORP. C. A. 3d Cir. Certiorari denied. *Blanch Freedman* for petitioner. Reported below: 224 F. 2d 414.

No. 284, Misc. WHITE *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 344, Misc. PARKER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 374, Misc. HERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 227 F. 2d 332.

No. 376, Misc. MCGLONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States.

No. 379, Misc. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 226 F. 2d 812.

No. 381, Misc. TABOR *v.* HARDWICK, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 224 F. 2d 526.

No. 382, Misc. BARUCHAS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 396, Misc. MAHAR *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied. Reported below: 247 Iowa 297, 72 N. W. 2d 516.

No. 399, Misc. BUSH *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 407, Misc. RICE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 408, Misc. PECK *v.* RAGEN, WARDEN, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 411, Misc. CUOMO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 412, Misc. KEMMERER *v.* SHEPHERD, SOLICITOR GENERAL, ET AL. C. A. 6th Cir. Certiorari denied.

No. 414, Misc. BERGERON *v.* SIGLER, WARDEN. Supreme Court of Louisiana. Certiorari denied.

No. 416, Misc. FRISCO *v.* ALVIS, WARDEN. District Court of Appeals of Ohio, Second District, Franklin County. Certiorari denied.

No. 417, Misc. FLEMING ET AL. *v.* MANNING, SUPERINTENDENT, SOUTH CAROLINA PENITENTIARY. Supreme Court of South Carolina. Certiorari denied.

No. 418, Misc. KITCHIN *v.* MISSOURI ET AL. Supreme Court of Missouri. Certiorari denied.

No. 419, Misc. CALDWELL *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 421, Misc. ARMSTRONG *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 422, Misc. NOR WOODS *v.* TEETS, WARDEN. District Court of Appeal of California, First District, and Supreme Court of California. Certiorari denied.

No. 424, Misc. BRAASCH ET AL. *v.* UTAH. C. A. 10th Cir. Certiorari denied. *A. W. Sandack* for Sullivan, petitioner. Reported below: 227 F. 2d 511.

No. 425, Misc. RICHARDSON *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 427, Misc. SIKES *v.* PENNSYLVANIA. County Court of McKean County, Pennsylvania. Certiorari denied.

No. 429, Misc. HALL *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 430, Misc. SPAMPINATO ET UX. *v.* M. BREGER & CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 226 F. 2d 742.

No. 434, Misc. AHEARN *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied. Reported below: 309 N. Y. 835, 130 N. E. 2d 622.

No. 432, Misc. HEARDS *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 435, Misc. DURAN *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 436, Misc. DUNNE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 437, Misc. JENKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 438, Misc. PERRIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 440, Misc. SATCHELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 441, Misc. IN RE POLLACK. Court of Appeals of New York. Certiorari denied.

No. 442, Misc. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 227 F. 2d 524.

No. 449, Misc. ILLINOIS EX REL. HAINES *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 454, Misc. DARRIN *v.* CAPITAL TRANSIT CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 453, Misc. POE *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 205 Ore. 538, 288 P. 2d 823.

No. 479, Misc. LITTLE *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 205 Ore. 659, 288 P. 2d 446, 290 P. 2d 802.

No. 462, Misc. CAHILL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 464, Misc. MORTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 97 U. S. App. D. C. —, 229 F. 2d 793.

No. 467, Misc. JAZOREK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 226 F. 2d 693.

No. 150, Misc. THOMAS *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 472, Misc. KLUBNIKIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 227 F. 2d 87.

No. 473, Misc. TRUSTY ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se.* *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 132 Ct. Cl. 192, 132 F. Supp. 340.

No. 450, Misc. MAHURIN *v.* MORRIS. Supreme Court of Missouri. Certiorari denied.

No. 481, Misc. SELL *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 482, Misc. WATSON *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 483, Misc. CROWE *v.* ILLINOIS ET AL. Circuit Court of Will County, Illinois. Certiorari denied.

No. 469, Misc. DESIMONE *v.* MARONEY, ACTING WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

Rehearing Granted. (*See No. 298, ante, p. 962.*)

Rehearing Denied.

No. 432, October Term, 1952. KENNEY *v.* WABASH RAILROAD CO., 344 U. S. 913. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion.

No. 538. GLENN L. MARTIN CO. *v.* NORTHWEST AIRLINES, INC. ET AL., *ante,* p. 937. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 500. SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A. *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., *ante,* p. 937. Rehearing

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

No. 33. LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., *ante*, p. 155;

No. 501. HOLMAN *v.* MATTHEWS, COMMISSIONER OF BANKS OF WISCONSIN, *ante*, p. 927;

No. 502. DANIELS ET AL. *v.* THOMAS, *ante*, p. 932;

No. 506. GULF, MOBILE & OHIO RAILROAD CO. *v.* ILLINOIS CENTRAL RAILROAD CO., *ante*, p. 932;

No. 518. KIEFER *v.* UNITED STATES, *ante*, p. 933;

No. 524. TERRY *v.* SEEGMILLER, *ante*, p. 934;

No. 525. BAUDHUIN *v.* WISCONSIN EX REL. MATTISON, *ante*, p. 944;

No. 540. WEISS *v.* UNITED STATES, *ante*, p. 936;

No. 546. MARIO MERCADO E HIJOS *v.* PASARELL ET AL., *ante*, p. 936;

No. 554. BLOCH *v.* UNITED STATES, *ante*, p. 948;

No. 136, Misc. BRINKLEY *v.* TEXAS, *ante*, p. 938;

No. 237, Misc. MORGAN *v.* CITY OF NEW YORK, *ante*, p. 939;

No. 290, Misc. SHOTKIN *v.* TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF FLORIDA ET AL., *ante*, p. 928;

No. 328, Misc. WILLIAMS *v.* GEORGIA, *ante*, p. 950;

No. 341, Misc. SPEARS *v.* TRANSCONTINENTAL BUS SYSTEM, INC., *ante*, p. 950;

No. 359, Misc. GWYTHER *v.* TALBOTT, SECRETARY OF THE AIR FORCE, ET AL., *ante*, p. 951;

No. 367, Misc. GRIMM *v.* WASHINGTON, *ante*, p. 946; and

No. 369, Misc. WELCH *v.* CRIMINAL DISTRICT COURT OF REEVES COUNTY, TEXAS, *ante*, p. 930. Petitions for rehearing denied.

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MARCH 1, 1956.

Cases Dismissed Under Rule 60.

No. 1. SILESIAN HOLDING CO. ET AL. *v.* UNION BANK OF SWITZERLAND ET AL.; and

No. 2. BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* UNION BANK OF SWITZERLAND ET AL. On petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit. The petitions for writs of certiorari are dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Ralph D. Ray* for the Silesian Holding Co., *William Gilligan* for the Silesian-American Corporation, and *Charles E. Scribner* for the Bondholders Protective Committee were on the stipulation for petitioners in No. 1. *Solicitor General Sobeloff* was on the stipulation for petitioner in No. 2. *Lawrence J. McKay* was on the stipulation for respondents. See 350 U. S. 858.

No. 198. AKTIESELSKABET DAMPSKIBSSELSKABET SVENBORG ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. Dismissed on motion of petitioners pursuant to Rule 60 of the Rules of this Court. *Stanley W. Schaefer* for petitioners. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, Melvin Richter* and *William W. Ross* were on the brief for the United States in opposition to the petition. Reported below: 131 Ct. Cl. 399, 130 F. Supp. 363.

No. 556. DAMPSKIBSSELSKABET NORDEN AKTIESELSKAB ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. Dismissed on motion of petitioners pursuant to Rule 60 of the Rules of this Court. *Stanley W. Schaefer* for petitioners. *Solicitor General Sobeloff* for the United States. Reported below: 132 Ct. Cl. 752.

No. 562. AKTIESELSKABET DAMPSKIBSSELSKABET VESTERHAVET ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. Dismissed on motion of petitioners pursuant to Rule 60 of the Rules of this Court. *John G. Laylin* for petitioners. *Solicitor General Sobeloff* for the United States. Reported below: 132 Ct. Cl. 752.

MARCH 5, 1956.

Decisions Per Curiam.

No. 587. BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA ET AL. *v.* FRASIER ET AL. Appeal from the United States District Court for the Middle District of North Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *William B. Rodman, Jr.*, Attorney General of North Carolina, and *T. W. Bruton, Claude L. Love, Harry W. McGalliard, John Hill Paylor, Peyton B. Abbott, Samuel Behrends, Jr.* and *Robert E. Giles,* Assistant Attorneys General, for appellants. *Conrad O. Pearson, Floyd B. McKissick, John H. Wheeler, Thurgood Marshall* and *Robert L. Carter* for appellees. Reported below: 134 F. Supp. 589.

No. 613. PACIFIC GAS & ELECTRIC CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from the District Court of Appeal of California, First Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Robert H. Gerdes* and *Richard H. Peterson* for appellant. *Edmund G. Brown,* Attorney General of California, *James E. Sabine* and *Irving H. Perluss,* Assistant Attorneys General, and *Ernest P. Goodman,* Deputy Attorney General, for appellee. Reported below: 134 Cal. App. 2d 149, 285 P. 2d 305.

No. 627. FULLERTON ET VIR. *v.* CITY OF SCHENECTADY. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Walter A. Fullerton* for appellants. *Charles W. Brown* for appellee. Reported below: 309 N. Y. 701, 855, 128 N. E. 2d 413, 130 N. E. 2d 909.

Miscellaneous Orders.

No. 373. COMMISSIONER OF INTERNAL REVENUE *v.* LOBUE. Certiorari, 350 U. S. 893, to the United States Court of Appeals for the Third Circuit. The motion for leave to file brief of Raymond G. Lochiel, as *amicus curiae,* is denied.

No. 714. POLLARD *v.* UNITED STATES. Certiorari, 350 U. S. 965, to the United States Court of Appeals for the Eighth Circuit. It is ordered that *Bennett Boskey, Esquire,* of Washington, D. C., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

Certiorari Granted.

No. 657. MASSACHUSETTS BONDING & INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *Stanley H. Rudman* for petitioners. *Solicitor General Sobeloff* for the United States. Reported below: 227 F. 2d 385.

No. 596. JENCKS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted, limited to questions 1 to 5, inclusive, and question 7 presented by the petition for the writ. *John T. McTernan* and *Nathan Witt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 226 F. 2d 540, 553.

No. 643. JOHNSTON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Hayden C. Covington* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 227 F. 2d 745.

No. 704. UNITED STATES *v.* PATTESON. C. A. 10th Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 229 F. 2d 257.

Certiorari Denied.

No. 57. BRIDAL VEIL LUMBER CO. *v.* UNION PACIFIC RAILROAD CO. C. A. 9th Cir. Certiorari denied. *Robert A. Imlay* for petitioner. Reported below: 219 F. 2d 825.

No. 185. WAGNER IRON WORKS *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 381. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO) *v.* WAGNER IRON WORKS. C. A. 7th Cir. Certiorari denied. *Morris Karon* for petitioner in No. 185. *Max Raskin* for petitioner in No. 381. *Solicitor General Sobeloff* and *Theophil C. Kammholz* filed memoranda for the National Labor Relations Board in both cases. Reported below: 220 F. 2d 126.

No. 343. UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), LOCAL 1113, *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Scribner* and *Arthur Kinoy* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 96 U. S. App. D. C. 46, 223 F. 2d 338.

No. 581. OHIO TRANSPORT, INC. *v.* PUBLIC UTILITIES COMMISSION OF OHIO. Supreme Court of Ohio. Certiorari denied. *Vernon L. Stouffer, Joe F. Asher* and *Edward J. Hayes* for petitioner. *C. William O'Neill,* Attorney General of Ohio, and *Ralph N. Mahaffey* and *Paul Tague, Jr.,* Assistant Attorneys General, for respondent. Reported below: 164 Ohio St. 98, 128 N. E. 2d 22.

No. 603. DUCCI *v.* COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *John L. Seymour* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, John R. Benney, Melvin Richter* and *Lester S. Jayson* for respondent. Reported below: 42 C. C. P. A. (Pat.) 1088, 225 F. 2d 683.

No. 630. FIELDS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Stuart B. Campbell* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 228 F. 2d 544.

No. 631. HOLT *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 2d Cir. Certiorari denied. *Carl O. Olson* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice, A. F. Prescott* and *Davis W. Morton, Jr.* for the Commissioner of Internal Revenue, respondent. Reported below: 226 F. 2d 757.

No. 632. CASTLEMAN ET AL. *v.* HUGHES ET AL. C. A. 9th Cir. Certiorari denied. *Jack P. Blume* for November et al., petitioners. *Irwin D. Shapiro* for Castleman et al., and *Roy W. McDonald* for RKO Radio Pictures, Inc., respondents. Reported below: 227 F. 2d 533.

No. 634. HIDALGO COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 7 ET AL. *v.* HEDRICK ET AL. C. A. 5th Cir. Certiorari denied. *Sawnie B. Smith* for petitioners. *H. H. Rankin, Jr.* for respondents. Reported below: 226 F. 2d 1.

No. 648. LEEPER ET AL. *v.* CHARLOTTE PARK AND RECREATION COMMISSION ET AL. Supreme Court of North Carolina. Certiorari denied. *Robert L. Carter, Thurgood Marshall* and *Spottswood W. Robinson, III* for petitioners. *Frank Thomas Miller, Jr.* for Barringer, respondent. Reported below: 242 N. C. 311, 88 S. E. 2d 114.

No. 21, Misc. TURCICH, ADMINISTRATRIX, *v.* LIBERTY CORPORATION. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman, Charles Lakatos* and *Joseph Weiner* for petitioner. *John D. M. Hamilton* for respondent. Reported below: 217 F. 2d 495.

No. 313, Misc. UNITED STATES EX REL. TOUHY *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. *Robert B. Johnstone* and *Howard B. Bryant* for petitioner. Reported below: 224 F. 2d 611.

No. 273, Misc. LEE *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Reported below: 309 N. Y. 676, 128 N. E. 2d 322.

Rehearing Denied.

No. 39. MITCHELL, SECRETARY OF LABOR, *v.* KING PACKING CO., *ante*, p. 260. Rehearing denied.

MARCH 12, 1956.

Decision Per Curiam.

No. 584. GENTLES ET AL. *v.* MCCONNELL, INSURANCE COMMISSIONER OF CALIFORNIA, ET AL.; and

No. 585. PACIFIC MUTUAL LIFE INSURANCE CO. ET AL. *v.* MCCONNELL, INSURANCE COMMISSIONER OF CALIFORNIA, ET AL. Appeals from the Supreme Court of California. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied. THE CHIEF JUSTICE and MR. JUSTICE REED took no part in the consideration or decision of these cases. *Alfred McCormack, John Logan O'Donnell, Peyton Ford* and *Alan Y. Cole* for appellants in No. 584. *Joseph L. Lewinson, Henry W. Low* and *Frank E. Holman* for appellants in No. 585. *Guy Knupp* and *Peery Price* for McConnell, and *Homer I. Mitchell, Warren M. Christopher* and *Charles A. Horsky* for the Pacific Mutual Life Insurance Co., appellees. Reported below: 44 Cal. 2d 715, 285 P. 2d 636.

Miscellaneous Orders.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. The request of the United States that it be permitted to defer until November 15, 1956, the submission of a statement of its views regarding its indispensability as a party to this suit is granted. *Solicitor General Sobeloff, Assistant Attorney General Rankin, Oscar H. Davis* and *George S. Swarth* for the United States.

No. 201. HYUN *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 350 U. S. 816, to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file brief of James C. Baker et al., as *amici curiae,* is denied.

No. 366. NAIM *v.* NAIM. Appeal from the Supreme Court of Appeals of Virginia. The motion to recall the mandate and to set the case down for oral argument upon the merits, or, in the alternative, to recall and amend the mandate is denied. The decision of the Supreme Court of Appeals of Virginia of January 18, 1956, 197 Va. 734, 90 S. E. 2d 849, in response to our order of November 14, 1955, 350 U. S. 891, leaves the case devoid of a properly presented federal question. *David Carliner, Herbert Monte Levy, Will Maslow, Arthur Lazarus, Richard Schifter, Jack Wasserman* and *Edward Ennis* for appellant-movant.

No. 105. THOMPSON *v.* COASTAL OIL CO. Certiorari, 350 U. S. 817, to the United States Court of Appeals for the Third Circuit. The petition for rehearing is granted. The judgment entered January 30, 1956, 350 U. S. 956, is vacated and the case is restored to the docket for reargument. MR. JUSTICE HARLAN took no part in the consideration or decision of the petition for rehearing. *Silas Blake Axtell* and *Charles Andrews Ellis* for petitioner. Reported below: 221 F. 2d 559.

No. 701. REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL, *v.* COVERT. Appeal from the United States District Court for the District of Columbia. Further consideration of the question of the jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for appellant. *Frederick Bernays Wiener* for appellee.

No. 437. BOSTON & PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. The petition for rehearing, the

motion to clarify the order of January 9, 350 U. S. 926, and the petition for reconsideration of the judgment as to costs are denied.

Certiorari Granted.

No. 241. NATIONAL LABOR RELATIONS BOARD *v.* LION OIL CO. C. A. 8th Cir. Certiorari granted. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for petitioner. *Jeff Davis* and *Sam Pickard* for respondent. Reported below: 221 F. 2d 231.

No. 713. KINSELLA, WARDEN, *v.* KRUEGER. C. A. 4th Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for petitioner. *Frederick Bernays Wiener* for respondent. See 137 F. Supp. 806.

Certiorari Denied. (*See also No. 624, ante, p. 413, and Nos. 584 and 585, supra.*)

No. 254. SMITH, COLLECTOR OF INTERNAL REVENUE, *v.* CURTIS PUBLISHING CO. C. A. 3d Cir. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman* for petitioner. *Francis H. Scheetz* for respondent. Reported below: 220 F. 2d 748.

No. 337. BANKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Joseph A. Maun* and *John W. Graff* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Joseph M. Howard* for the United States. Reported below: 223 F. 2d 884.

No. 598. HOLCOMB ET AL. *v.* AETNA LIFE INSURANCE CO. C. A. 10th Cir. Certiorari denied. *Glenn O. Young* and *Warren E. Miller* for petitioners. *Robert J. Woolsey* for respondent. Reported below: 228 F. 2d 75.

No. 606. PANHANDLE EASTERN PIPE LINE CO. *v.* MICHIGAN CONSOLIDATED GAS CO. C. A. 6th Cir. Certiorari denied. *William E. Miller* for petitioner. *Clifton G. Dyer* for respondent. Reported below: 226 F. 2d 60.

No. 620. DELAWARE & HUDSON CO. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. C. A. 2d Cir. Certiorari denied. *Frederick H. Wiggin* for petitioner. *William T. Griffin* and *Herbert Burstein* for the New York, New Haven & Hartford Railroad Co., and *Edward K. Hanlon* for the Connecticut Railway & Lighting Co., respondents. Reported below: 227 F. 2d 291.

No. 629. BLACKBURN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Crampton Harris, Pat Whitaker* and *Tom Whitaker* for petitioner. Reported below: 83 So. 2d 694.

No. 633. SEARS, ROEBUCK & CO. *v.* RY-LOCK CO., LTD. C. A. 9th Cir. Certiorari denied. *Frank E. Liverance, Jr.* for petitioner. Reported below: 227 F. 2d 615.

No. 637. MYERS *v.* HOLLISTER, DIRECTOR, INTERNATIONAL COOPERATION ADMINISTRATION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles F. O'Neall* and *Francis C. Brooke* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for respondents. *Ralph B. Gregg* filed a brief for the American Legion, as *amicus curiae,* urging that the petition be granted. Reported below: 96 U. S. App. D. C. 388, 226 F. 2d 346.

No. 638. AVCO MANUFACTURING CORP. ET AL. *v.* HAZELTINE RESEARCH, INC. C. A. 7th Cir. Certiorari denied. *Floyd H. Crews, Charles M. Hogan* and *Morris Relson* for

petitioners. *Laurence B. Dodds, Miles D. Pillars, Philip F. LaFollette, Leonard A. Watson* and *M. Hudson Rathburn* for respondent. Reported below: 227 F. 2d 137.

No. 640. DeBusk *v.* United States. Court of Claims. Certiorari denied. *Charles C. Crenshaw, Sr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 132 Ct. Cl. 790.

No. 642. Students Book Co. *v.* Washington Law Book Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nathan L. Silberberg* for petitioner. *William E. Leahy* and *Wm. J. Hughes, Jr.* for respondent. Reported below: —— U. S. App. D. C. ——, 232 F. 2d 49.

No. 644. Sylvania Electric Products, Inc. *v.* Barker, Executrix. C. A. 1st Cir. Certiorari denied. *Thomas H. Mahony* for petitioner. *Robert D. Neely* for respondent. Reported below: 228 F. 2d 842.

No. 645. Lambert *v.* United States. C. A. 5th Cir. Certiorari denied. *Fred Botts* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 226 F. 2d 602.

No. 646. Terrasi *v.* South Atlantic Lines, Inc. C. A. 2d Cir. Certiorari denied. *Harry D. Graham* for petitioner. *Louis J. Gusmano* for respondent. Reported below: 226 F. 2d 823.

No. 649. Songy et al. *v.* Godchaux Sugars, Inc. Twenty-Ninth Judicial District Court of Louisiana, Parish of St. John the Baptist. Certiorari denied.

Eugene Cotton and *Richard F. Watt* for petitioners. *M. Truman Woodward, Jr.* and *Richard C. Keenan* for respondent.

No. 650. FREDERICKS *v.* AMERICAN EXPORT LINES, INC. C. A. 2d Cir. Certiorari denied. *Chester A. Hahn* for petitioner. *Leo F. Hanan* and *Martin J. McHugh* for respondent. Reported below: 227 F. 2d 450.

No. 652. UNITED STATES *v.* CHAMBERLAIN WHOLESALE GROCERY CO. ET AL. C. A. 8th Cir. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. *Lyle J. Wirt* for the Chamberlain Wholesale Grocery Co. et al., *Melvin Telford Woods* for Neugebauer et al., and *M. Q. Sharpe* for Reis et al., respondents. Reported below: 226 F. 2d 492.

No. 655. GREY ET AL. *v.* AMERICAN AIRLINES, INC. C. A. 2d Cir. Certiorari denied. *Arthur M. Laufer* for petitioners. *William J. Junkerman* for respondent. Reported below: 227 F. 2d 282.

No. 656. JONES (FORMERLY SCHELLENBERGER), ADMINISTRATRIX, *v.* SCHELLENBERGER. C. A. 7th Cir. Certiorari denied. *Harold E. Marks, Herman Herson* and *Charles Dana Snewind* for petitioner. *William C. Wines* for respondent. Reported below: 225 F. 2d 784.

No. 669. ATLANTIC COAST LINE RAILROAD CO. *v.* KING ET AL., MEMBERS OF FLORIDA RAILROAD & PUBLIC UTILITIES COMMISSION, ET AL. Supreme Court of Florida. Certiorari denied. *Charles Cook Howell* for petitioner. *Lewis W. Petteway* for King et al., and *Earle B. Askew* for the City of St. Petersburg, Florida, respondents.

Rehearing Granted. (*See No. 105, ante, p. 985.*)

Rehearing Denied. (*See No. 437, ante, p. 985.*)

MARCH 26, 1956.

Decision Per Curiam.

No. 201. HYUN *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 350 U. S. 816, to the United States Court of Appeals for the Ninth Circuit. Argued March 5, 1956. Decided March 26, 1956. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *William B. Murrish* argued the cause for petitioner. With him on the brief was *John W. Porter*. *Beatrice Rosenberg* argued the cause for respondent. With her on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Carl H. Imlay*. *A. L. Wirin* filed a brief for the American Civil Liberties Union, Southern California Branch, as *amicus curiae,* supporting petitioner. Reported below: 219 F. 2d 404.

Miscellaneous Orders.

No. 15, Original. UNITED STATES *v.* LOUISIANA. The motion for leave to file the complaint is granted and the defendant is allowed 30 days within which to answer. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Attorney General Brownell, Solicitor General Sobeloff, Assistant Attorney General Rankin, Oscar H. Davis, John F. Davis* and *George S. Swarth* for the United States, plaintiff. *Fred S. LeBlanc,* Attorney General, *John L. Madden,* Assistant Attorney General, *Bailey Walsh,* Special Assistant Attorney General, *W. Scott Wilkinson, L. H. Perez* and *Grove Stafford* for the State of Louisiana, defendant.

No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL. Appeal from the Supreme Court of Nebraska. (Probable

jurisdiction noted, 350 U. S. 910.) The motion of the State of Nebraska for leave to appear and present oral argument, as *amicus curiae,* is granted and 30 minutes is allowed for that purpose. *Lester P. Schoene* and *Milton Kramer* for appellants. *Clarence S. Beck,* Attorney General, and *Robert A. Nelson,* Assistant Attorney General, for the State of Nebraska, movant. Reported below: 160 Neb. 669, 71 N. W. 2d 526.

No. 451. Railway Employes' Department, American Federation of Labor, et al. *v.* Hanson et al. Appeal from the Supreme Court of Nebraska. (Probable jurisdiction noted, 350 U. S. 910.) The motion of the National Right to Work Committee for leave to appear and present oral argument, as *amicus curiae,* is denied.

No. 672. Balian Ice Cream Co., Inc. et al. *v.* Arden Farms Co. et al. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file brief of Dee C. Blythe and Lynell G. Skarda, as *amici curiae,* is denied. The petition for writ of certiorari is denied. *Gordon F. Hampton* for petitioners. *Julian O. von Kalinowski* and *Leonard A. Diether* for respondents. Reported below: 231 F. 2d 356.

No. 293, Misc. Bilbao *v.* United States;

No. 311, Misc. Sherman *v.* United States; and

No. 506. Green *v.* New York. Motions for leave to file petitions for writs of certiorari denied.

No. 391, Misc. Cherry et al. *v.* Reid, Superintendent, District of Columbia Jail;

No. 497, Misc. Minton *v.* Criminal District Court Reporter of San Jacinto County, Texas; and

No. 502, Misc. Bukorsky *v.* Illinois et al. Motions for leave to file petitions for writs of mandamus denied.

No. 385, Misc. BEARD *v.* OHIO; and

No. 487, Misc. MOORE *v.* CALIFORNIA. Applications denied.

No. 488, Misc. LEE *v.* RHODE ISLAND;

No. 504, Misc. BLAKE *v.* WARDEN, NEW YORK STATE PENITENTIARY;

No. 507, Misc. HAMEL *v.* EIDSON, WARDEN;

No. 520, Misc. IN RE UTTAL;

No. 531, Misc. EX PARTE BANNING; and

No. 553, Misc. MACDONALD *v.* DUNNE, JUDGE, PROBATE COURT OF COOK COUNTY, ILLINOIS. Motions for leave to file petitions for writs of habeas corpus denied.

No. 602, Misc. BRINKLEY *v.* TEXAS. Motion for leave to file petition for writ of error *coram nobis* denied. *Preston Pope Reynolds* for petitioner.

Certiorari Granted.

No. 626. SCALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Telford Taylor* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Harold D. Koffsky* and *John H. Davitt* for the United States. Reported below: 227 F. 2d 581.

No. 661. LIGHTFOOT *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *John J. Abt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 228 F. 2d 861.

No. 664. PAOLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Daniel H. Greenberg* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 229 F. 2d 319.

No. 676. ROWOLDT *v.* PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari granted. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 228 F. 2d 109.

No. 378, Misc. FIKES *v.* ALABAMA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Alabama granted. *Peter A. Hall, Orzell Billingsley, Jr.* and *Jack Greenberg* for petitioner. *John Patterson,* Attorney General of Alabama, and *Robert Straub* and *Paul T. Gish, Jr.,* Assistant Attorneys General, for respondent. Reported below: 263 Ala. 89, 81 So. 2d 303.

Certiorari Denied. (*See also No. 672 and Misc. Nos. 293, 311 and 506, supra.*)

No. 543. RUBENSTEIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Isaac Mellman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 227 F. 2d 638.

No. 614. ZACHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Milton Yawitz* and *William J. Costello* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 227 F. 2d 219.

No. 641. EVANS *v.* ST. LOUIS HOUSING AUTHORITY ET AL. C. A. 8th Cir. Certiorari denied. *Anne M. Evans, pro se.* Reported below: 226 F. 2d 750.

No. 647. STARR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Jack H. Oppenheim* for petitioner. *Solicitor General Sobeloff,*

Acting Assistant Attorney General Rice and *Robert N. Anderson* for respondent. Reported below: 226 F. 2d 721.

No. 653. CLICK *v.* JACKSONVILLE TERMINAL CO. Supreme Court of Florida. Certiorari denied. *Will O. Murrell* for petitioner. *Elliott Adams* for respondent. Reported below: 83 So. 2d 117.

No. 654. DE VEGVAR *v.* GILLILLAND ET AL., CONSTITUTING THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ernest Angell, Percy A. Shay* and *James E. Hughes* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *B. Jenkins Middleton* for respondents. *Philip Levy, Samuel A. McCain, Milton Pollack* and *Robert T. Reynolds* filed a brief for Anninger et al., as *amici curiae,* in opposition to the petition. Reported below: 97 U. S. App. D. C. —, 228 F. 2d 640.

No. 659. MOODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *L. E. Gwinn* for petitioner. *Solicitor General Sobeloff* and *Acting Assistant Attorney General Rice* for the United States. Reported below: 229 F. 2d 740.

No. 660. BLUNT *v.* EMPLOYERS MUTUAL LIABILITY INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Franklin Jones* and *C. A. Brian* for petitioner. *Hobert Price* and *Royal H. Brin, Jr.* for respondent. Reported below: 227 F. 2d 312.

No. 663. CHRISTIANSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Eugene Gressman* and *John W. Graff* for petitioners. *Solicitor General Sobeloff,*

Assistant Attorney General Olney, Beatrice Rosenberg and *Joseph A. Barry* for the United States. Reported below: 226 F. 2d 646.

No. 665. CHESBRO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Samuel B. Groner* and *Harold Fein* for petitioners. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice, Harry Baum* and *S. Dee Hanson* for respondent. Reported below: 225 F. 2d 674.

No. 666. FREEMAN *v.* SUSSIN CORPORATION ET AL. C. A. 7th Cir. Certiorari denied. *Francis B. Stine* for petitioner. *Harry C. Kinne* for the Sussin Corporation, and *Benjamin F. Morrison* for Parkin, respondents. Reported below: 227 F. 2d 121.

No. 668. COLE ET AL. *v.* FAIRVIEW DEVELOPMENT, INC. ET AL. C. A. 9th Cir. Certiorari denied. *Bailey E. Bell* for petitioners. Reported below: 226 F. 2d 175.

No. 670. MCVAY *v.* PENNSYLVANIA EX REL. MCVAY. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Thomas W. Pomeroy, Jr.* for petitioner. *Dane Critchfield* for respondent. Reported below: 383 Pa. 70, 118 A. 2d 144.

No. 671. DWYER ET AL., TRUSTEES, *v.* FRANKLIN. C. A. 7th Cir. Certiorari denied. *J. G. Shehee* for petitioners. *Jacob B. Courshon* for respondent. Reported below: 227 F. 2d 152.

No. 673. SQUIRREL BRAND CO. *v.* BARNARD NUT CO., INC. C. A. 5th Cir. Certiorari denied. *Cedric W. Porter* and *Francis C. Browne* for petitioner. *Ben Paul Noble* for respondent. Reported below: 224 F. 2d 840.

No. 674. ALEXANDER *v.* IRVING TRUST CO., EXECUTOR, ET AL. C. A. 2d Cir. Certiorari denied. *Richard J. Mackey* for petitioner. *David Asch* for respondents. Reported below: 228 F. 2d 221.

No. 678. HAMMETT *v.* TIMES-HERALD, INC. C. A. 4th Cir. Certiorari denied. *William H. McGrath* for petitioner. *John Henry Lewin* and *Perry S. Patterson* for respondent. Reported below: 227 F. 2d 328.

No. 679. PALMER ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 229 F. 2d 861.

No. 680. VALDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 229 F. 2d 145.

No. 683. MOFFETT, EXECUTRIX, *v.* COMMERCE TRUST CO. Supreme Court of Missouri. Certiorari denied. *Martin J. O'Donnell* for petitioner. *Charles M. Blackmar* and *Philip J. Close* for respondent. Reported below: 283 S. W. 2d 591.

No. 685. ALPHA BETA FOOD MARKETS, INC. ET AL. *v.* RETAIL CLERKS UNION LOCAL NO. 770 ET AL. Supreme Court of California. Certiorari denied. *Harold F. Collins* for petitioners. *George E. Bodle* and *Thurman Arnold* for respondents. Reported below: 45 Cal. 2d 764, 291 P. 2d 433.

No. 687. ESTEP ET UX. *v.* DECKER, SHERIFF. C. A. 5th Cir. Certiorari denied. *Louis W. Woosley* for petitioners. Reported below: 228 F. 2d 320.

No. 700. Hoss et al. *v.* Purinton. C. A. 9th Cir. Certiorari denied. *Bailey E. Bell* for petitioners. Reported below: 229 F. 2d 104.

No. 726. Order of Railroad Telegraphers *v.* New Orleans, Texas & Mexico Railway Co. C. A. 8th Cir. Certiorari denied. *Milton Kramer* for petitioner. *Thos. T. Railey* for respondent. Reported below: 229 F. 2d 59.

No. 58, Misc. Taylor *v.* Moore, Warden. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *John Ben Shepperd,* Attorney General of Texas, and *John A. Wild,* Assistant Attorney General, for respondent.

No. 63, Misc. Shaw *v.* Florida. Supreme Court of Florida. Certiorari denied. *Zach H. Douglas* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent. Reported below: 79 So. 2d 304.

No. 89, Misc. Sepe *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 329, Misc. Lawrence *v.* California. Supreme Court of California. Certiorari denied.

No. 352, Misc. LeBeau *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 365, Misc. Kester *v.* California et al. Supreme Court of California. Certiorari denied.

No. 370, Misc. Branch *v.* California. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 134 Cal. App. 2d 572, 286 P. 2d 39.

No. 375, Misc. FILI *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 1 App. Div. 2d 799, 144 N. Y. S. 2d 738.

No. 389, Misc. ECKFORD *v.* RANDOLPH, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 400, Misc. LEVY *v.* HAYWARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff* for respondents.

No. 410, Misc. FORD *v.* RANDOLPH, WARDEN. Circuit Court of Pulaski County, Illinois. Certiorari denied.

No. 443, Misc. BREEDING *v.* WARDEN, MINNESOTA STATE PRISON. Supreme Court of Minnesota. Certiorari denied.

No. 448, Misc. MALMBERG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 225 F. 2d 958.

No. 451, Misc. STELTER *v.* RAGEN, WARDEN, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 456, Misc. LOWERY *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 457, Misc. SPRY *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 461, Misc. NOTTAGE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 286 App. Div. 1023, 146 N. Y. S. 2d 481.

No. 463, Misc. SHEARD *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 465, Misc. BONSOR *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 470, Misc. BOCOCK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 226 F. 2d 720.

No. 480, Misc. MAY *v.* INDIANA. Criminal Court of Marion County, Indiana. Certiorari denied.

No. 486, Misc. UNITED STATES EX REL. EVANS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 490, Misc. LIVESAY *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 491, Misc. EDWARDS *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 493, Misc. LANDERS *v.* NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 309 N. Y. 806, 130 N. E. 2d 608.

No. 495, Misc. HENDERSON *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 496, Misc. MITCHELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 498, Misc. CULLEN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 499, Misc. MURRAY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 500, Misc. GARCIA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 503, Misc. CIANCI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 508, Misc. SPENCER *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 512, Misc. DIDIER *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 514, Misc. PETRUCELLI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 519, Misc. AULL *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 521, Misc. FREY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 286 App. Div. 996, 144 N. Y. S. 2d 713.

No. 522, Misc. REDDINGTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 229 F. 2d 178.

No. 527, Misc. WATSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 530, Misc. UNITED STATES EX REL. LEDBETTER *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 532, Misc. STONE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 286 App. Div. 989, 144 N. Y. S. 2d 742.

No. 536, Misc. RICHARDSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 537, Misc. KADIO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 540, Misc. LUZZI *v.* COURT OF QUARTER SESSIONS OF OYER AND TERMINER, BERKS COUNTY, PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 543, Misc. SELTENRICH *v.* SIGLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 228 F. 2d 615.

No. 524, Misc. RIDDLE *v.* MCLEOD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 292 P. 2d 1043.

No. 681. SOUTHSIDE VIRGINIA TELECASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leonard H. Marks* and *Paul*

Dobin for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Warren E. Baker* and *Richard A. Solomon* for the Federal Communications Commission, and *Paul A. Porter, Harry M. Plotkin* and *Reed Miller* for the Petersburg Television Corporation, respondents. Reported below: 97 U. S. App. D. C. —, 228 F. 2d 644.

No. 688. EVANS *v.* BUENTE ET AL. Supreme Court of Missouri. Certiorari denied. *Anne M. Evans, pro se.* Reported below: 284 S. W. 2d 543, 285 S. W. 2d 550.

No. 682. COVINGTON MILLS ET AL. *v.* MITCHELL, SECRETARY OF LABOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Llewellyn C. Thomas, W. Glen Harlan* and *Whiteford S. Blakeney* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney, Edward H. Hickey, Stuart Rothman* and *Bessie Margolin* for the Secretary of Labor, *Arthur J. Goldberg, David E. Feller* and *Benjamin Wyle* for the Textile Workers Union of America, and *John W. Cragun* and *Warren F. Farr* for the National Association of Cotton Manufacturers et al., respondents. Reported below: 97 U. S. App. D. C. —, 229 F. 2d 506.

No. 397, Misc. MCNUTT *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Reported below: 47 Wash. 2d 563, 288 P. 2d 848.

No. 489, Misc. EX PARTE WINGFIELD. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 162 Tex. Cr. R. —, 282 S. W. 2d 219.

Rehearing Denied.

No. 505. MALOY *v.* CITY OF MULBERRY, *ante*, p. 933; and

No. 379, Misc. LIPSCOMB *v.* UNITED STATES, *ante*, p. 971. Petitions for rehearing denied.

APRIL 2, 1956.

Decisions Per Curiam.

No. 66. RIVERBANK LABORATORIES *v.* HARDWOOD PRODUCTS CORP. Certiorari, 350 U. S. 817, to the United States Court of Appeals for the Seventh Circuit. Argued January 16, 1956. Decided April 2, 1956. *Per Curiam:* The Court is of the opinion that the District Court correctly found there was proper service upon the defendant in this case. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to that Court for further proceedings.* MR. JUSTICE HARLAN took no part in the consideration or decision of this case. *Maurice Rosenfield* argued the cause for petitioner. With him on the brief were *Philip B. Kurland* and *Jack H. Oppenheim*. *David A. Fox* argued the cause for respondent. With him on the brief were *Gerrit P. Groen* and *Roger Sherman Hoar*. Reported below: 220 F. 2d 465.

No. 316. RAYMOND BAG CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction. *Wellmore B. Turner* and *Guy H. Wells* for appellant. *C. William O'Neill,* Attorney General of Ohio, and *Jack H. Bertsch* and *Larry H. Snyder,* Assistant Attorneys General, for appellee. Reported below: 163 Ohio St. 275, 126 N. E. 2d 321.

*As amended by order entered April 9, 1956, *post*, p. 1012.

Miscellaneous Orders.

No. 625. ROGERS *v.* THOMPSON, TRUSTEE. Certiorari, 350 U. S. 964, to the Supreme Court of Missouri. Missouri Pacific Railroad Company substituted for Thompson, Trustee, as the party respondent.

No. 445, Misc. STEVENS *v.* MARTIN, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: 1 App. Div. 2d 799, 144 N. Y. S. 2d 738.

No. 557, Misc. COLLINS *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 12, Misc. BINDRIM *v.* RAGEN, WARDEN;

No. 426, Misc. SCHRADER *v.* RAGEN, WARDEN;

No. 433, Misc. JOHNSON *v.* WARDEN, EASTERN STATE PENITENTIARY, PENNSYLVANIA; and

No. 589, Misc. DAVIS *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent in No. 12, Misc.

No. 428, Misc. BOYCE *v.* CALIFORNIA. Application denied.

No. 431, Misc. SHOTKIN *v.* BOARD OF EDUCATION OF FLORIDA. Petition for allowance of appeal denied.

No. 511, Misc. BELL *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 690. NATIONAL LABOR RELATIONS BOARD *v.* TEXTILE WORKERS UNION OF AMERICA, CIO, ET AL. United States Court of Appeals for the District of Columbia

Circuit. Certiorari granted. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Owsley Vose* for petitioner. *Arthur J. Goldberg, David E. Feller* and *Benjamin Wyle* for respondents. *Henry E. Seyfarth* and *Jerome Powell* filed a brief for the Personal Products Corporation, as *amicus curiae,* urging that the petition be granted. Reported below: 97 U. S. App. D. C. —, 227 F. 2d 409.

No. 702. Nilva *v.* United States. C. A. 8th Cir. Certiorari granted. *Eugene Gressman* and *John W. Graff* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 227 F. 2d 74, 228 F. 2d 134.

Certiorari Denied. (See also Misc. Nos. 445 and 557, supra.)

No. 667. Tractor Training Service et al. *v.* Federal Trade Commission. C. A. 9th Cir. Certiorari denied. *McDannell Brown* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 227 F. 2d 420.

No. 684. Michigan Wisconsin Pipe Line Co. *v.* Phillips Petroleum Co. et al. C. A. 10th Cir. Certiorari denied. *Charles V. Shannon* and *Arthur R. Seder, Jr.* for petitioner. *Rayburn L. Foster, Harry D. Turner* and *Kenneth Heady* for the Phillips Petroleum Co., respondent. Reported below: 227 F. 2d 470.

No. 686. Tonty *v.* Pennsylvania. Superior Court and the Supreme Court of Pennsylvania, Western District. Certiorari denied. *Charles J. Margiotti* and *Edward E. Petrillo* for petitioner. Reported below: 178 Pa. Super. Ct. 447, 115 A. 2d 883.

No. 696. SALE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Harry Gershenson* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 228 F. 2d 682.

No. 698. UNITED STATES EX REL. MARINO *v.* HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Irving Goodman, Emil M. Caliendo* and *Nathan B. Engelstein* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for respondent. Reported below: 227 F. 2d 886.

No. 705. RIESER ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Victor House, Spencer Pinkham, Louis Boehm, Nathan B. Kogan* and *Abraham K. Weber* for petitioners. *Albert R. Connelly, George M. Billings* and *John D. Calhoun* for respondent. Reported below: 228 F. 2d 563.

No. 709. PLEASON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice, Hilbert P. Zarky* and *Joseph F. Goetten* for respondent. Reported below: 226 F. 2d 732.

No. 711. BOARD OF EDUCATION OF HILLSBORO, OHIO, ET AL. *v.* CLEMONS ET AL. C. A. 6th Cir. Certiorari denied. *Timothy S. Hogan* for petitioners. *Constance Baker Motley* and *Thurgood Marshall* for respondents. Reported below: 228 F. 2d 853.

No. 717. EFCO MANUFACTURING, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Benjamin H. Dorsey* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Nancy M. Sherman* for respondent. Reported below: 227 F. 2d 675.

No. 756. KROMER ET AL. *v.* RIEGEL TEXTILE CORP. C. A. 7th Cir. Certiorari denied. *Abraham W. Brussell* for petitioners. *John F. Ryan* for respondent. Reported below: 227 F. 2d 741.

No. 689. PINELLAS BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Arthur H. Schroeder, Telford Taylor* and *Neville Miller* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Warren E. Baker, Richard A. Solomon* and *Daniel R. Ohlbaum* for the Federal Communications Commission, and *Philip J. Hennessey, Jr., Warren D. Quenstedt, Paul M. Segal* and *George S. Smith* for the Tribune Company, respondents. Reported below: —— U. S. App. D. C. ——, 230 F. 2d 204.

No. 677. JOHNSON *v.* IDAHO. Supreme Court of Idaho. Certiorari denied. *J. M. Lampert* for petitioner. *Graydon W. Smith,* Attorney General of Idaho, and *J. R. Smead,* Assistant Attorney General, for respondent. Reported below: 77 Idaho ——, 287 P. 2d 425.

No. 567, Misc. LEA *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *John P. Dowling* for petitioner. Reported below: 228 La. 724, 84 So. 2d 169.

No. 392, Misc. KRAMER *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *C. William O'Neill,* Attorney General of Ohio, and *Roger B. Turrell,* Assistant Attorney General, for respondent. Reported below: 163 Ohio St. 510, 127 N. E. 2d 367.

No. 452, Misc. LEARY *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 444, Misc. LINDSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harry Boehme, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 227 F. 2d 113.

No. 455, Misc. HATFIELD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 459, Misc. SESSIONS *v.* MANNING, SUPERINTENDENT, SOUTH CAROLINA PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 227 F. 2d 324.

No. 485, Misc. HILDERBRAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 505, Misc. ILLINOIS EX REL. WINSTON *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 518, Misc. ACKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. D. Maddox* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 226 F. 2d 575.

No. 544, Misc. ORTEGA *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 550, Misc. DI SILVESTRO *v.* UNITED STATES VETERANS ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff* for respondents. Reported below: 228 F. 2d 516.

No. 561, Misc. TILLMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 562, Misc. MERCER *v.* NEW YORK ET AL. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 585, Misc. MAHURIN *v.* WARDEN, MISSOURI STATE PRISON, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 587, Misc. GRIESHABER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 604, Misc. MIKKA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 7 Ill. 2d 454, 131 N. E. 2d 79.

Rehearing Denied.

No. 21. UNITED STATES *v.* TWIN CITY POWER CO. ET AL., *ante*, p. 222;

No. 209. UNITED STATES *v.* TWIN CITY POWER COMPANY OF GEORGIA ET AL., *ante*, p. 956;

No. 589. V. P. SERODINO, INC. *v.* UNITED STATES ET AL., *ante*, p. 961;

No. 396, Misc. MAHAR *v.* LAINSON, WARDEN, *ante*, p. 972; and

No. 430, Misc. SPAMPINATO ET UX. *v.* M. BREGER & CO., INC., *ante*, p. 973. Petitions for rehearing denied.

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APRIL 9, 1956.

Decisions Per Curiam.

No. 699. UNITED STATES *v.* WHITE BEAR BREWING CO., INC. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. Dissenting opinion by MR. JUSTICE DOUGLAS in which MR. JUSTICE HARLAN concurs. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Harry Baum* for the United States. *Kenneth F. Burgess, Edward P. Saltiel* and *William H. Avery, Jr.* for the White Bear Brewing Co. et al., respondents. Reported below: 227 F. 2d 359.

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

I dissent. The Court holds that a federal tax lien has priority over a statutory mechanic's lien, even though the mechanic's lien was specific, prior in time, perfected in the sense that everything possible under state law had been done to make it choate, and was being enforced before the federal tax lien arose. The mechanic's lien arose out of a contract to furnish labor and materials for the improvement of the real estate. The contract had been performed, the mechanic's lien recorded for a specific amount, and suit instituted to enforce the lien—all before the federal taxes were assessed and the tax liens recorded. Moreover, by the time the United States filed the present action to foreclose its tax liens, the mechanic's lien had been reduced to judgment, and the real estate sold at public auction and transferred by the purchaser to others. In *United States* v. *City of New Britain,* 347 U. S. 81, 84, we said that liens under state law were "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." Accordingly, we held that the principle that

"the first in time is the first in right" (*id.*, at 85) should be applied. I would apply the same principle here.

None of our other cases stands in the way. *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47, involved a general inchoate attachment lien which had been procured by the holder of an unsecured note. The attachment lien gave no right to proceed against the property unless the lienor obtained a judgment within three years. In *United States* v. *Acri,* 348 U. S. 211, the attachment lien was contingent upon the outcome of the suit for damages and was therefore "inchoate." *Id.*, at 214. The same was true of the lien of the garnisher in *United States* v. *Liverpool & London Ins. Co.,* 348 U. S. 215. In *United States* v. *Scovil,* 348 U. S. 218, the landlord's distress lien was "only a caveat of a more perfect lien to come." *Id.*, at 220. And in *United States* v. *Colotta,* 350 U. S. 808, the mechanic's lien which we subordinated to the federal tax lien had become definite in amount but no steps had been taken to file the statutory *lis pendens* notice nor to enforce the lien before the federal lien arose and was recorded.

Here the lien is not general and inchoate. It is specific and choate. The lienor had an immediate right to "enforce his lien" against the property. Ill. Rev. Stat., 1953, c. 82, § 9. This is clearly more than "merely a *lis pendens* notice that a right to perfect a lien exists." 340 U. S., at 50. Indeed, the mechanic's lienor had instituted suit to enforce the lien before the federal tax lien arose and had completed enforcement of the lien by the time the United States instituted the present action.

The Court apparently holds that under 26 U. S. C. § 3670 a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment. That is new doctrine, not warranted by our decisions, and supportable only if the *New Britain* case were overruled.

No. 675. ROTHWELL ET AL. *v.* LINZELL, DIRECTOR OF HIGHWAYS. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *John Caren, William S. Evatt* and *Robert L. Barton* for appellants. *C. William O'Neill,* Attorney General of Ohio, and *Hugh E. Kirkwood, Jr.,* Assistant Attorney General, for appellee. Reported below: 163 Ohio St. 517, 127 N. E. 2d 524.

Miscellaneous Orders.

No. 66. RIVERBANK LABORATORIES *v.* HARDWOOD PRODUCTS CORP. Certiorari, 350 U. S. 817, to the United States Court of Appeals for the Seventh Circuit. The order entered in this case on April 2, 1956, *ante,* p. 1003, is amended to provide for a remand of the case to the United States Court of Appeals for the Seventh Circuit.

No. 92. BLACK ET AL. *v.* CUTTER LABORATORIES. Certiorari, 350 U. S. 816, to the Supreme Court of California. The motion to continue this case to the next term is denied.

No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL. Appeal from the Supreme Court of Nebraska. (Probable jurisdiction noted, 350 U. S. 910.) The motion of the State of South Dakota for leave to appear and present oral argument, as *amicus curiae,* is denied.

No. 546, Misc. BALDWIN *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

No. 624, Misc. DONNELL *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 577, Misc. DUNN *v.* UNITED STATES;

No. 598, Misc. GORDON *v.* UNITED STATES; and

No. 638, Misc. WULSCH *v.* ILLINOIS ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 699, ante, p. 1010.*)

No. 718. UNITED STATES *v.* PLESHA ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade, Lester S. Jayson* and *David A. Turner* for the United States. *Philip C. Wilkins* for respondents. Reported below: 227 F. 2d 624.

Certiorari Denied. (*See also No. 624, Misc., supra.*)

No. 639. MOE ET AL. *v.* EARLE, FORMER COLLECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *William E. Dougherty* for petitioners. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 226 F. 2d 583.

No. 651. GREYHOUND CORPORATION *v.* MARTIN. C. A. 6th Cir. Certiorari denied. *K. Harlan Dodson, Jr.* for petitioner. *Kenneth Harwell* for respondent. Reported below: 227 F. 2d 501.

No. 708. DUBE ET AL. *v.* CITY OF CHICAGO. Supreme Court of Illinois. Certiorari denied. *Thomas J. Downs* for petitioners. *John C. Melaniphy* and *Sydney R. Drebin* for respondent. Reported below: 7 Ill. 2d 313, 131 N. E. 2d 9.

No. 712. FAUCETTA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Maurice Edelbaum* for petitioner.

No. 715. DESKIN *v.* PAZAN, DOING BUSINESS AS PAZAN MOTOR FREIGHT, ET AL. Supreme Court of Michigan. Certiorari denied. *David Previant* and *Abraham L. Zwerdling* for petitioner. Reported below: 343 Mich. 587, 73 N. W. 2d 327.

No. 725. MARATHON FOUNDRY & MACHINE CO. *v.* SCHWARTZ ET AL., TRUSTEES, ET AL. C. A. 7th Cir. Certiorari denied. *Jacob Cohen* for petitioner. *Francis S. Clamitz* for Schwartz et al., and *Henry S. Blum* for Dreyfuss, respondents. Reported below: 228 F. 2d 594.

No. 740. LUDVIGSEN *v.* COMMERCIAL STEVEDORING CO., INC. ET AL. C. A. 2d Cir. Certiorari denied. *Abraham M. Fisch* for petitioner. *Thomas F. Keane* and *Albert P. Thill* for the Commercial Stevedoring Co., Inc., and *J. Ward O'Neill* and *David P. H. Watson* for A/S L. J. Mowinckels Rederi, respondents. Reported below: 228 F. 2d 707.

No. 405, Misc. SMEREKA ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 492, Misc. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 228 F. 2d 747.

No. 539, Misc. HAINES *v.* CASTLE, ATTORNEY GENERAL OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 226 F. 2d 591.

No. 730. HULETT *v.* BRINSON. United States Court of Appeals for the District of Columbia Circuit. Certiorari

denied. *Karl M. Dollak* for petitioner. *E. Willard Hyde* and *Mario S. Romero* for respondent. Reported below: 97 U. S. App. D. C. —, 229 F. 2d 22.

No. 703. BRAMBLETT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Edward Bennett Williams* and *Murdaugh Stuart Madden* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: — U. S. App. D. C. —, 231 F. 2d 489.

No. 710. ALLENTOWN BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Donald C. Beelar* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Warren E. Baker, Richard A. Solomon* and *Daniel R. Ohlbaum* for respondent. Reported below: — U. S. App. D. C. —, 232 F. 2d 57.

No. 697. GRANT ET AL. *v.* BENSON, SECRETARY OF AGRICULTURE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry Polikoff* and *Lipman Redman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles H. Weston, Robert L. Farrington* and *Neil Brooks* for the Secretary of Agriculture, *Keith L. Seegmiller* and *Robert G. Blabey* for Carey, and *Frederic P. Lee* and *Edmund F. Cooke* for the Adams Producers Cooperative, Inc. et al., respondents. Reported below: 97 U. S. App. D. C. —, 229 F. 2d 765.

No. 547, Misc. MAS ET AL. *v.* OWENS-ILLINOIS GLASS CO. C. A. 3d Cir. Certiorari denied. Petitioners *pro se*. *Ward J. Herbert* for respondent. Reported below: 222 F. 2d 889.

No. 551, Misc. INGENITO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 19 N. J. 620, 118 A. 2d 129.

No. 555, Misc. MITCHELL *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied.

No. 559, Misc. STROUP *v.* FOX, ATTORNEY GENERAL OF WEST VIRGINIA, ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 574, Misc. ALLEN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 592, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

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No. 42. GIBSON *v.* LOCKHEED AIRCRAFT SERVICE, INC., *ante*, p. 356;

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No. 454, Misc. DARRIN *v.* CAPITAL TRANSIT CO. ET AL., *ante*, p. 974; and

No. 484, Misc. GOODSON *v.* VIRGINIA, *ante*, p. 963. Petitions for rehearing denied.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Effective July 8, 1956.

The following amendments to the Rules of Criminal Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on April 9, 1956, pursuant to 18 U. S. C. § 3771, which provides, in part, that, "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." They were reported to Congress by THE CHIEF JUSTICE on April 9, 1956, *post,* p. 1019, and became effective on July 8, 1956.

For earlier publications of the Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 9, 1956.

To the Senate and The House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court and pursuant to the Act of June 25, 1948, chapter 645 (62 Stat. 683), as amended by the Act of May 24, 1949, chapter 139, section 59 (63 Stat. 98), Title 18, U. S. C., § 3771, I have the honor to report to the Congress during a regular session thereof commencing the third day of January, 1956, the enclosed amendments to the Rules of Criminal Procedure for the United States District Courts.

These amendments to the Rules were adopted by the Supreme Court pursuant to the Acts above mentioned.

Respectfully yours,

(Signed) EARL WARREN,
Chief Justice of the United States.

ORDER.

ORDERED:

1. That Rules 41 (a), 46 (a)(2), 54 (a)(1), and 54 (c) of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended as hereinafter set forth.

2. That THE CHIEF JUSTICE be authorized to report these amendments to Congress in accordance with the provisions of Title 18, U. S. C., § 3771.

APRIL 9, 1956.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

"RULE 41 (a).

"(a) AUTHORITY TO ISSUE WARRANT. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth, or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

"RULE 46 (a)(2).

"(2) UPON REVIEW. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any Court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

"RULE 54 (a)(1).

"(1) *Courts.* These rules apply to all criminal proceedings in the United States District Courts, which include the District Court for the Territory of Alaska, the District Court of Guam, and the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District

Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

"RULE 54 (c).

"(c) APPLICATION OF TERMS. As used in these rules the term 'State' includes District of Columbia, Puerto Rico, territory and insular possession. 'Law' includes statutes and judicial decisions. 'Act of Congress' includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in an insular possession. 'District court' includes all district courts named in subdivision (a), paragraph (1) of this rule. 'Civil action' refers to a civil action in a district court. 'Oath' includes affirmations. 'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein. The words 'demurrer,' 'motion to quash,' 'plea in abatement,' 'plea in bar,' and 'special plea in bar,' or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12."

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