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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1955

APRIL 23 THROUGH JUNE 11, 1956

(END OF TERM)

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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.)

RETIREMENT OF CLERK OF THE COURT AND APPOINTMENT OF SUCCESSOR.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 11, 1956.

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

THE CHIEF JUSTICE said:

"On behalf of the Court, I announce with regret the retirement of one of its trusted officers. Mr. Harold B. Willey has been an employee of this Court for 32 years and for the last four years the Clerk of the Court. He has served faithfully and well. We all wish for him many years of happiness in the leisure he has earned and continued success in anything he may undertake. Mr. John T. Fey, presently Dean of the George Washington University Law School, will succeed Mr. Willey as Clerk and assume his duties on July 1st."

For order of appointment of Mr. Fey, entered June 11, 1956, see *post*, p. 977. Mr. Fey took the oath of office on June 30, 1956.

TABLE OF CASES REPORTED

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TABLE OF STATUTES CITED

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(B) Statutes of the States and Territories.

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(D) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1955.

SQUIRE, COLLECTOR OF INTERNAL REVENUE, *v.* CAPOEMAN ET UX.

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

No. 134. Argued January 19, 1956.—Decided April 23, 1956.

Income from the sale by the Government of standing timber on allotted forest land on the Quinaielt Indian Reservation held in trust by the Government for a noncompetent Quinaielt Indian may not be subjected to a capital-gains tax consistently with applicable treaty and statutory provisions and the Government's role as trustee and guardian for such Indian. Pp. 2–10.

(a) Though Indians are citizens and are subject to income taxes, it cannot be said that, in the circumstances of this case, the taxability of this Indian is unaffected by the treaty with the Quinaielt Indians, the General Allotment Act or the trust patent under which this land is held in trust for the Indian. Pp. 5–6.

(b) The provision of § 5 of the General Allotment Act of 1887 that lands on Indian reservations allotted to individual Indians and held in trust for them by the Government shall ultimately be conveyed to them in fee simple discharged of the trust and "free of all charge or incumbrance whatsoever" might well be construed as exempting such lands from taxation. Pp. 6–7.

(c) The provision of § 6 of the General Allotment Act, as amended, that, when a patent in fee simple has been issued to an Indian allottee, "all restrictions as to . . . taxation of said land shall be removed," implies that, until such time as the patent is issued, the allotment shall be free from all taxes. Pp. 7–9.

(d) *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, distinguished. P. 9.

(e) Since the purpose of the General Allotment Act is to enable Indian allottees to attain a state of competency and independence, and since that purpose would be defeated by imposition of the tax here proposed, it is unreasonable to infer that, in enacting the income tax law, Congress intended to destroy the tax exemption afforded by the General Allotment Act. P. 10.

220 F. 2d 349, affirmed.

Charles F. Barber argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Holland*, *Hilbert P. Zarky* and *Carolyn R. Just*.

John W. Cragun argued the cause for respondents. With him on the brief were *Glen A. Wilkinson* and *Robert W. Barker*.

Briefs of *amici curiae* urging affirmance were filed by *George W. Shoemaker* for the Coeur d'Alene Tribe of Indians et al., and *Houston Bus Hill*, *Wm. C. Leahy*, *Wm. J. Hughes, Jr.*, *Roy St. Lewis* and *Carl L. Shipley* for Taunah et al.

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

The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the Quinaielt Indian Reservation may be made subject to capital-gains tax, consistently with applicable treaty and statutory provisions and the Government's role as respondents' trustee and guardian.

When white men first came to the Olympic Peninsula, in what is now the State of Washington, they found the Quinaielt Tribe of Indians and their neighboring allied tribes occupying a tract of country lying between the

Coast Range and the Pacific Ocean. This vast tract, with the exception of a small portion reserved for their exclusive use, was ceded by the Quinaielts and their neighbors to the United States in exchange for protection and tutelage by the treaty of July 1, 1855, and January 25, 1856, 12 Stat. 971. According to this treaty, the Quinaielts were to have exclusive use of their reservation "and no white man shall be permitted to reside thereon without permission of the tribe . . . ." Article II. Years later, Congress passed the General Allotment Act of 1887.[1] Thereunder, Indians were to be allotted lands on their reservations not to exceed 160 acres of grazing land or 80 acres of agricultural land,[2] and 25 years after allotment the allottees were to receive the lands discharged of the trust under which the United States had theretofore held them, and to obtain a patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever," [3] though the President might extend the period.[4]

Respondents, husband and wife, were born on the reservation, and are described by the Government as full-blood, noncompetent Quinaielt Indians. They have lived on the reservation all their lives with the exception of the time served by respondent husband in the Armed Forces of the United States during World War II.

Pursuant to the treaty and under the General Allotment Act of 1887, respondent husband was allotted from the treaty-guaranteed reservation 93.25 acres and received

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[1] 24 Stat. 388, 25 U. S. C. § 331 *et seq.*

[2] 25 U. S. C. § 331.

[3] *Id.*, § 348.

[4] *Ibid.* The trust period here involved has regularly been extended by Executive Order. See note following 25 U. S. C. § 348, and see 25 U. S. C. § 462, which provides: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress."

a trust patent[5] therefor dated October 1, 1907.[6] During the tax year here in question, the fee title to this land was still held by the United States in trust for him, and was not subject to alienation or encumbrance by him, except with the consent of the United States Government, which consent had never been given. The land was forest land, covered by coniferous trees from one hundred years to several hundred years old. It was not adaptable to agricultural purposes, and was of little value after the timber was cut.

In the year 1943, the Bureau of Indian Affairs of the United States Department of the Interior entered into a contract of sale for the standing timber on respondent's allotted land for the total price of $15,080.80. The Government received the sum of $8,418.28 on behalf of respondent in that year.[7]

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[5] The term "patent" inadequately describes respondent's interest. "Congress . . . was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what . . . is in reality an allotment certificate . . . ." *Monson* v. *Simonson*, 231 U. S. 341, 345.

[6] In pertinent part, the patent provides:

"Now know ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Horton Capoeman, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, ..."

[7] This sale seems to have followed a pattern generally adopted by the Government in selling timber from Indian allotments. Huge areas of forest are put up for competitive bids by lumber companies. These tracts include the tribal forest lands and individual allotments, with the consent of tribal councils and individual allottees. The successful bidder is required to make an immediate advance payment

Upon demand of petitioner, Collector of Internal Revenue for the District of Washington, respondents filed a joint income tax return on October 10, 1947, for the tax year 1943, reporting long-term capital gain from the sale of the timber in that year. Simultaneously, they paid the taxes shown due. Thereafter, they filed a timely claim for refund of the taxes paid and contended that the proceeds from the sale of timber from the allotted land were not subject to federal income taxation because such taxation would be in violation of the provisions of the Quinaielt Treaty, the trust patent, and the General Allotment Act. The claim for refund was denied, and this action was instituted. The District Court found that the tax had been unlawfully collected and ordered the refund. 110 F. Supp. 924. The Court of Appeals, agreeing with the District Court but recognizing a conflict between this case and the decision of the Tenth Circuit in the case of *Jones* v. *Taunah,* 186 F. 2d 445, affirmed. 220 F. 2d 349. Because of the apparent conflict, we granted certiorari. 350 U. S. 816.

The Government urges us to view this case as an ordinary tax case without regard to the treaty, relevant statutes, congressional policy concerning Indians, or the

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of a large proportion of the estimated value of the lumber in the tract. Since as much as 640 million board feet have been sold at one time, this requirement makes it economically infeasible for any but the largest companies to submit bids. The uncertainties of such large scale operations, which are to be carried on over 25- or 30-year periods, coupled with local quality and accessibility variables, has resulted in substantially lower than prevailing market bids. In some instances, the return to other sellers of comparable timber was two or three times that received by the Indians. See Transcript of November 28, 1955, Joint Hearing of Subcommittee on Legislative Oversight Function of the Senate Committee on Interior and Insular Affairs and of Subcommittee on Public Works and Resources of the House Committee on Government Operations, 2151–2217, and *passim.*

guardian-ward relationship between the United States and these particular Indians. It argues:

> "As citizens of the United States they are taxable under the broad provisions of Sections 11 and 22 (a) of the Internal Revenue Code of 1939, which imposes a tax on the net income of every individual, derived from any source whatever. There is no exemption from tax in the Quinaielt Treaty, the General Allotment Act, the taxing statute, or in any other legislation dealing with taxpayers' affairs. . . .
>
> "Even if it be assumed that the United States would be prohibited from imposing a direct tax on the allotted land held in trust for the taxpayers, there would, nevertheless, be no prohibition against a federal tax on the income derived from the land, since a tax on such income is not the same as a tax on the source of the income, the land." [8]

We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

The courts below held that imposition of the tax here in question is inconsistent with the Government's promise to transfer the fee "free of all charge or incumbrance whatsoever." Although this statutory provision is not expressly couched in terms of nontaxability, this Court has said that

> "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards

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[8] Brief for Petitioner, pp. 7–8.

> of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' *Worcester* v. *The State of Georgia,* 6 Pet. 515, 582." *Carpenter* v. *Shaw,* 280 U. S. 363, 367.

Thus, the general words "charge or incumbrance" might well be sufficient to include taxation. But Congress, in an amendment to the General Allotment Act, gave additional force to respondents' position. Section 6 of that Act was amended to include a proviso—

> "That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . . ." [9]

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited.[10] The fact that this amendment antedated the federal income tax by 10 years also seems irrelevant. The

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[9] 25 U. S. C. § 349.

[10] See S. Rep. No. 1998, 59th Cong., 1st Sess.; H. R. Rep. No. 1558, 59th Cong., 1st Sess.

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literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.[11]

The first opinion of an Attorney General touching on this question seemed to construe the language of the amendment to Section 6 as exempting from the income tax income derived from restricted allotments.[12] And even without such a clear statutory basis for exemption, a later Attorney General advised that he was—

> "[U]nable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." [13]

Two of these opinions were published as Treasury Decisions.[14] On the basis of these opinions and decisions, and a series of district and circuit court decisions, it was said by Felix S. Cohen, an acknowledged expert in

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[11] This provision was relied upon by Chief Judge Phillips, dissenting in *Jones* v. *Taunah*, 186 F. 2d 445, 449.

[12] 34 Op. Atty. Gen. 275, 281 (1924). And see *id.*, 302 (1924).

[13] *Id.*, 439, 445 (1925). This ruling was followed in 35 Op. Atty. Gen. 1 (1925). And cf. *id.*, 107 (1926).

[14] T. D. 3570, III–1 Cum. Bull. 85 (1924); T. D. 3754, IV–2 Cum. Bull. 37 (1925).

Indian law, that "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." [15] These relatively contemporaneous official and unofficial writings are entitled to consideration. The Government makes much of a subsequent Attorney General's opinion,[16] which expressly overruled an earlier opinion,[17] on the authority of *Superintendent of Five Civilized Tribes* v. *Commissioner,* 295 U. S. 418.

That case is distinguishable from the case at hand. It involved what the Court characterized as "income derived from investment of surplus income from land," [18] or income on income, which Cohen termed "reinvestment income." The purpose of the allotment system was to protect the Indians' interest and "to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Board of Commissioners* v. *Seber,* 318 U. S. 705, 715. To this end, it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens. It is noteworthy that the *Superintendent* case did not involve an attempt to tax the land "surplus." [19]

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[15] Cohen, Handbook of Federal Indian Law, 265. He distinguished cases permitting the imposition of income taxes upon income derived from unrestricted lands, and upon reinvestment income. *Id.,* at 265–266. Mr. Cohen was Chairman of the Department of Interior Board of Appeals, and Assistant Solicitor of the Department. The Handbook has a foreword by Harold L. Ickes, then Secretary of the Interior, and was printed by the United States Government Printing Office.

[16] 39 Op. Atty. Gen. 107 (1937).

[17] 34 *id.,* 439.

[18] 295 U. S., at 421.

[19] The Government also relies upon *Choteau* v. *Burnet,* 283 U. S. 691, but that case also is not controlling, since it held only that a *competent* Indian, who had unrestricted control over lands and

The wisdom of the congressional exemption from tax embodied in Section 6 of the General Allotment Act is manifested by the facts of the instant case. Respondent's timber constitutes the major value of his allotted land. The Government determines the conditions under which the cutting is made.[20] Once logged off, the land is of little value.[21] The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would, in the words of the court below, be "at the least, a sorry breach of faith with these Indians." [22]

The judgment of the Court of Appeals is

Affirmed.

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

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income therefrom, was not exempt from income tax solely because of his status as an Indian. Such a tax is specifically authorized by Section 6 of the General Allotment Act.

[20] See *United States* v. *Eastman,* 118 F. 2d 421.

[21] See 220 F. 2d, at 350. In its answer filed in the District Court, the Government admitted that the lands "are generally unsuitable for agricultural purposes . . . ." R. 31.

[22] 220 F. 2d 350.

1 REED, J., dissenting.

MR. JUSTICE REED, dissenting.

My view is that the sale price of the timber in excess of its market value on March 1, 1913, was a capital gain, subject to federal income tax. *Jones* v. *Taunah,* 186 F. 2d 445. Cf. *Choteau* v. *Burnet,* 283 U. S. 691; *Superintendent* v. *Commissioner,* 295 U. S. 418. The gain is taxable income like the value of annual crops.

GRIFFIN ET AL. *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 95. Argued December 7, 1955.—Decided April 23, 1956.

Illinois law gives every person convicted in a criminal trial a right of review by writ of error; but a full direct appellate review can be had only by furnishing the appellate court with a bill of exceptions or report of the trial proceedings, certified by the trial judge, and it is sometimes impossible to prepare such documents without a stenographic transcript of the trial proceedings, which are furnished free only to indigent defendants sentenced to death. Convicted in an Illinois state court of armed robbery, petitioners moved in the trial court that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished to them without cost. They alleged that they were without funds to pay for such documents and that failure of the court to provide them would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Their motion was denied. They then filed a petition under the Illinois Post-Conviction Hearing Act, under which only questions arising under the State or Federal Constitution may be raised. They alleged that there were manifest nonconstitutional errors in the trial which entitled them to have their convictions set aside on appeal, that the only impediment to full appellate review was their lack of funds to buy a transcript, and that refusal to afford full appellate review solely because of their poverty was a denial of due process and equal protection. This petition was dismissed, and the Illinois Supreme Court affirmed, solely on the ground that the petition raised no substantial state or federal constitutional question. *Held:* Petitioners' constitutional rights were violated, the judgment of the Illinois Supreme Court is vacated, and the cause is remanded to that Court for further action affording petitioners adequate and effective appellate review. Pp. 13–26.

Judgment vacated and cause remanded.

Charles A. Horsky, acting under appointment by the Court, 349 U. S. 949, argued the cause and filed a brief for petitioners.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *Latham Castle,* Attorney General.

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

Illinois law provides that "Writs of error in all criminal cases are writs of right and shall be issued of course." [1] The question presented here is whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others.

The petitioners Griffin and Crenshaw were tried together and convicted of armed robbery in the Criminal Court of Cook County, Illinois. Immediately after their conviction they filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost. They alleged that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal . . . ." These allegations were not denied. Under Illinois law in order to get full direct appellate review of alleged errors by a writ of error it is necessary for the defendant to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge.[2] As Illinois concedes, it is sometimes

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[1] Ill. Rev. Stat., 1955, c. 38, § 769.1.

[2] Ill. Rev. Stat., 1953, c. 110, § 259.70A (Supreme Court Rule 70A), now Ill. Rev. Stat., 1955, c. 110, § 101.65 (Supreme Court Rule 65). A writ of error may also be prosecuted on a "mandatory record" kept by the clerk, consisting of the indictment, arraignment, plea, verdict and sentence. The "mandatory record" can be obtained free of charge by an indigent defendant. In such instances review is

impossible to prepare such bills of exceptions [3] or reports without a stenographic transcript of the trial proceedings.[4] Indigent defendants sentenced to death are provided with a free transcript at the expense of the county where convicted.[5] In all other criminal cases defendants needing a transcript, whether indigent or not, must themselves buy it. The petitioners contended in their motion before

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limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erroneous ruling on the admission of evidence. See *People* v. *Loftus*, 400 Ill. 432, 81 N. E. 2d 495. See also *Cullen* v. *Stevens*, 389 Ill. 35, 58 N. E. 2d 456; A Study of the Illinois Supreme Court, 15 U. of Chi. L. Rev. 107, 125.

[3] "A complete bill of exceptions consists of all proceedings in the case from the time of the convening of the court until the termination of the trial. It includes all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record." *People ex rel. Iasello* v. *McKinlay*, 409 Ill. 120, 124–125, 98 N. E. 2d 728, 730.

[4] In oral argument counsel for Illinois stated:

"With respect to the so-called bystanders' bill of exceptions or the bill of exceptions prepared from someone's memory in condensed and narrative form and certified to by the trial judge—as to whether that's available in Illinois I can say that everybody out there understands that it is but nobody has heard of its ever being actually used in a criminal case in Illinois in recent years. I think if you went back before the days of court reporting you would find them but none today. And I will say that Illinois has not suggested in the brief that such a narrative transcript would necessarily or even generally be the equivalent of a verbatim transcript of all of the trial.

. . . . . .

"There isn't any way that an Illinois convicted person in a non-capital case can obtain a bill of exceptions without paying for it."

See *People* v. *Yetter*, 386 Ill. 594, 54 N. E. 2d 532; *People* v. *Johns*, 388 Ill. 212, 57 N. E. 2d 895; *Jennings* v. *Illinois*, 342 U. S. 104, 109–110, on remand, 411 Ill. 21, 23, 25, 27, 102 N. E. 2d 824, 825–827; *People* v. *Joyce*, 1 Ill. 2d 225, 230, 115 N. E. 2d 262, 264–265; *People* v. *La Frana*, 4 Ill. 2d 261, 266, 122 N. E. 2d 583, 585–586; *People ex rel. Iasello* v. *McKinlay*, 409 Ill. 120, 98 N. E. 2d 728; *People* v. *O'Connell*, 411 Ill. 591, 104 N. E. 2d 825.

[5] Ill. Rev. Stat., 1955, c. 38, § 769a.

the trial court that failure to provide them with the needed transcript would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court denied the motion without a hearing.

Griffin and Crenshaw then filed a petition under the Illinois Post-Conviction Hearing Act.[6] Only questions arising under the Illinois or Federal Constitution may be raised in proceedings under this Act. A companion state act provides that indigent petitioners under the Post-Conviction Act may, under some circumstances, obtain a free transcript.[7] The effect is that indigents may obtain a free transcript to obtain appellate review of constitutional questions but not of other alleged trial errors such as admissibility and sufficiency of evidence. In their Post-Conviction proceeding petitioners alleged that there were manifest nonconstitutional errors in the trial which entitled them to have their convictions set aside on appeal and that the only impediment to full appellate review was their lack of funds to buy a transcript. These allegations have not been denied. Petitioners repeated their charge that refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection. This petition like the first was dismissed without hearing any evidence. The Illinois Supreme Court affirmed the dismissal solely on the ground that the charges raised no substantial state or federal constitutional questions—the only kind of questions which may

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[6] Ill. Rev. Stat., 1955, c. 38, §§ 826–832.

[7] Ill. Rev. Stat., 1955, c. 37, § 163f. This section provides in part that "In any case arising under [the Post-Conviction Hearing Act] in which the presiding judge has determined that the post-conviction petition is sufficient to require an answer, it shall be the duty of the official court reporter to transcribe, in whole or in part, his stenographic notes of the evidence introduced at the trial in which the petitioner was convicted, if instructed so to do by the State's Attorney or by the court."

be raised in Post-Conviction proceedings. We granted certiorari. 349 U. S. 937.

Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors.[8] There is no contention that petitioners were dilatory in their efforts to get appellate review, or that the Illinois Supreme Court denied review on the ground that the allegations of trial error were insufficient. We must therefore assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript. Counsel for Illinois denies that this violates either the Due Process or the Equal Protection Clause, but states that if it does, the Illinois Post-Conviction statute entitles petitioners to a free transcript. The sole question for us to decide, therefore, is whether due process or equal protection has been violated.[9]

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem.[10] People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: "To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or

[8] See note 4, *supra*, and cases there cited.

[9] A dissenting opinion argues that the constitutional question is narrower because petitioners alleged that a transcript was needed rather than required. The State made no such claim and all the briefs and arguments on both sides together with the opinion of the Illinois Supreme Court treated the sole question as being as we have stated it.

[10] "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: *but* in righteousness shalt thou judge thy neighbor." Leviticus, c. 19, v. 15.

disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court." *Chambers* v. *Florida,* 309 U. S. 227, 241. See also *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369.[11]

Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court.[12] Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's

[11] Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, this Court struck down the so-called "grandfather clause" of the Oklahoma Constitution as discriminatory against Negroes although that clause was by its terms nondiscriminatory. *Guinn* v. *United States,* 238 U. S. 347. See also *Lane* v. *Wilson,* 307 U. S. 268.

[12] See discussion in *Hovey* v. *Elliott,* 167 U. S. 409.

guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. Indeed, a provision in the Constitution of Illinois of 1818 provided that every person in Illinois "ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." [13]

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e. g., McKane* v. *Durston,* 153 U. S. 684, 687–688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See *Cole* v. *Arkansas,* 333 U. S. 196, 201; *Dowd* v. *United States ex rel. Cook,* 340 U. S. 206, 208; *Cochran* v. *Kansas,* 316 U. S. 255, 257; *Frank* v. *Mangum,* 237 U. S. 309, 327.

All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate

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[13] Ill. Constitution of 1818, Art. VIII, § 12. Substantially the same provision has been carried over into the present Illinois Constitution, Art. II, § 19.

courts.[14] Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it.[15] A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.[16] There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

The Illinois Supreme Court denied these petitioners relief under the Post-Conviction Act because of its holding that no constitutional rights were violated. In view of our holding to the contrary the State Supreme Court may decide that petitioners are now entitled to a transcript, as the State's brief suggests. See Ill. Rev. Stat., 1955, c. 37, § 163f. Cf. *Dowd* v. *United States ex rel. Cook,* 340

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[14] See Note, Reversals in Illinois Criminal Cases, 42 Harv. L. Rev. 566.

[15] See, *e. g.,* Ariz. Code Ann., 1939, § 44–2525; Ark. Stat., 1947, § 22–357; Page's Ohio Rev. Code Ann., 1954, § 2301.24; S. C. Code, 1952, § 15–1903; McKinney's N. Y. Laws, Crim. Code, 1945 (Supp. 1955), § 456. See also Note, 100 A. L. R. 321.

[16] The Criminal Court of Appeals in Oklahoma in 1913 spoke in the tradition of this country's dedication to due process and equal protection when it declared that the law is no respecter of persons and said:

"We want the people of Oklahoma to understand, one and all, that the poorest and most unpopular person in the state . . . can depend upon it that justice is not for sale in Oklahoma, and that no one can be deprived of his right of appeal simply because he is unable to pay a stenographer to extend the notes of the testimony." *Jeffries* v. *State,* 9 Okla. Cr. 573, 576, 132 P. 823, 824.

U. S., at 209–210. We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases.[17] The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice.[18] We are confident that the State will provide corrective rules to meet the problem which this case lays bare.

The judgment of the Supreme Court of Illinois is vacated and the cause is remanded to that court for further action not inconsistent with the foregoing paragraph. MR. JUSTICE FRANKFURTER joins in this disposition of the case.

Vacated and remanded.

MR. JUSTICE FRANKFURTER, concurring in the judgment.

The admonition of de Tocqueville not to confuse the familiar with the necessary has vivid application to appeals in criminal cases. The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law. "Due process" is, perhaps, the least frozen concept of our law—the least

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[17] See *Weatherford* v. *Wilson,* 3 Ill. (2 Scam.) 253 (1840); *People ex rel. Maher* v. *Williams,* 91 Ill. 87 (1878); *People ex rel. Hall* v. *Holdom,* 193 Ill. 319, 61 N. E. 1014 (1901); *People* v. *Joyce,* 1 Ill. 2d 225, 230, 115 N. E. 2d 262, 264–265 (1953); *Miller* v. *United States,* 317 U. S. 192 (1942); Note, 15 Ann. Cas. 737.

[18] Ill. Rev. Stat., 1955, c. 110, § 2; Ill. Rev. Stat., 1955, c. 110, § 101.65 (Supreme Court Rule 65); *People* v. *Callopy,* 358 Ill. 11, 192 N. E. 634.

confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of "due process" nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again with exceptions not now pertinent) until 1907. Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments.

Nor does the equal protection of the laws deny a State the right to make classifications in law when such classifications are rooted in reason. "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." *Tigner* v. *Texas,* 310 U. S. 141, 147. Since capital offenses are *sui generis,* a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others. Again, "the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." *McKane* v. *Durston,* 153 U. S. 684, 687–688. The States have exercised this discriminating power. The different States and the same State from time to time have conditioned criminal appeals by fixing the time within which an appeal may be taken, by delimiting the scope of review, by shaping the mechanism by which alleged errors may be brought before the appellate tribunal, and so forth.

But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down

conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society. Surely it would not need argument to conclude that a State could not, within its wide scope of discretion in these matters, allow an appeal for persons convicted of crimes punishable by imprisonment of a year or more, only on payment of a fee of $500. Illinois, of course, has done nothing so crude as that. But Illinois has said, in effect, that the Supreme Court of Illinois can consider alleged errors occurring in a criminal trial only if the basis for determining whether there were errors is brought before it by a bill of exceptions and not otherwise.* From this it follows that Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court. (See *People* v. *La Frana,* 4 Ill. 2d 261,

* "The record in the trial court may consist only of the mandatory record, *viz.*, indictment, arraignment, plea, trial and judgment. . . . This appears in the clerk's record in every case . . . . The record may include also a bill of exceptions, which consists of all of the motions and rulings of the trial court, evidence heard, instructions, and other matters which do not come directly within the clerk's mandatory record. This may be only a part of the record on review when a bill of exceptions is prayed and allowed, and certified by the court. . . . Therefore, when the review is had upon the common-law record, the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by argument, affidavit, or otherwise, to supply or expand the record. The case must stand or fall upon the errors appearing in the record. Of course, where there is a bill of exceptions, which includes motions, evidence, rulings on evidence, instructions, and the like, and such bill of exceptions is made a part of the record, errors may be reached by the remedy of writ of error. . . ." *People* v. *Loftus,* 400 Ill. 432, 433–434, 81 N. E. 2d 495, 497–498.

266, 122 N. E. 2d 583, 585–586.) It has thereby shut off means of appellate review for indigent defendants.

This Court would have to be willfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of indigent defendants, and that the number of those who have not had the means for paying for the cost of a bill of exceptions is not so negligible as to invoke whatever truth there may be in the maxim *de minimis*.

Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (John Cournos, A Modern Plutarch, p. 27.)

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The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope. But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.

It follows that the petitioners must be accorded an appeal from their conviction, either by having the State furnish them a transcript of the proceedings in the trial court, or by any other means, of which we have not been advised, that may be available under Illinois law, so that the errors of which they complain can effectively be brought for review to the Illinois Supreme Court. It is not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion.

The case of these petitioners is that the only adequate means of bringing for review allegedly fatal trial defects resulting in a potentially reversible conviction was a bill of exceptions which their poverty precluded them from securing. The order of the Illinois Supreme Court and the argument of the Attorney General of Illinois in support of that court's judgment apparently assumed that that was the case. Considering the nature of the issue

thus raised by petitioners appearing for themselves, it would savor of disrespect to the Supreme Court of Illinois for us to find an implication in its unqualified rejection of the claims of the petitioners that an effective review other than by bill of exceptions could be had in the present situation. Cf. *Diaz* v. *Gonzalez,* 261 U. S. 102, 105–106. When the case again reaches the Illinois Supreme Court, that court may, of course, find within the existing resources of Illinois law means of according to petitioners effective satisfaction of their constitutional right not to be denied the equal protection of the laws.

We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted—as was the timely claim by these petitioners—cannot be asserted now. The answer is too easy. Candor compels acknowledgement that the decision rendered today is a new ruling. Candor compels the further acknowledgement that it would not be unreasonable for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore it could well be claimed that thereby any conscious waiver of a constitutional right is negatived.

The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial

choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasons, law generally speaks prospectively. More than a hundred years ago, for instance, the Supreme Court of Ohio, confronted with a problem not unlike the one before us, found no difficulty in doing so when it concluded that legislative divorces were unconstitutional. *Bingham* v. *Miller,* 17 Ohio 445. In arriving at a new principle, the judicial process is not impotent to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel "either/or" determinations.

We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court. See Address of Chief Judge Cardozo, 55 Report of New York State Bar Assn., 263, 294 *et seq.*, and *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 363–366. Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated.

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

While we do not disagree with the desirability of the policy of supplying an indigent defendant with a free transcript of testimony in a case like this, we do not agree

that the Constitution of the United States compels each State to do so with the consequence that, regardless of the State's legislation and practice to the contrary, this Court must hold invalid state appellate proceedings wherever a required transcript has not been provided without cost to an indigent litigant who has requested that it be so provided. It is one thing for Congress and this Court to prescribe such procedure for the federal courts. It is quite another for this Court to hold that the Constitution of the United States has prescribed it for all state courts.

In the administration of local law the Constitution has been interpreted as permitting the several States generally to follow their own familiar procedure and practice. In so doing this Court has recognized the widely differing but locally approved procedures of the several States. Whether approving of the particular procedures or not, this Court has treated them largely as matters reserved to the States and within the broad range of permissible "due process" in a constitutional sense.

Illinois, as the majority admit, could thus deny an appeal altogether in a criminal case without denying due process of law. *McKane* v. *Durston,* 153 U. S. 684. To allow an appeal at all, but with some difference among convicted persons as to the terms upon which an appeal is exercised, does not deny due process. It may present a question of equal protection. The petitioners urge that point here.

Whether the Illinois statute denies equal protection depends upon whether, first, it is an arbitrary and unreasonable distinction for the legislature to make, between those convicted of a capital offense and those convicted of a lesser offense, as to their right to a free transcript. It seems to us the whole practice of criminal law teaches that there are valid distinctions between the ways in which criminal cases may be looked upon and treated

without violating the Constitution. Very often we have cases where the convicted seek only to avoid the death penalty. As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty. There is something pretty final about a death sentence.

If the actual practice of law recognizes this distinction between capital and noncapital cases, we see no reason why the legislature of a State may not extend the full benefit of appeal to those convicted of capital offenses and deny it to those convicted of lesser offenses. It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations. Examples of such will readily occur. All States allow a larger number of peremptory challenges of jurors in capital cases than in other cases. Most States permit changes of venue in capital cases on different terms than in other criminal cases. Some States require a verdict of 12 jurors for conviction in a capital case but allow less than 12 jurors to convict in noncapital cases. On the other side of the coin, most States provide no statute of limitations in capital cases. We think the distinction here made by the Illinois statute between capital cases and noncapital cases is a reasonable and valid one.

Secondly, certainly Illinois does not deny equal protection to convicted defendants when the terms of appeal are open to all, although some may not be able to avail themselves of the full appeal because of their poverty. Illinois is not bound to make the defendants economically equal before its bar of justice. For a State to do so may be a desirable social policy, but what may be a good legislative policy for a State is not necessarily required by the Constitution of the United States. Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better

lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?

The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws.

MR. JUSTICE BLACK'S opinion is not limited to the future. It holds that a past as well as a future conviction of crime in a state court is invalid where the State has failed to furnish a free transcript to an indigent defendant who has sought, as petitioner did here, to obtain a review of a ruling that was dependent upon the evidence in his case. This is an interference with state power for what may be a desirable result, but which we believe to be within the field of local option.

Whether Illinois would permit appeals adequate to pass upon alleged errors on bills of exception, prepared by counsel and approved by judges, without requiring that full stenographic notes be transcribed is not before us. We assume that it would.

MR. JUSTICE HARLAN, dissenting.

Much as I would prefer to see free transcripts furnished to indigent defendants in all felony cases, I find myself unable to join in the Court's holding that the Fourteenth Amendment requires a State to do so or to furnish indigents with equivalent means of exercising a right to appeal. The importance of the question decided by the Court justifies adding to what MR. JUSTICE BURTON and MR. JUSTICE MINTON have written my further grounds for dissenting and the reasons why I find the majority opinions unsatisfying.

1. *Inadequacy of the Record.*—I would decline to decide the constitutional question tendered by petitioners because the record does not present it in that "clean-cut,"

"concrete," and "unclouded" form usually demanded for a decision of constitutional issues. *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 584. In my judgment the case should be remanded to the Illinois courts for further proceedings so that we might know the precise nature of petitioners' claim before passing on it.

The record contains nothing more definite than the allegation that "petitioners are poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal from their convictions." For my part I cannot tell whether petitioners' claim is that a transcript was "needed" because (a) under Illinois *law* a transcript is a prerequisite to appellate review of trial errors,[1] or (b) as a *factual* matter petitioners could not prepare an adequate bill of exceptions short of having a transcript.

If the claim is that a transcript was *legally* necessary, it is based on an erroneous view of Illinois law. The Illinois cases cited by the petitioners establish only that trial errors cannot be reviewed in the absence of a bill of exceptions, and not that a transcript is essential to the preparation of such a bill.[2] To the contrary, an

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[1] The Illinois Supreme Court may have interpreted the pleadings in this manner. It described the petitioners' "sole contention" as being that they were "unable to purchase a bill of exceptions and were, therefore, unable to obtain a complete review by this Court." This suggests that the state court construed the claim to be that an appeal was necessarily precluded by the lack of a transcript, not that the petitioners' particular circumstances produced that result. If that is what the Illinois court meant, its construction, having a reasonable basis, would be binding on this Court and would constitute an adequate state ground for the denial of any claim premised on the existence of particular circumstances preventing the petitioners from pursuing other available methods of review.

[2] *E. g., People* v. *Johns,* 388 Ill. 212, 57 N. E. 2d 895; *People* v. *Loftus,* 400 Ill. 432, 81 N. E. 2d 495; *People* v. *O'Connell,* 411 Ill. 591, 104 N. E. 2d 825.

unbroken line of Illinois cases establishes that a bill of exceptions may consist simply of a narrative account of the trial proceedings prepared from any available sources—for example, from the notes or memory of the trial judge, counsel, the defendant, or bystanders—and that the trial judge must either certify such a bill as accurate or point out the corrections to be made.[3] Viewed in the light of these cases, the only constitutional question

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[3] *Weatherford* v. *Wilson*, 3 Ill. (2 Scam.) 253 (1840); *People ex rel. Maher* v. *Williams*, 91 Ill. 87 (1878); *People ex rel. Munson* v. *Gary*, 105 Ill. 264 (1883); *People ex rel. Hall* v. *Holdom*, 193 Ill. 319, 61 N. E. 1014 (1901); *162 East Ohio Street Hotel Corp.* v. *Lindheimer*, 368 Ill. 294, 13 N. E. 2d 970 (1938); *Weber* v. *Sneeringer*, 247 Ill. App. 294 (1928); *Merkle* v. *Kegerreis*, 350 Ill. App. 103, 112 N. E. 2d 175 (1953); see also *People ex rel. North American Restaurant* v. *Chetlain*, 219 Ill. 248, 76 N. E. 364 (1906); *Mayville* v. *French*, 246 Ill. 434, 92 N. E. 919 (1910); *People ex rel. Simus* v. *Donoghue*, 377 Ill. 122, 35 N. E. 2d 371 (1941). This line of cases was reaffirmed by the Illinois Supreme Court in 1953, just three months before the petitioners were convicted, in *People* v. *Joyce*, 1 Ill. 2d 225, 230, 115 N. E. 2d 262, 264–265, in which the *Williams*, *Gary*, *Holdom* and *Lindheimer* cases, *supra*, were cited with approval for the proposition that trial errors may be presented on a writ of error by a "constructed or 'bystander's' bill of exceptions." The holding of that case was that a defendant to whom these alternative methods were not available "as a practical matter" because of his indigence and incarceration did not, by failing to seek direct review of his conviction, "waive" the right given him by the Illinois Post-Conviction Hearing Act to assert his constitutional claims in a collateral proceeding. Accord: *People* v. *La Frana*, 4 Ill. 2d 261, 266, 122 N. E. 2d 583, 585–586. That holding does not, of course, detract from the court's affirmation that a transcript is not legally required for appellate review of trial errors. It is equally clear that Illinois' recognition of "practicalities" in not applying a strict doctrine of waiver to the remedial Post-Conviction Hearing Act does not necessarily mean that the alternative methods of obtaining review are not sufficiently "available" to satisfy any supposed constitutional requirements. That question would depend upon the facts of the particular case—of which we have not been informed here—and upon the evaluation of them for constitutional purposes.

presented by petitioners' bare allegation that they were unable to purchase a transcript would be: Is an indigent defendant, who has not shown that he is unable to obtain full appellate review of his conviction by a narrative bill of exceptions, constitutionally entitled to the added advantage of a free transcript of the trial proceedings for use as a bill of exceptions? I need hardly pause to suggest that such a claim would present no substantial constitutional question.

The Court, however, either takes judicial notice that as a practical matter the alternative methods of preparing a bill of exceptions are inadequate or finds in petitioners' claims an allegation of *fact* that their circumstances were such as to prevent them from utilizing the alternative methods. But even accepting this reading of the pleadings, the constitutional question tendered should not be decided without knowing the circumstances underlying the conclusory allegation of "need." Petitioners' indigence, the only underlying "fact" alleged, did not in itself necessarily preclude them from preparing a narrative bill of exceptions, and we are told nothing as to the other circumstances which prevented them from doing so. The record does not even disclose whether petitioners were incarcerated during the period in which the bill of exceptions had to be filed, or whether they were represented by counsel at the trial. We are left to speculate on the nature of the alleged trial errors and the scope of the bill of exceptions needed to present them. Who can say that if we knew the facts we might not have before us a much narrower constitutional question than the one decided today, or perhaps no such question at all. In these circumstances, I would follow the salutary policy "of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty," *Rescue Army* v. *Municipal Court of Los Angeles, supra,* at p. 576, and would refuse to decide the

constitutional question in the abstract form in which it has been presented here.

According to petitioners' tabulation, no more than 29 States provide free transcripts as of right to indigents convicted of non-capital crimes. Thus the sweeping constitutional pronouncement made by the Court today will touch the laws of at least 19 States [4] and will create a host of problems affecting the status of an unknown multitude of indigent convicts. A decision having such wide impact should not be made upon a record as obscure as this, especially where there are means ready at hand to have clarified the issue sought to be presented.

However, since I stand alone in my view that the Court should refrain from deciding the broad question urged upon us until the necessity for such a decision becomes manifest, I deem it appropriate also to note my disagreement with the Court's decision of that question. Inasmuch as the Court's decision is not—and on this record cannot be—based on any facts peculiar to this case, I consider that question to be: Is an indigent defendant

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[4] Of these 19 at least 5 have, however, expressly given the trial courts discretionary power to order free transcripts in non-capital cases. Mass. Ann. Laws, c. 278, § 33A, as amended by Acts 1955, c. 352 ("by order of the court"); N. D. Rev. Code, 1943, § 27–0606 (when "there is reasonable cause therefor"); Ore. Rev. Stat., 1953, § 21.470 (if "justice will be thereby promoted"); S. D. Code, 1939, § 34.3903 (if "essential to the protection of the substantial rights of the defendant"); Wash. Rev. Code, 1951, § 2.32.240 (if "justice will thereby be promoted"). The Rhode Island Supreme Court has reached a similar result by interpretation of a statute authorizing reimbursement for expenditures of appointed counsel. *State* v. *Hudson*, 55 R. I. 141, 179 A. 130 (1935) ("sound discretion . . . to be exercised with great circumspection and only for serious cause"). In addition, petitioners' brief refers to a letter from the Chief Justice of the Connecticut Supreme Court of Errors which states that free transcripts may be furnished in the discretion of the court in non-capital cases.

who "needs" a transcript in order to appeal constitutionally entitled, regardless of the nature of the circumstances producing that need, to have the State either furnish a free transcript or take some other action to assure that he does in fact obtain full appellate review?

2. *Equal Protection.*—In finding an answer to that question in the Equal Protection Clause, the Court has painted with a broad brush. It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. Illinois has not imposed any arbitrary conditions upon the exercise of the right of appeal nor any requirements unnecessary to the effective working of its appellate system. Trial errors cannot be reviewed without an appropriate record of the proceedings below; if a transcript is used, it is surely not unreasonable to require the appellant to bear its cost; and Illinois has not foreclosed any other feasible means of preparing such a record. Nor is this a case where the State's own action has prevented a defendant from appealing. Cf. *Dowd* v. *United States ex rel. Cook,* 340 U. S. 206; *Cochran* v. *Kansas,* 316 U. S. 255. All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.

The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for. Granting that such a classification would be reasonable, it does not follow that a State's failure to make it can be regarded as discrimina-

tion. It may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.

I do not understand the Court to dispute either the necessity for a bill of exceptions or the reasonableness of the general requirement that the trial transcript, if used in its preparation, be paid for by the appealing party. The Court finds in the operation of these requirements, however, an invidious classification between the "rich" and the "poor." But no economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against "indigents" by name would be unconstitutional. Thus, while the exclusion of "indigents" from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees. And if imposing a condition of payment is not the equivalent of a classification by the State in one case, I fail to see why it should be so regarded in another. Thus if requiring defendants in felony cases to pay for a transcript constitutes a discriminatory denial to indigents of the right of appeal available to others, why is it not a similar denial in misdemeanor cases or, for that matter, civil cases?

It is no answer to say that equal protection is not an absolute, and that in other than criminal cases the differentiation is "reasonable." The resulting *classification* would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences. Hence it must be that the differences are "reasonable" in other cases not because the "classification" is reasonable but simply because it is not unreasonable in those cases for the State to fail to relieve indigents of the economic burden. That is, the issue here

is not the typical equal protection question of the reasonableness of a "classification" on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities. The Court holds that the failure of the State to do so is constitutionally unreasonable in this case although it might not be in others. I submit that the basis for that holding is simply an unarticulated conclusion that it violates "fundamental fairness" for a State which provides for appellate review, and thus apparently considers such review necessary to assure justice, not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That of course is the traditional language of due process, see *Betts* v. *Brady*, 316 U. S. 455, 462, and I see no reason to import new substance into the concept of equal protection to dispose of the case, especially when to do so gives rise to the all-too-easy opportunity to ignore the real issue and solve the problem simply by labeling the Illinois practice as invidious "discrimination."

3. *Due Process.*—Has there been a violation of the Due Process Clause? The majority of the Court concedes that the Fourteenth Amendment does not require the States to provide for any kind of appellate review. Nevertheless, Illinois, in the forefront among the States, established writs of error in criminal cases as early as 1827.[5] In 1887, it provided for official court reporters, thereby relieving defendants of the burden of hiring reporters in order to obtain a transcript.[6] In 1927, it provided that for indigents sentenced to death "all necessary costs and expenses" incident to a writ of error, including the cost of a transcript, would be paid by

[5] Ill. Rev. L. 1827, Crim. Code, §§ 186, 187; Ill. Rev. Stat., 1955, c. 38, § 769.1.

[6] Ill. Laws 1887, p. 159; Ill. Rev. Stat., 1955, c. 37, § 163b.

the counties.[7] And in 1953, free transcripts were authorized for the presentation of constitutional claims.[8] Thus Illinois has steadily expanded the protection afforded defendants in criminal cases, and in recent years has made substantial strides towards alleviating the natural disadvantages of indigents. Can it be that, while it was not unconstitutional for Illinois to afford no appeals, its steady progress in increasing the safeguards against erroneous convictions has resulted in a constitutional decline?

Of course the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed. It does mean, however, that there is no "right" to an appeal in the same sense that there is a right to a trial.[9] Rather the constitutional right under the Due Process Clause is simply the right not to be denied an appeal for arbitrary or capricious reasons. Nothing of that kind, however, can be found in any of the steps by which Illinois has established its appellate system.

We are all agreed that no objection of substance can be made to the provisions for free transcripts in capital and constitutional cases. The due process challenge must therefore be directed to the basic step of permitting appeals at all without also providing an *in forma pauperis* procedure. But whatever else may be said of Illinois' reluctance to expend public funds in perfecting appeals for indigents, it can hardly be said to be arbitrary. A policy of economy may be unenlightened, but it is cer-

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[7] Ill. Laws 1927, p. 400, § 1½; Ill. Rev. Stat., 1955, c. 38, § 769a.

[8] Ill. Laws 1953, p. 859; Ill. Rev. Stat., 1955, c. 37, § 163f.

[9] This difference makes of dubious validity any analogy between a condition imposed upon the right to defend oneself and a condition imposed upon the right to appeal.

tainly not capricious. And that it has never generally been so regarded is evidenced by the fact that our attention has been called to no State in which *in forma pauperis* appeals were established contemporaneously with the right of appeal. I can find nothing in the past decisions of this Court justifying a holding that the Fourteenth Amendment confines the States to a choice between allowing no appeals at all or undertaking to bear the cost of appeals for indigents, which is what the Court in effect now holds.

It is argued finally that, even if it cannot be said to be "arbitrary," the failure of Illinois to provide petitioners with the means of exercising the right of appeal that others are able to exercise is simply so "unfair" as to be a denial of due process. I have some question whether the non-arbitrary denial of a right that the State may withhold altogether could ever be so characterized. In any event, however, to so hold it is not enough that we consider free transcripts for indigents to be a desirable policy or that we would weigh the competing social values in favor of such a policy were it our function to distribute Illinois' public funds among alternative uses. Rather the question is whether some method of assuring that an indigent is able to exercise his right of appeal is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325, so that the failure of a State so to provide constitutes a "denial of fundamental fairness, shocking to the universal sense of justice," *Betts* v. *Brady, supra,* at 462. Such an equivalence between persons in the means with which to exercise a right of appeal has not, however, traditionally been regarded as an essential of "fundamental fairness," and the reforms extending such aid to indigents have only recently gained widespread acceptance. Indeed, it was not until an Act of Congress in 1944 that defendants in federal criminal

cases became entitled to free transcripts,[10] and to date approximately one-third of the States still have not taken that step. With due regard for the constitutional limitations upon the power of this Court to intervene in State matters, I am unable to bring myself to say that Illinois' failure to furnish free transcripts to indigents in all criminal cases is "shocking to the universal sense of justice."

As I view this case, it contains none of the elements hitherto regarded as essential to justify action by this Court under the Fourteenth Amendment. In truth what we have here is but the failure of Illinois to adopt as promptly as other States a desirable reform in its criminal procedure. Whatever might be said were this a question of procedure in the federal courts, regard for our system of federalism requires that matters such as this be left to the States. However strong may be one's inclination to hasten the day when *in forma pauperis* criminal procedures will be universal among the States, I think it is beyond the province of this Court to tell Illinois that it must provide such procedures.

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[10] 58 Stat. 5, 28 U. S. C. §§ 753 (f), 1915 (a). On the prior federal practice, see, *e. g.*, *Estabrook* v. *King*, 119 F. 2d 607, 610 (C. A. 8th Cir.); *United States* v. *Fair*, 235 F. 1015 (D. C. N. D. Calif.).

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FROZEN FOOD EXPRESS *v.* UNITED STATES ET AL.

NO. 158. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.*

Argued March 7, 1956.—Decided April 23, 1956.

After an investigation and hearing instituted on its own motion, the Interstate Commerce Commission issued an order listing a large number of specified commodities which it found not to be "agricultural" within the meaning of § 203 (b) (6) of the Interstate Commerce Act, which exempts from the requirement of a permit or a certificate of public convenience and necessity motor vehicles used only in carrying "agricultural" commodities. A motor carrier transporting without a certificate or permit numerous commodities found by the Commission not to be "agricultural" commodities, and which had not been a party to the administrative proceeding, sued in a Federal District Court to enjoin and set aside the Commission's order. *Held:* The Commission's order is subject to judicial review, and the District Court should adjudicate the merits. *United States* v. *Los Angeles R. Co.*, 273 U. S. 299, distinguished. Pp. 41–45.

128 F. Supp. 374, reversed.

Carl L. Phinney argued the cause and filed a brief for Frozen Food Express, appellant in No. 158 and appellee in Nos. 159, 160 and 161.

Robert W. Ginnane argued the cause for the Interstate Commerce Commission, appellant in No. 159 and appellee in No. 158. With him on the brief was *Leo H. Pou.*

David G. Macdonald argued the cause for the American Trucking Associations, Inc., et al., appellants in No. 160. With him on the brief were *Francis W. McInerny, Peter T. Beardsley, Clarence D. Todd* and *Dale C. Dillon.*

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*Together with No. 159, *Interstate Commerce Commission* v. *Frozen Food Express et al.;* No. 160, *American Trucking Associations, Inc., et al.* v. *Frozen Food Express et al.;* and No. 161, *Akron, Canton & Youngstown R. Co. et al.* v. *Frozen Food Express et al.*, also on appeal from the same court.

Charles P. Reynolds and *Carl Helmetag, Jr.* submitted on brief for the Akron, Canton & Youngstown Railroad Co. et al., appellants in No. 161.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. § 301 *et seq.*, grants the Commission pervasive control over motor carriers. Common carriers and contract carriers by motor vehicle, subject to that part of the Act, must have a certificate of public convenience and necessity or a permit issued by the Commission. §§ 206 (a), 209 (a). The Commission has powers of investigation to determine if a motor carrier has complied with the Act; and it has authority to issue an order compelling compliance. § 204 (c). These requirements for a certificate or permit* are not, however, applicable to "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation." § 203 (b)(6).

The controversy in these cases centers around this "agricultural" exemption. After an investigation instituted on its own motion, the Commission issued an order that specified commodities are not "agricultural" within the meaning of § 203 (b)(6).

The hearing to determine the meaning and application of the term "agricultural . . . commodities (not including manufactured products thereof)" as used in § 203 (b)(6) was held before an examiner. It was a public hearing at which various governmental officials and agencies and

*Exempted carriers are also not subject to the provisions concerning rates and charges, §§ 217, 218, nor to the requirements concerning bodily injury and property damage insurance. § 215.

various producers, shippers, and carriers appeared and presented evidence. The Commission's decision was in the form of a report and order. 52 M. C. C. 511. The report, which concerns various groups of commodities, covers 71 pages of the printed record. The findings list those commodities that the Commission finds are exempted under § 203 (b)(6) and those that are not. The order of the Commission incorporates the "findings" and states that the proceeding "be, and it is hereby discontinued."

Frozen Food Express, the plaintiff, is a motor carrier transporting numerous commodities which the Commission ruled were nonexempt under § 203 (b)(6) but which the carrier claims are "agricultural commodities." Plaintiff, who was not a party to the administrative proceeding, instituted suit before a three-judge District Court (28 U. S. C. § 2325) to enjoin the order of the Commission and have it set aside, naming the United States and the Commission as defendants. 28 U. S. C. § 1336; 49 Stat. 550, as amended, 49 U. S. C. § 305 (g); 60 Stat. 243, 5 U. S. C. § 1009. The complaint alleged that plaintiff is a common carrier by motor vehicle, holding a certificate of public convenience and necessity which authorizes it to transport certain commodities between designated points and places; that plaintiff is transporting, in addition to those commodities, commodities which are exempt under § 203 (b)(6) and for which plaintiff has sought no authority from the Commission; that the Commission in its order has held the latter commodities nonexempt and accordingly has deprived it of the right granted by the statute; that the order of the Commission classifying certain commodities as nonexempt is unlawful; and that the Commission threatens to enjoin transportation of the commodities which plaintiff claims are exempt. The Secretary of Agriculture intervened, supporting plaintiff's position on some of the commodities. Other interveners

are trucking associations and railroads which support the Commission. The United States as a defendant supports the Commission on some of its findings and opposes it on others.

The District Court, being of the view that the case was controlled by *United States* v. *Los Angeles R. Co.*, 273 U. S. 299, dismissed the action, saying that the "order" of the Commission was not subject to judicial review. 128 F. Supp. 374. The cases are here by appeal. 28 U. S. C. §§ 1253, 2101 (b).

We disagree with the District Court. We do not think *United States* v. *Los Angeles R. Co., supra,* is controlling here. In that case the "order" held nonreviewable was a valuation of a carrier's property made by the Commission. The Court held that the "order" was no more than a report of an investigation which might never be the basis of a proceeding before the Commission or a court. Mr. Justice Brandeis, speaking for the Court, said:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. . . ." 273 U. S. 309–310.

The situation here is quite different. The determination by the Commission that a commodity is not an

exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The "order" of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. § 222 (a). Where unauthorized operations occur, the Commission may proceed administratively and issue a cease and desist order. § 204 (c). Such orders of the Commission are enforceable by the courts. § 222 (b). And wilful violation of a cease and desist order is ground for revocation of a certificate or permit. § 212. The determination made by the Commission is not therefore abstract, theoretical, or academic. Cf. *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 18–19. The "order" of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. Cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 132. Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. A carrier authorized to carry specified commodities and dependent on exempt articles for its return load may lose its right to operate at all, if it does not respect the Commission's "order." Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The "order" of the Commission is in substance a "declaratory" one, see 60 Stat. 240, 5 U. S. C. § 1004 (d), which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. Cf. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. The consequences we have summarized are not conjectural. The Commission itself places this interpretation on its action and argues, contrary to its

position in the *Los Angeles Case, supra,* for finality of the order. We conclude that the issues raised in the complaint are justiciable and that the District Court should adjudicate the merits.

Reversed.

MR. JUSTICE HARLAN, dissenting.

I do not agree that the District Court had jurisdiction to entertain this action to set aside the Commission's "order." It seems to me that the case falls squarely within those carefully developed rules which require that judicial intervention be withheld until administrative action has reached its complete development. I find nothing in the nature of the order which commends it to reviewability at this stage other than the fact that its promulgation was preceded by a lengthy investigation and that it contains a series of "findings" and "conclusions." These factors should not be permitted to obscure the true character of the order.

After a self-initiated investigation, in which various carriers participated, the Commission entered this order discontinuing the proceedings and incorporating the "findings of fact and conclusions" of the Commission. That the order was not intended to be a "legislative" regulation seems apparent, since it was not put in the form ordinarily used by the Commission in promulgating regulations. The order simply lists the commodities considered by the Commission and determines whether they are within the § 203 (b)(6) exemption; it nowhere commands that carriers hauling commodities considered non-exempt comply either with the order or with the general requirements of the Interstate Commerce Act. It is clear, therefore, that no administrative or criminal proceeding can be brought for violation of the order itself. And it is equally clear that the proceeding did not conclude any rights as between any specific carriers and the Commission.

The Interstate Commerce Act does, of course, provide for administrative and criminal sanctions to enforce compliance with its provisions. An uncertificated carrier hauling commodities non-exempt under § 203 (b)(6) runs the risk of a criminal prosecution under § 222 (a) of the Act. But the order has no operative effect in such a proceeding—it does not extend the carrier's criminal liability, which exists because of a violation of the Act and not the order. And if the enforcement takes the form of a cease and desist proceeding against a particular carrier, again the only question would be whether the Act, rather than the order, was being violated. If such an administrative proceeding is instituted, and a cease and desist order is issued, the carrier subject to that order would be entitled to contest the statutory authority of the Commission in judicial proceedings of precisely the scope brought here.

Nor can this order be likened to a determination of status, held reviewable in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125. As I understand that case, the touchstone of the decision was that the determination "necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority." 307 U. S., at p. 144. The specific determination that a particular carrier must comply with Commission regulations is quite different from this order, which is directed to no one in particular and is binding on no one, not even the Commission. Neither can this order be analogized to a declaratory order directed to the status of a particular carrier, which might be reviewable as carrying with it a direct threat of prosecution—see *Rochester Telephone Corp.* v. *United States, supra,* at p. 132, n. 11. Indeed, the Commission itself does not consider its determinations the final answer to the meaning of the § 203 (b)(6) exemption, even for administra-

tive purposes. This is evident from the proceedings in *East Texas Motor Freight Lines* v. *Frozen Food Express, post,* p. 49, where in a cease and desist proceeding the Commission heard new evidence on whether the particular commodities there involved were within the exemption, and was evidently ready to reconsider the determinations embodied in the order involved here.

To be sure, the order does serve as a warning to carriers that the Commission interprets the Act in a particular way, and it is true that courts will give the Commission's views some indeterminate weight in construing the statute. But that very fact, instead of justifying a holding of reviewability, seems to me a strong argument against it. The Commission's willingness, in individual cases, to reconsider its determinations with respect to particular commodities points up the tentative nature of the conclusions here sought to be reviewed. When this action is heard on the merits, the District Court will have as an aid in construing the statute administrative interpretations which are admittedly inconclusive, and if they are to be given any weight it would seem important that this Court not do anything to freeze them in their present immature state. For all we know, the Commission's decision not to issue this order in the form of regulations may have been because it recognized the need for further study.

Years of experience have shown that § 203 (b)(6) presents difficult problems of interpretation, and this Court should be wary of establishing a procedure which would prematurely throw into the courts questions of statutory construction not arising in the context of concrete facts, and which does not bring to the courts even the benefit of final interpretation by the agency assigned to administer the statute. That this should be done in a case where there is a right of direct appeal to this Court makes the wisdom of today's decision even more questionable.

Lastly, the order does not have the immediate impact of the sort which, at times, has led this Court to regard particular administrative action as ripe for judicial review. In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, the very existence of the regulations had, without anything more, an immediate effect on the business of the party attacking them. There is much to be said for finding administrative action reviewable when it entails immediate practical consequences for those affected by it. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. But the carriers subject to the Interstate Commerce Act are in no way worse off now than they were before this order issued; there is no greater liability or risk under the statute occasioned by the order, which has no more effect than would any other informal expression of views by the Commission. If anything, carriers are in a better position, since they can now make a more reasoned judgment as to the applicability of the statute to particular commodities, and this may have been the principal reason for the Commission making public its findings.

In my view, then, the language quoted by the majority from *United States* v. *Los Angeles R. Co.* aptly describes this order of the Commission, and I consider that wise decision controlling here. Neither the character nor the meaning of this order can be changed by the fact that the Commission, in asking us to hold it reviewable, calls it a "formal determination" of the scope of § 203 (b)(6). The significant fact is that, as shown by *East Texas Motor Freight Lines* v. *Frozen Food Express, post*, p. 49, the Commission itself does not consider its order definitive. Today's decision opens the door wide to premature judicial review of various kinds of administrative action, and I must withhold my assent from it. I would affirm the decision below.

EAST TEXAS MOTOR FREIGHT LINES, INC., ET AL. *v.* FROZEN FOOD EXPRESS ET AL.

NO. 162. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.*

Argued March 7, 1956.—Decided April 23, 1956.

On complaint of three motor common carriers under § 204 (c) of the Interstate Commerce Act, the Commission ordered Frozen Food Express, another motor common carrier, to cease and desist from transporting in interstate commerce without a certificate of convenience and necessity fresh and frozen dressed poultry, which it found not to be within the exemption under § 203 (b) (6) of the Act of "agricultural . . . commodities (not including manufactured products thereof)." Frozen Food Express sued in a Federal District Court to set aside the order. *Held:* Fresh and frozen dressed poultry is an "agricultural" commodity within the meaning of § 203 (b) (6), and not a "manufactured" product thereof, and the District Court properly set aside the Commission's order. Pp. 50–54.

128 F. Supp. 374, affirmed.

David G. Macdonald argued the cause for the East Texas Motor Freight Lines, Inc., et al., appellants in No. 162. With him on the brief were *Francis W. McInerny, Peter T. Beardsley, Clarence D. Todd* and *Dale C. Dillon.*

Robert W. Ginnane argued the cause for the Interstate Commerce Commission, appellant in No. 163. With him on the brief was *Leo H. Pou.*

Charles P. Reynolds and *Carl Helmetag, Jr.* submitted on brief for the Akron, Canton & Youngstown Railroad Co. et al., appellants in No. 164.

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*Together with No. 163, *Interstate Commerce Commission* v. *Frozen Food Express et al.*, and No. 164, *Akron, Canton & Youngstown R. Co. et al.* v. *Frozen Food Express et al.*, also on appeal from the same court.

Charles H. Weston argued the cause for the United States and the Secretary of Agriculture, appellees. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell.*

Carl L. Phinney argued the cause and filed a brief for Frozen Food Express, appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Three motor common carriers filed a complaint with the Interstate Commerce Commission under § 204 (c) of Part II of the Interstate Commerce Act, 49 Stat. 547, as amended, 49 U. S. C. § 304 (c), alleging that Frozen Food Express, a common carrier by motor vehicle, was and had been transporting fresh and frozen meats and fresh and frozen dressed poultry in interstate commerce without a certificate of convenience and necessity from the Commission which covers those commodities. The complaint prayed for a cease and desist order. Frozen Food Express admitted that it was and had been so transporting the named commodities but asserted in defense that those operations were within the exemption of § 203 (b)(6).[1]

The Commission found that Frozen Food Express had been performing unauthorized operations and that fresh and frozen meats and fresh and frozen dressed poultry were not within the exemption of § 203 (b)(6). 62

[1] SEC. 203 (b)(6) provides:

"Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation . . . ."

M. C. C. 646. Accordingly it ordered Frozen Food Express to cease and desist from engaging in these operations. Frozen Food Express brought suit before a three-judge District Court (28 U. S. C. § 2325) to set the Commission's order aside, 28 U. S. C. § 1336; 49 Stat. 550, as amended, 49 U. S. C. § 305 (g); 60 Stat. 243, 5 U. S. C. § 1009. The answer of the United States and the complaint in intervention filed by the Secretary of Agriculture supported the position of Frozen Food Express. The original complainants before the Commission and other interested carriers and carrier associations intervened in support of the Commission. The District Court sustained the Commission's conclusion that fresh and frozen meats are nonexempt commodities. No appeal was taken from that holding. The District Court held that fresh and frozen dressed poultry are exempt commodities under § 203 (b)(6) and restrained the Commission from enforcing its cease and desist order as respects those products. 128 F. Supp. 374. The cases are here by appeal. 28 U. S. C. §§ 1253, 2101 (b).

We agree with the District Court that the Commission's ruling does not square with the statute. The exemption of motor vehicles carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)" was designed to preserve for the farmers the advantage of low-cost motor transportation. See especially 79 Cong. Rec. 12217. The victory in the Congress for the exemption was recognition that the price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state or after they have become marketable by incidental processing.

The history of the words "agricultural . . . commodities (not including manufactured products thereof)" contained in § 203 (b)(6) supports that conclusion. The bill as it came to the floor of the House from the Interstate

and Foreign Commerce Committee (79 Cong. Rec. 12204) exempted "motor vehicles used exclusively in carrying livestock or unprocessed agricultural products." *Id.*, 12220. Mr. Pettengill for the Committee offered an amendment which substituted for the words "unprocessed agricultural products" the phrase "agricultural commodities not including manufactured products thereof." That amendment was agreed to after the following colloquy:

> "Mr. PETTENGILL. Mr. Chairman, we have heard a good deal of discussion this afternoon as to what is a processed agricultural product, whether that would include pasteurized milk or ginned cotton. It was not the intent of the committee that it should include those products. Therefore, to meet the views of many Members we thought we would strike out the word 'unprocessed' and make it apply only to manufactured products.
>
> . . . . . .
>
> "Mr. WHITTINGTON. In other words, under the amendment to the committee amendment, cotton in bales and cottonseed transported from the ginneries to the market or to a public warehouse would be exempt, whereas they might not be exempt if the language remained, because ginning is sometimes synonymous with processing.
>
> "Mr. PETTENGILL. That is correct."

It is plain from this change that the exemption of "agricultural commodities" was considerably broadened by making clear that the exemption was lost not by incidental or preliminary processing but by manufacturing.[2] Killing, dressing, and freezing a chicken is certainly a

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[2] Two more changes were made in the agricultural exemption clause before the bill reached final form. The words "fish, including shellfish," were added after the word "livestock" (79 Cong. Rec. 12220), and the exemption was strengthened by making it "absolute

change in the commodity. But it is no more drastic a change than the change which takes place in milk from pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling. Yet the Commission agrees that milk so processed is not a "manufactured" product, but falls within the meaning of the "agricultural" exemption. 52 M. C. C. 511, 551. The Commission also agrees that ginned cotton and cottonseed are exempt. *Id.*, 523–524. But there is hardly less difference between cotton in the field and cotton at the gin or in the bale or between cottonseed in the field and cottonseed at the gin, than between a chicken in the pen and one that is dressed. The ginned and baled cotton and the cottonseed, as well as the dressed chicken, have gone through a processing stage. But neither has been "manufactured" in the normal sense of the word. The Court in *Anheuser-Busch Assn.* v. *United States,* 207 U. S. 556, 562, in a case arising under the tariff laws, said,

> ". . . Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft* v. *Wiegmann,* 121 U. S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.' "

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rather than discretionary" with the Interstate Commerce Commission. *Id.*, at 12225–12226.

As originally enacted in 1935, § 203 (b) (6) exempted motor vehicles "used exclusively" in carrying agricultural commodities. In 1938 the word "exclusively" was deleted and the following language was added at the end of the clause: "if such motor vehicles are not used in carrying any other property, or passengers, for compensation." 52 Stat. 1237. In 1940 the word "ordinary" was inserted before the word "livestock," making the exemption applicable to "ordinary livestock." 54 Stat. 921. Finally, in 1952, the words "agricultural commodities" were broadened to "agricultural (including horticultural) commodities." 66 Stat. 479.

In that case imported corks were made ready for use in beer bottles by stamping, by removal of dust, meal, bugs, and worms, by washing and steaming to remove tannin and to increase elasticity, and by drying. Plainly, the corks were processed. But the Court held they had not been manufactured within the drawback provision of the tariff laws. And see *Hartranft* v. *Wiegmann,* 121 U. S. 609, 615; *United States* v. *Dudley,* 174 U. S. 670.

A chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a "manufactured" commodity.[3]

At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of § 203 (b)(6).

The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates. *American Trucking Assns.* v. *United States,* 344 U. S. 298, 310. But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. See *Social Security Board* v. *Nierotko,* 327 U. S. 358. Those limits would be passed here if the Commission were permitted to expand "manufactured" to include such incidental processing as is involved in dressing and freezing a chicken.

Affirmed.

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[3] The fact that most poultry is sold alive and is not killed and processed by the grower is not controlling. For § 203 (b)(6) exempts carriers transporting "agricultural commodities" unless those products are "manufactured." The exemption is concerned with the stage of the processing, not with the person who does it.

MR. JUSTICE BURTON, whom MR. JUSTICE FRANKFURTER, MR. JUSTICE MINTON and MR. JUSTICE HARLAN join, dissenting.

For the reasons given by the Interstate Commerce Commission, 52 M. C. C. 511, 62 M. C. C. 646, and its administrative practice of over 15 years, I would sustain its interpretation of the Act to the effect that fresh and frozen dressed poultry, like fresh and frozen dressed meats, are not entitled to exemption as agricultural commodities. No appeal has been taken from that part of the judgment which held valid the Commission's determination that fresh and frozen dressed meats are products manufactured from agricultural commodities. The Commission's like treatment of poultry is not arbitrary or unreasonable. On the contrary, there was much evidence before the Commission which clearly supported its decision. Consequently, we should accord that decision the weight ordinarily given to informed administrative action. We cannot say that the order of the Commission, which held that there is no significant distinction between the two, is not an allowable judgment.

> "Such determinations [of fact by the Shipping Board or Interstate Commerce Commission as a basis for administrative orders] will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304. See also, *Federal Communications Commission* v. *WOKO, Inc.,* 329 U. S. 223, 229; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 535–536; *Barrett Line, Inc.* v. *United States,* 326 U. S. 179, 199.

380673 O—56——8

DIXIE CARRIERS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 233. Argued March 27, 1956.—Decided April 23, 1956.

On shipments of sulphur from mines near Galveston, Tex., to Danville, Ill., the railroads have established a joint all-rail rate which is lower than both the combination all-rail rate and the combination rail-barge rate; but they have refused to establish a joint rail-barge rate between the same points. *Held:* Such refusal constitutes a discrimination in rates between connecting lines prohibited by § 3 (4) of the Interstate Commerce Act, and it is the duty of the Commission under § 307 (d) to establish through routes and joint rates for rail-barge transportation, in order to effectuate the National Transportation Policy that the Act be administered to preserve the "inherent advantages" of each form of transportation. Pp. 56–61.

129 F. Supp. 28, reversed.

Nuel D. Belnap argued the cause for appellants. With him on the brief were *Donald Macleay* and *Francis W. McInerny.*

Daniel M. Friedman argued the cause for the United States, appellee. With him on the brief were *Solicitor General Sobeloff* and *Assistant Attorney General Barnes.*

Samuel R. Howell argued the cause for the Interstate Commerce Commission, appellee. With him on the brief was *Robert W. Ginnane.*

John A. Daily argued the cause for the New York Central Railroad Co. et al., appellees. With him on the brief was *Robert D. Brooks.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sulphur mined near Galveston, Texas, can be shipped to Danville, Illinois, either by rail or by barge and

rail. If the sulphur goes by barge and rail, it is transported up the Mississippi via New Orleans to East St. Louis and then by rail to Danville. The total charge for that movement is $9.77 per ton.[1] The total of the various local rates for all-rail shipments from the mines to Danville is $11.68. But the railroads have established a joint all-rail rate[2] of $9.184 which is lower than both the combination all-rail rate and the combination rail-barge rate.

Appellants, who are water carriers, requested the competing railroads to establish a joint rail-barge rate of $7.67 on sulphur from Galveston to Danville. The railroads refused. Appellants thereupon filed a complaint with the Interstate Commerce Commission, alleging that the existing rail-barge rates on sulphur were excessive and unreasonable, that through rail-barge routes and joint rates with reasonable differentials below the all-rail rates should be established, and that the refusal of the railroads to establish such joint rates discriminated against the barges as connecting carriers in violation of the Interstate Commerce Act, as amended by the Transportation Act of 1940.[3] Appellants requested the Commission to establish a through rail-barge route and a joint rate and suggested that the joint rate be fixed at $7.67. Appellants proposed that the Danville railroads receive $2.26 as a division of that rate, calculated to be the same as they receive from the all-rail rate from Galveston to Danville. Under the proposed rate, the cost of rail-barge

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[1] The charge consists of rail and loading charges of $1.50 at Galveston, the barge rate of $5.32 to East St. Louis, and the local rail rate of $2.95 from East St. Louis to Danville.

[2] For a discussion of joint rates see *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 139, note 2; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

[3] 24 Stat. 379, as amended, 54 Stat. 898, 49 U. S. C. § 1.

shipments from the mines to Danville would be $9.17 as compared with the all-rail rate of $9.184.

A Division of the Commission dismissed the complaint, one Commissioner dissenting. 287 I. C. C. 403. The Commission affirmed the Division, three Commissioners dissenting. 291 I. C. C. 422. A three-judge District Court sustained the Commission. 129 F. Supp. 28. The case is here on appeal, 28 U. S. C. §§ 1253, 2101 (b), 2325.

Section 3 (4) of the Act provides that "All carriers subject to the provisions of this part . . . shall not discriminate in their rates, fares, and charges between connecting lines . . . ." Section 3 (4) defines "connecting line" as including "any common carrier by water subject to Part III." Appellants are common carriers by water within that definition. They maintain that it is unlawful under § 3 (4) of the Act for a railroad to refuse to join in through routes and joint rates with a water carrier when it has already joined in such routes and rates with a connecting rail line. They further maintain that the power of the Commission under § 307 (d)[4] to establish

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[4] Section 307 (d) provides:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . ."

through routes and joint rates should have been exercised here.

We had a closely related question before us in *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. In that case we invalidated an order of the Commission which approved higher rail rates for the transportation of grain east of Chicago if it had arrived in Chicago by barge, rather than by rail. We reviewed the history of the Transportation Act of 1940 and concluded that that Act "unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service." *Id.,* at 575. We held that the discrimination which was outlawed applied to through rates as well as to ordinary rates.

The *Mechling* case involved an attempt to deprive water transportation of one of its "inherent advantages," as that phrase is used in the preamble of the 1940 Act, by increasing the cost of barge service. The Commission's present decision achieves the same result through the device of a joint rate allowed carriers by rail but denied carriers by water. It was recognized in the debates on the bill that became the Transportation Act of 1940 that manipulation of rail rates downward might deprive water carriers of their "inherent advantages" and therefore violate the Act.[5] It was emphasized that one of the evils to be remedied was cutthroat competition, whereby strong rail carriers would reduce their rates, put-

[5] There was the following colloquy during the debate in the Senate between Senator Wheeler who was in charge of the bill and Senator Norris (84 Cong. Rec. 5874):

"Mr. NORRIS. Suppose, however, this bill should become a law, and an article of freight were to be transported which admittedly could be carried by water better than by railroad, and suppose the railroad should undertake to reduce its rate down to the water rate:

ting water carriers out of business.[6] There was recognition that for shippers to get the benefit of the "inherent advantages" of water transportation there frequently would have to be joint rail-barge rates.[7] Barge transportation frequently covers only one segment of the journey to market. The failure of the railroads to establish nondiscriminatory joint rates with barges might, therefore, seriously impair the development of barge service as a vital component of our national transportation system. Section 3 outlaws discrimination in all its forms. See *New York* v. *United States,* 331 U. S. 284, 296. Where there is discrimination by the use of a joint rate to favor rail carriers over carriers by water and to deprive the latter of their "inherent advantages," the Commission has a duty to end it under § 307 (d). That subsection [8] makes it mandatory for the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest." The public interest, as defined in the Act, is the guide to the Commission's action. *McLean Trucking Co.* v. *United*

Would there be anything in the law to prevent the railroad from doing that?

"Mr. WHEELER. Of course there would be.

"Mr. NORRIS. Disastrous rates can be brought about by reducing them just as well as by increasing them, as a matter of fact.

"Mr. WHEELER. Exactly.

"Mr. NORRIS. And the water carrier ought to be protected on the freight that ought to be carried by water rather than on the railroad.

"Mr. WHEELER. It would be absolutely protected under this measure.

"Mr. NORRIS. That is what I want to see done.

"Mr. WHEELER. There is not any question about it. Under the rate-making provision and under the other provisions I have read, there is not any question about it."

[6] *Id.,* 5877.

[7] *Id.,* 5875.

[8] Note 4, *supra.*

States, 321 U. S. 67, 82. The policy is to preserve all the "inherent advantages" of the water carriers.[9] That means that a joint barge-rail rate must be established when it appears, as here, that a joint rail rate discriminates against the water carriers. Otherwise a manipulated rate structure will take the business from the water carriers. In absence of the joint all-rail rate, the rail-barge combination rate for sulphur would be $1.91 per ton less than the all-rail combination rate between the same points. That differential reflects the lower cost of the barge segment of the journey. It is at once lost to shippers when joint rates are allowed rail carriers and withheld from the water carriers. To hold otherwise would be to sanction a rate structure which, through the use of discriminatory joint rates, denies shippers the "inherent advantages" of water transportation.

Reversed.

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[9] The Division of the Commission thought that regard for the "inherent advantages" of water transportation did not require it "to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition." 287 I. C. C., at 407. But part of that critical "depressed rate"—and the one most relevant here—is the $2.26 of the joint all-rail rate received by the East St. Louis-Danville rail carrier. For this same haul, the East St. Louis-Danville rail carrier receives $2.95 on the barge-rail rate. Yet on that haul the railroad has no competition from the water carriers.

UNITED MINE WORKERS OF AMERICA ET AL. *v.* ARKANSAS OAK FLOORING CO.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 227. Argued January 23, 1956.—Decided April 23, 1956.

In the case of an employer subject to the National Labor Relations Act, as amended, a state court may not enjoin peaceful picketing of the employer's premises, undertaken by its employees and their union for the purpose of obtaining recognition of the union as the employees' bargaining representative, when the union holds cards authorizing such representation concededly signed by a majority of the employees eligible to be represented—even though the union has not filed with the Secretary of Labor any of the financial or organizational data described in § 9 (f) and (g) of the Act, nor with the National Labor Relations Board any of the non-Communist affidavits described in § 9 (h) of the Act. Pp. 63–76.

(a) By its noncompliance with § 9 (f), (g) and (h), a union makes itself ineligible for certain advantages and services offered by the Act; but it does not exempt itself from other applicable provisions of the Act. Pp. 69–70.

(b) Section 8 (a) (5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of" § 9 (a); but the latter section does not make it a condition that the representative shall have complied with § 9 (f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification. Pp. 70–72.

(c) Likewise, § 7, which deals with the employees' rights to self-organization and representation, makes no reference to any need that the employees' chosen representative must have complied with § 9 (f), (g) or (h). Pp. 72–73.

(d) Subsections (f), (g) and (h) of § 9 merely describe certain advantages that may be gained by compliance with their conditions, and the express provision for the loss of these advantages implies that no other consequences shall result from noncompliance. P. 73.

(e) In this case, noncompliance of the union with § 9 (f), (g) and (h) precludes any right of the union to seek certification of its status

by the Board; but the employer, employees and union are controlled by the applicable provisions of the Act, and all courts, state and federal, are bound by them. Pp. 73–74.

(f) Under §§ 7 and 9 (a), and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the union, and the union can take lawful action, such as striking and peaceful picketing, to induce the employer to do so. Pp. 74–75.

(g) That being so, the State cannot enjoin the peaceful picketing here practiced. P. 75.

227 La. 1109, 81 So. 2d 413, reversed and remanded.

Crampton Harris argued the cause for petitioners. With him on the brief were *James I. McCain, Yelverton Cowherd* and *Alfred D. Treherne.*

John L. Pitts argued the cause for respondent. With him on the brief were *Grove Stafford* and *Richard C. Keenan.*

Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli and *Norton J. Come* filed a brief for the National Labor Relations Board, as *amicus curiae,* urging reversal.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether, in the case of an employer subject to the National Labor Relations Act, as amended, a state court may enjoin peaceful picketing of the employer's premises, undertaken by its employees and their union for the purpose of obtaining recognition of that union as the employees' bargaining representative, when the union holds cards authorizing such representation concededly signed by a majority of the employees eligible to be represented, but has filed none of the data or affidavits described in § 9 (f), (g) and (h) of that

Act, as amended.[1] For the reasons hereafter stated, our answer is in the negative.

In 1953, the respondent, Arkansas Oak Flooring Company, a Delaware corporation with its main office in Pine

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[1] "SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . .

. . . . . .

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constitutent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of

Bluff, Arkansas, owned and operated a sawmill and flooring plant in Alexandria, Louisiana. The company was there engaged in interstate commerce and subject to the National Labor Relations Act, as amended. At the same

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fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

"and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, 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

time, District 50, United Mine Workers of America, here called the "union," was an unincorporated labor organization which undertook to organize the company's eligible employees at its Alexandria plant. The union, however, did not file with the Secretary of Labor any of the financial or organizational data described in § 9 (f) and (g) of the National Labor Relations Act, as amended, nor, with the National Labor Relations Board, any of the non-Communist affidavits described in § 9 (h) of that Act. It contended that the company, nevertheless, should recognize it as the collective-bargaining representative of the Alexandria plant employees because it was authorized by more than a majority of such employees to represent them.

Although for four years there had been no labor organization representing the plant employees, this union, by February 24, 1954, held applications for membership from 174 of the 225 eligible employees. Such applicants had elected officers and stewards and had authorized the union organizer to request the company to recognize the union as their collective-bargaining representative. On February 24, the organizer, accordingly, presented that request to the assistant superintendent of the plant. The latter, in the absence of any higher officer of the company, replied that the union was not recognized either by the National Labor Relations Board or by him, and that, if negotiations were desired, the union organizer should call the company's office at Pine Bluff.

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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. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." 61 Stat. 143, 145–146, 65 Stat. 602, 29 U. S. C. § 159 (a), (f), (g) and (h).

On March 1, the petitioning employees struck for recognition of the union and set up a peaceful picket line of three employees. Two were placed in front of the plant and one at the side. They carried signs stating "This Plant is on Strike" or "We want Recognition, District 50 UMWA."

On March 2, respondent sought a restraining order and injunction in the Ninth Judicial District for the Parish of Rapides, Louisiana. That court promptly issued an order restraining the above-described picketing by 11 named employees, the union and its organizer. The order was obeyed but the strike continued. On March 12 and 15, evidence was introduced, including, by that date, 179 applications for membership in the union, each of which authorized the union to represent the signer in negotiations and in the making of agreements as to wages, hours and conditions of work. The parties to the proceeding stipulated that each of those applications was signed by an employee of respondent. In the face of that record, the court nevertheless converted its restraining order into a temporary injunction and the defendants, who are the petitioners herein, appealed to the Supreme Court of Louisiana. While that appeal was pending, the trial court, on the same record, made its injunction permanent. Petitioners appealed that decision to the Supreme Court of Louisiana and the two appeals were consolidated. There the permanent injunction was sustained, one judge concurring specially and another dissenting, in part, on an issue not material here. 227 La. 1109, 81 So. 2d 413.

The State Supreme Court's ground for sustaining the injunction was that the union, which sought to be recognized, had failed to file with the Secretary of Labor the financial and other data required by § 9 (f) and (g), and had failed to file with the Labor Board the non-Communist affidavits required by § 9 (h). The court held that the union, by failing to comply with § 9 (f), (g) and (h),

had precluded its certification by the Board, and that, accordingly, neither the employees nor the union had a right to picket the plant to induce the company to recognize the noncomplying union. The court, agreeing with respondent's theory, took the position that such recognition would be illegal and that picketing to secure it, therefore, was subject to restraint by a state court.[2] Rehearing was denied.

Because of the significance of that decision in relation to the National Labor Relations Act, as amended, we granted certiorari and invited the Solicitor General to file a brief setting forth the views of the National Labor Relations Board. 350 U. S. 860. Such a brief was filed favoring a reversal.

There is no doubt that, if the union had filed the data and affidavits required by § 9 (f), (g) and (h), the complaint, under the circumstances of this case, would have had to be dismissed by the state court for lack of jurisdiction, and that, if an injunction were sought through the National Labor Relations Board, the request would have had to be denied on the merits. Under those circumstances, the Board would have had jurisdiction of the issue to the exclusion of the state court. *Garner* v. *Team-*

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[2] Respondent also had sought the injunction on the alternative ground that the request for recognition of the union was being made in the absence of a selection of the union by the majority of respondent's employees. The Supreme Court of Louisiana did not pass upon this contention. The record upon which the temporary and the permanent injunctions were granted contained concededly genuine applications for union membership and authorizations of representation from 179 of the 225 eligible employees. Accordingly, we do not now consider the questions that would have been presented if the union or the pickets had represented less than a majority of the eligible employees, or if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees.

sters Union, 346 U. S. 485, and see *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468. In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8 (a)(5) of the Act.[3]

The issue before us thus turns upon the effect of the union's choice not to file the information and affidavits described in § 9 (f), (g) and (h). The state court misconceived that effect. The union's failure to file was not a confession of guilt of anything. It was merely a choice not to make public certain information. The Act prescribes no fine or penalty, in the ordinary sense, for failure to file the specified data and affidavits. The Act does not even direct that they be filed. The nearest to such a direction in the Act is the statement, in § 9 (g), that it shall be "the obligation" of all labor organizations to file annual reports "bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B)." However, neither subsection (f)(A) nor (f)(B) of § 9 requires any initial filing to be made. Each merely describes what is required to be filed in the event that a labor organization elects to seek the advantages offered by subsection (f).

Congress seeks to induce labor organizations to file the described data and affidavits by making various benefits of the Act strictly contingent upon such filing. See *New*

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[3] "SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." 61 Stat. 140, 141, 29 U. S. C. § 158 (a)(5). For the material portion of § 9 (a), see note 1, *supra.*

Jersey Carpet Mills, Inc., 92 N. L. R. B. 604, 610. In particular, Congress makes the services of the Labor Board available to labor organizations only upon their filing of the specified data and affidavits.[4] By its noncompliance with § 9 (f), (g) and (h), a union does not exempt itself from other applicable provisions of the Act.[5]

What, then, is the precise status of a labor organization that elects not to file some or all of the data or affidavits in question? It is significant that the effect of noncompliance is the same whether one or more of the filings are omitted. Accordingly, it simplifies the issue to assume a situation where a union has filed the non-Communist affidavits specified in § 9 (h), but has chosen not

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[4] Congress seeks "to stop the use of the Labor Board" by noncomplying unions. *Labor Board* v. *Dant*, 344 U. S. 375, 385. For example, the following benefits are available to labor organizations only upon their voluntary compliance with the conditions prescribed in the statutory provisions listed below:

(1) The Board's investigations of questions, raised by labor organizations, concerning representation, on compliance with § 9 (f) and (h); (2) labor organizations' eligibility for certification as representatives, on compliance with § 9 (g) and (h); (3) the Board's issuance of complaints pursuant to charges by labor organizations, on compliance with § 9 (f) and (g); (4) privilege of making a union-shop agreement, see § 8 (a) (3); (5) labor organizations' right to obtain redress from Board for unfair labor practices, see § 8; (6) limited right to engage in boycott when seeking recognition, see § 8 (b) (4) (B); (7) limited right to strike for assignment of work, see § 8 (b) (4) (D); and (8) limited protection for a certified representative against a strike for recognition of a rival organization, see § 8 (b) (4) (C).

[5] The Board may provide relief in case of a refusal by a noncomplying union to bargain in good faith, as required by § 8 (b) (3). See *Chicago Typographical Union No. 16*, 86 N. L. R. B. 1041, 1048, and n. 16; *National Maritime Union*, 78 N. L. R. B. 971, 987–988. As to decertification of a noncomplying union under § 9 (c) (1) (A) (ii), see *Harris Foundry & Machine Co.*, 76 N. L. R. B. 118. For the effect of noncompliance with § 9 (h), see generally *American Communications Assn.* v. *Douds*, 339 U. S. 382, 390.

to disclose the information called for by § 9 (f)(A)(2) and (3) as to the salaries of its officers, or the manner in which they have been elected. There is no provision stating that, under those circumstances, the union may not represent an appropriate unit of employees if a majority of those employees give it authority so to do. Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representative. Section 8 (a)(5)[6] declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9 (a).*" (Emphasis supplied.) Section 9 (a),[7] which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board,* 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied

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[6] See note 3, *supra.* When a majority of an employer's eligible employees have authorized a noncomplying union to represent them and such union later has complied with the statutory filing requirements, the union, under appropriate circumstances, has been permitted to invoke the Board's processes to remedy the consequences of the employer's prior refusal to bargain with the union.

". . . Congress has not made compliance with the filing requirements of § 9 (f), (g) and (h) a condition precedent to the obligation of an employer under § 8 (a)(5) to bargain collectively with the chosen representative of the employees; such compliance is merely made a condition precedent to invoking the machinery of the Act for the investigation of a question concerning representation, or for the issuance of a complaint charging the commission of unfair labor practices." *Labor Board* v. *Reed & Prince Mfg. Co.,* 205 F. 2d 131, 133–134. See also, *Labor Board* v. *Pecheur Lozenge Co.,* 209 F. 2d 393, 402–403; *Labor Board* v. *Tennessee Egg Co.,* 201 F. 2d 370; *West Texas Utilities Co.* v. *Labor Board,* 87 U. S. App. D. C. 179, 185, 184 F. 2d 233, 239.

[7] See note 1, *supra.*

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with § 9 (f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification.[8]

Likewise, § 7, which deals with the employees' rights to self-organization and representation, makes no reference to any need that the employees' chosen representative must have complied with § 9 (f), (g) or (h).[9] Section 7 provides—

> "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 activ-

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[8] A Board election is not the only method by which an employer may satisfy itself as to the union's majority status. See, *e. g., Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 338–339; *Labor Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 921–922; *Labor Board* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261; *Labor Board* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501, 503–504; *Labor Board* v. *Kobritz*, 193 F. 2d 8, 14; *Brookville Glove Co.*, 114 N. L. R. B. 213, 214, n. 4, 36 L. R. R. M. 1548, 1549, n. 4.

[9] ". . . The Act does not proscribe bargaining with a noncomplying union; indeed, consonant with public policy, an employer may voluntarily recognize and deal with such a union. If Congress had intended the Act to have the effect urged by the Respondents, it easily could have inserted an express provision in the statute to accomplish such result. This, Congress did not do." *Brookville Glove Co., supra,* at 1549. The Board there held that the employer committed an unfair labor practice (§ 8 (a)(3)) when it discharged employees who struck to induce their employer to recognize as their bargaining representative the same noncomplying union (United Mine Workers) which is a petitioner here. There also the union had been designated as their chosen representative by a majority of the eligible employees. See also, *Rubin Bros. Footwear, Inc.*, 99 N. L. R. B. 610, 619; *Labor Board* v. *Coal Creek Coal Co.*, 204 F. 2d 579, 581; *Labor Board* v. *Electronics Equipment Co.*, 194 F. 2d 650, 651, n. 1; *Labor Board* v. *Pratt, Read & Co.*, 191 F. 2d 1006, 1008. Cf. *Ohio Ferro-Alloys Corp.* v. *Labor Board,* 213 F. 2d 646; *Stewart-Warner Corp.* v. *Labor Board,* 194 F. 2d 207.

> ities 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)." 61 Stat. 140, 29 U. S. C. § 157.[10]

Subsections (f), (g) and (h) of § 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance.[11]

The noncompliance of the union with § 9 (f), (g) and (h) in the instant case precludes any right of the union to seek certification of its status by the Labor Board.[12]

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[10] The cross reference to § 8 (a)(3) has to do only with an exception in favor of union shops.

[11] For example, § 9 (f) prescribes that, *unless the labor organization files the required material*, "No investigation shall be made *by the Board of any question* affecting commerce concerning the representation of employees, *raised by a labor organization under subsection* (*c*) of this section . . . ." (Emphasis supplied.) Subsection (c) of § 9 so referred to relates to elections of collective-bargaining representatives under supervision of the Board. Section 9 (f) also prescribes that, *unless the labor organization files the required material, "no complaint shall be issued* [by the Board] pursuant to a charge made by a *labor organization under subsection* (*b*) *of section 10* . . . ." (Emphasis supplied.) Subsection (b) of § 10 so referred to relates to complaints by the Board, so that here again that which is cut off by noncompliance is only that which the Act has added. Subsections (g) and (h) of § 9 contain like provisions.

[12] For the Board's conclusion that an employer may not have recourse to the Board to verify, by certification, the union's status or lack of status as the exclusive representative of the eligible em-

Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.

The industrial relations between the company and its employees nonetheless affect interstate commerce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them.

Section 7 recognizes the right of the instant employees "to bargain collectively through representatives of their own choosing" and leaves open the manner of choosing such representatives when certification does not apply. The employees have exercised that right through the action of substantially more than a majority of them authorizing the instant union to represent them.

Section 9 (a) provides that representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . ." That fits this situation precisely. It does not require the designated labor organization to disclose

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ployees, see *Herman Loewenstein, Inc.*, 75 N. L. R. B. 377; *Sigmund Cohn Mfg. Co.*, 75 N. L. R. B. 177, 180, n. 2; *National Maritime Union* v. *Herzog*, 78 F. Supp. 146, 156, aff'd, 334 U. S. 854; *Fay* v. *Douds*, 172 F. 2d 720, 724–726.

the salaries of its officers, or even to file non-Communist affidavits.

Under those sections and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union. Upon the employer's refusal to do so, the union, because of its noncompliance with § 9 (f), (g) and (h), cannot resort to the Labor Board. It can, however, take other lawful action such as that engaged in here.

The company can, if it so wishes, lawfully recognize the union as the employees' representative. That being so, there is no reason why the employees, and their union under their authorization, may not, under § 13, strike,[13] and, under § 7, peacefully picket the premises of their employer to induce it thus to recognize their chosen representative. See *West Texas Utilities Co.* v. *Labor Board,* 87 U. S. App. D. C. 179, 185, 184 F. 2d 233, 239, and the other cases cited in note 6, *supra.*[14]

Such being the case, the state court is governed by the federal law which has been applied to industrial relations, like these, affecting interstate commerce and the state court erred in enjoining the peaceful picketing here practiced. A "State may not prohibit the exercise of rights which the federal Acts protect." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 474, and see *Garner* v. *Teamsters Union,* 346 U. S. 485, 494.

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[13] "SEC. 13. 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. See also, *Labor Board* v. *Rice Milling Co.,* 341 U. S. 665, 673, and cases cited in note 6, *supra.*

[14] "Present law in no way limits the primary strike for recognition except in the face of another union's certification." Report of the Joint Committee on Labor-Management Relations, No. 986, Pt. 3, 80th Cong., 2d Sess. 71; S. Rep. No. 105, 80th Cong., 1st Sess. 22; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 43.

The judgment of the Supreme Court of Louisiana, accordingly, is reversed and the case is remanded to it for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

MR. JUSTICE FRANKFURTER, dissenting.

Although my doubts are not shared by others, they have not been overcome, and the nature of the problem raised by this case makes it not inappropriate to express them.

The problem is the recurring difficulty of determining when a federal enactment bars the exercise of what otherwise would clearly be within the scope of a State's lawmaking power. There is, of course, no difficulty when Congress explicitly displaces state power. The perplexity arises in a situation like the present, where such displacement by the controlling federal power is attributed to implications or radiations of a federal statute.

The various aspects in which this problem comes before the Court are seldom easy of solution. Decisions ultimately depend on judgment in balancing overriding considerations making for the requirement of an exclusive nation-wide regime in a particular field of legal control and respect for the allowable area within which the forty-eight States may enforce their diverse notions of policy. The Court has heretofore adverted to the uncertainties in the accommodation of these interests of the Nation and the States in regard to industrial relations affecting interstate commerce—uncertainties inevitable in the present state of federal legislation.

Proper accommodation is dependent on an empiric process, on case-to-case determinations. Abstract propositions and unquestioned generalities do not furnish answers.

In this case, the Court concludes that Louisiana law must yield to the dominance of the National Labor Relations Act. Presumably, what Louisiana has decreed in the judgment now reversed would be within Louisiana's power were it not for the argumentatively derived withdrawal of that power by the National Labor Relations Act, as amended. Over the years, the Court has found such withdrawal of state power from reasonable implications of what Congress wrote in the National Labor Relations Act in some cases and not in others. Withdrawal has been found to exist in at least two types of situations: (1) where state law interferes with federal rights conferred on employees by § 7 of the National Labor Relations Act, *e. g., Hill* v. *Florida,* 325 U. S. 538; (2) where state law makes inroads on the primary jurisdiction with which Congress has invested the National Labor Relations Board, *e. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468. Here we are not concerned with the Board's primary jurisdiction. The issue is whether Louisiana, by enjoining, according to its law, a strike calculated to coerce respondent to bargain with a union which has not complied with the non-Communist and other reporting provisions, § 9 (f), (g) and (h) of the Taft-Hartley Act, interferes with the protection afforded by § 7 of that Act, where that union may represent a majority of employees.

Section 7 grants employees the federal right to engage in concerted activities in furtherance of collective bargaining. A strike accompanied by peaceful picketing is a typical expression of such authorized concerted activity. Instances of special situations that are clearly outside of this protection are (1) where the aspect that the strike action takes constitutes a union unfair labor practice interdicted by the Taft-Hartley Act, or (2) where the strike is in violation of the federal criminal law. See *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31. It

would be self-contradictory for federal law to protect conduct which federal law brands as illegal. That is not this situation. A non-complying union, such as the petitioner, however vigorously it may assert non-compliance as a matter of principle, is not under condemnation of illegality by the Taft-Hartley Act, or any other federal law, if it employs economic pressure to achieve its goal. The explicit consequence which that Act attaches to non-compliance is that such a union is denied the advantages of the National Labor Relations Board—it cannot utilize that Board's machinery to obtain certification as the bargaining representative or to secure redress against unfair labor practices by an employer.

The policy of § 9 is that of Congress and the wisdom of the policy is not our concern. But just as all fair implications must be given to § 7, so it is equally incumbent to give to the scope of the non-Communist affidavit and other reporting requirements of § 9 the reasonable direction of their meaning and purpose. So far as its own law-enforcement machinery for protecting the interests of employees is concerned, Congress designed to hamper non-conforming unions and to discriminate against them by denying them rights deemed of the utmost importance to trade unions. This being so, I find it rather difficult to conclude that, while visiting such consequences upon a non-conforming union in the federal domain of law enforcement, the Congress has impliedly withdrawn from the States the power to regulate such a union. In balancing these considerations, the weight of my judgment tips in favor of not finding in § 7 of the Taft-Hartley Act an implied limitation upon power exercised by Louisiana in the circumstances of this case.

Syllabus.

AMERICAN AIRLINES, INC. *v.* NORTH AMERICAN AIRLINES, INC., ET AL.

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

No. 410. Argued March 6–7, 1956.—Decided April 23, 1956.

In a proceeding under § 411 of the Civil Aeronautics Act, the Civil Aeronautics Board found that respondent's use of the name "North American" in the air transportation industry, in which it competed with American Airlines, had caused "substantial public confusion," by causing persons to check in at the wrong carrier, attempt to purchase transportation from the wrong carrier, meet flights of the wrong carrier, and otherwise, that such public confusion was "likely to continue" and was an unfair method of competition within the meaning of § 411. It further found that the public interest required elimination of the use of the name, and it ordered respondent to cease and desist from engaging in air transportation under the name of "North American Airlines" or any combination of the word "American." *Held:*

1. The Board applied criteria appropriate to a determination of whether a proceeding by it in this case would be in the "interest of the public," as required by § 411, and it had jurisdiction to inquire into the methods of competition presented here and to determine whether they constituted a violation of the Act. Pp. 80–85.

2. The Board's evidentiary findings concerned confusion of the type which can support a finding of violation of § 411. Pp. 85–86.

3. However, since this Court does not understand the Court of Appeals to have decided whether the Board's findings were supported by substantial evidence on the record as a whole, the case is remanded to that Court for further proceedings in the light of this opinion. P. 86.

97 U. S. App. D. C. 85, 228 F. 2d 432, reversed and remanded.

Howard C. Westwood argued the cause for petitioner. With him on the brief was *J. Randolph Wilson.*

Walter J. Derenberg argued the cause for North American Airlines, Inc., respondent. With him on the brief was *Hardy K. Maclay.*

Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Franklin M. Stone, O. D. Ozment and *Gerald F. Krassa* filed a brief for the Civil Aeronautics Board, respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

Twentieth Century Airlines, Inc., was issued a letter of registration as a large irregular air carrier by the Civil Aeronautics Board in 1947. For some reason, beginning in 1951 it conducted its business under the name of North American Airlines. On March 3, 1952, it amended its articles of incorporation so as legally to change its name to North American Airlines, Inc. By letter dated March 11, 1952, it requested the C. A. B. to reissue its letter of registration in the new corporate name. The Board took no action on that request, but rather, in August 1952, adopted an Economic Regulation requiring every irregular carrier after November 15, 1952, to do business in the name in which its letter of registration was issued. 14 CFR § 291.28. The Board explained that under the Regulation it would allow continued use of a different name to which good will had become attached, except where use of such name constitutes a violation of § 411 of the Civil Aeronautics Act, 52 Stat. 1003, as amended, 66 Stat. 628, 49 U. S. C. § 491, which prohibits unfair or deceptive commercial practices and unfair methods of competition. 17 Fed. Reg. 7809.

On October 6, 1952, respondent applied for permission to continue use of its name, "North American Airlines." Petitioner, American Airlines, on October 17, 1952, filed a memorandum with the Board requesting denial of North American's application for the reasons, among others, that use of the name "North American" infringed upon its long-established trade name, "American," and constituted an unfair method of competition in violation of § 411 of

the Act. The Board, as authorized by § 411, on its own motion instituted an investigation and hearing into whether there was a violation of § 411 by North American. It consolidated with that proceeding an investigation and hearing into the matter of North American's application for change of name in its letter of registration. American was granted leave to intervene in the consolidated proceeding.

After extensive hearings, the Board found that respondent's use of the name "North American" in the air transportation industry, in which it competed with American, had caused "substantial public confusion," which was "likely to continue" and which constituted "an unfair or deceptive practice and an unfair method of competition within the meaning of Section 411." Docket Nos. 5774 and 5928 (Nov. 4, 1953), 14–15 (mimeo). It found that the public interest required elimination of the use of the name, and accordingly it denied the application of North American and ordered it to "cease and desist from engaging in air transportation under the name 'North American Airlines, Inc.,' 'North American Airlines,' 'North American,' or any combination of the word 'American.' " *Id.*, at 15–16. On petition for review by North American, the Court of Appeals for the District of Columbia set aside the Board's order. 97 U. S. App. D. C. 85, 228 F. 2d 432. American, having been admitted as a party below by intervention, sought, and we granted, certiorari. 350 U. S. 894.

As we understand its opinion, the Court of Appeals set aside the order because the public interest in this proceeding was inadequate to justify exercise of the Board's jurisdiction under § 411. Although the court was critical of the finding of "substantial public confusion," it did not, on its disposition of the case, expressly disturb that or any other of the Board's findings. For the purposes of review here, we will accept the findings, and there is no cause

for this Court to review the evidence. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, has no application in the present posture of the case before us. The questions then presented are whether confusion between the parties' trade names justified a proceeding by the Board to protect the public and whether the kind of confusion found by the Board could support a conclusion of a violation of the statute by respondent.

This is a case of first impression under § 411. That section provides that

> "The Board may, upon its own initiative or upon complaint . . . if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

If the Board finds that the carrier is so engaged, "it shall order such air carrier . . . to cease and desist from such practices or methods of competition." Section 411 was modeled closely after § 5 of the Federal Trade Commission Act,* which similarly prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices" and provides for issuance of a complaint "if it shall appear to the Commission that a proceeding by it . . . would be to the interest of the public." 38 Stat. 719, as amended, 15 U. S. C. § 45. We may profitably look to judicial interpretation of § 5 as an aid in the resolution of the questions raised here under § 411.

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*See Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. 5; 83 Cong. Rec. 6726; Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 2 and S. 1760, 75th Cong., 1st Sess., Pt. 1, 74.

It should be noted at the outset that a finding as to the "interest of the public" under both § 411 and § 5 is not a prerequisite to the issuance of a cease and desist order as such. Rather, consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and methods of competition and determine whether or not they are unfair. Thus, this Court has held that, under § 5, the Federal Trade Commission may not employ its powers to vindicate private rights and that whether or not the facts, on complaint or as developed, show the public interest to be sufficiently "specific and substantial" to authorize a proceeding by the Commission is a question subject to judicial review. *Federal Trade Comm'n* v. *Klesner,* 280 U. S. 19. See also *Federal Trade Comm'n* v. *Keppel & Bro., Inc.,* 291 U. S. 304; *Federal Trade Comm'n* v. *Royal Milling Co.,* 288 U. S. 212.

In the *Klesner* case, two District of Columbia retailers, with a long history of acrimonious personal and business relations, were both operating stores called the "Shade Shop." This Court held that the public interest merely in resolving their private unfair competition dispute would not justify the Commission in issuing a complaint. The courts of law are open to competitors for the settlement of their private legal rights, one against the other. The Board, under a mandate from Congress, is charged with the protection of the public interest as affected by practices of carriers in the field of air transportation. In exercising our function of review of the Board's jurisdiction to protect the public interest by a proceeding which may be generated from facts also giving rise to a private dispute, we must take account of the significant differences between § 5 and § 411. Section 5 is concerned with purely private business enterprises which cover the full spectrum of economic activity. On the

other hand, the air carriers here conduct their business under a regulated system of limited competition. The business so conducted is of especial and essential concern to the public, as is true of all common carriers and public utilities. Finally, Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry.

The practices of the competitors here clashed in a field where Congress was specifically concerned to protect the public interest. Demonstrated confusion of the public as to the origin of major air transportation services may be of obvious national public concern. The criteria which the Board employed to determine whether the confusion here created a problem of concern to the public are contained in the following quotation from its report:

> ". . . the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded

> by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e. g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest . . . ." Docket Nos. 5774 and 5928 (Nov. 4, 1953), 12–13 (mimeo).

Under § 411 it is the Board that speaks in the public interest. We do not sit to determine independently what is the public interest in matters of this kind, committed as they are to the judgment of the Board. We decide only whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination. The Board has done that in the instant case. Considerations of the high standards required of common carriers in dealing with the public, convenience of the traveling public, speed and efficiency in air transport, and protection of reliance on a carrier's equipment are all criteria which the Board in its judgment may properly employ to determine whether the public interest justifies use of its powers under § 411.

It is argued that respondent's use of the name "North American" cannot amount to an unfair or deceptive practice or an unfair method of competition authorizing the Board's order within § 411. "Unfair or deceptive practices or unfair methods of competition," as used in § 411, are broader concepts than the common-law idea of unfair competition. See *Federal Trade Comm'n* v. *Keppel & Bro., Inc., supra; Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 648. The section is concerned not with punishment of wrongdoing or protection of injured competitors, but rather with protection of the public interest. See *Federal Trade Comm'n* v. *Klesner, supra,* at 27–28.

The courts have held, in construing § 5 of the Trade Commission Act, that the use of a trade name that is similar to that of a competitor, which has the capacity to confuse or deceive the public, may be prohibited by the Commission. *Federal Trade Comm'n* v. *Algoma Lumber Co.*, 291 U. S. 67; *Juvenile Shoe Co.* v. *Federal Trade Comm'n*, 289 F. 57. And see *Pep Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Comm'n*, 122 F. 2d 158, where the confusing name was not that of any competitor. The Board found that respondent knowingly adopted a trade name that might well cause confusion. But it made no findings that the use of the name was intentionally deceptive or fraudulent or that the competitor, American Airlines, was injured thereby. Such findings are not required of the Trade Commission under § 5, and there is no reason to require them of the Civil Aeronautics Board under § 411. *Federal Trade Comm'n* v. *Algoma Lumber Co., supra,* at 81; *Eugene Dietzgen Co.* v. *Federal Trade Comm'n*, 142 F. 2d 321, 327; *D. D. D. Corp.* v. *Federal Trade Comm'n*, 125 F. 2d 679, 682; *Gimbel Bros., Inc.* v. *Federal Trade Comm'n*, 116 F. 2d 578, 579; *Federal Trade Comm'n* v. *Balme*, 23 F. 2d 615, 621. See also S. Rep. No. 221, 75th Cong., 1st Sess. 2.

The Board had jurisdiction to inquire into the methods of competition presented here, and its evidentiary findings concerned confusion of the type which can support a finding of violation of § 411. The judgment of the Court of Appeals must therefore be reversed. However, since we do not understand the court to have decided whether the Board's findings were supported by substantial evidence on the record as a whole, the case is remanded to the Court of Appeals for further proceedings in the light of this opinion.

Reversed and remanded.

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

The Court decides that a finding of "substantial public confusion" resulting from respondent carrier's use of the name "North American" constitutes a violation of § 411 of the Civil Aeronautics Act, 52 Stat. 1003, as amended, 66 Stat. 628, 49 U. S. C. § 491.

If the Court held that the public confusion must be substantial enough to impair—or imminently threaten to impair—the efficiency of air service, I would agree. That construction would give practical content to the phrase "substantial public confusion." The Court, however, does not require a Board finding that the confusion has diminished the efficiency of air service. There is, indeed, no such finding by the Board in this case. There is only a naked finding of "substantial public confusion" and that such confusion is "likely to continue." There is no finding that any flight was delayed because a passenger was confused; there is no finding that any passenger missed his plane because of checking in at the wrong ticket counter; there is no finding that a confused passenger boarded the wrong plane.

The Board conceded that its order requiring respondent to cease and desist from using the name "North American" was "a serious sanction which necessarily involves disturbance and loss to the carrier. . . . The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel *may well be diminished* when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong car-

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rier, or direct their inquiries to the wrong carrier." Docket Nos. 5774 and 5928 (Nov. 4, 1953), 12–13 (mimeo). (Italics added.)

I would not permit the Board to find a violation of § 411 so easily. We should require a finding that the confusion has actually caused some impairment of air service or that at least there is an imminent threat of such impairment. Certainly the type of confusion found here "may well" diminish the speed of air travel—*if* it grows to such major proportions that flights are delayed and passengers begin missing flights or boarding the wrong planes. But it is mere conjecture that that will ever happen as a result of respondent's use of the name "North American." The type and extent of public confusion found by the Board here would probably also be found if the Board conducted a similar inquiry into passenger confusion between Pan-American and American Airlines. It would also be surprising if the Board could not find similar confusion between Eastern and Northeast Airlines, Western and Northwest Airlines, or, if the Board had jurisdiction in the railroad industry, among Northern Pacific, Union Pacific, Western Pacific and Southern Pacific. As the dissenting member of the Board said:

"Since American Airlines, Inc., carries approximately 5½ million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed between the services offered by American, on the one hand, and North American on the other. On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines receives every year over and above those received from passengers which it actually carries) if there were not *some* demonstrable public confusion between American

Airlines and the respondent in this case." *Id.,* at 1–2 (dissenting opinion).

The Court relies on the cases arising under § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45. *Federal Trade Comm'n* v. *Algoma Lumber Co.,* 291 U. S. 67; *Juvenile Shoe Co.* v. *Federal Trade Comm'n,* 289 F. 57; *Pep Boys* v. *Federal Trade Comm'n,* 122 F. 2d 158. Those cases are quite different. In each the Commission made more than a bald finding of "substantial public confusion." It found, in the *Algoma Lumber* case, that a substantial number of purchasers had been misled into buying something other than what they thought they were buying. 291 U. S., at 72. In the *Juvenile Shoe* case, the competitor took a name so similar ("Juvenile Shoe Corporation" and "Juvenile Shoe Company, Inc.") that confusion in the public mind was "inevitable." 289 F., at 58. And the Commission made a finding that the use of the word "Juvenile" caused confusion and led purchasers to believe that the goods of one company were the goods of the other company. *Id.,* at 59. In the *Pep Boys* case, the court approved the following test: ". . . whether the natural and probable result of the use by petitioner of the name . . . makes the average purchaser unwittingly, under ordinary conditions purchase that which he did not intend to buy." 122 F. 2d, at 161.

There are no similar findings in the instant case. There is no finding here that a passenger bought a North American ticket and flew North American under the mistaken belief that he was flying American. There is no finding that any passenger missed a plane because of the confusion. If passengers mistakenly bought North American service, believing it to be American, a finding of unfair or deceptive practices or unfair methods of competition under § 411 would be justified. That is a type of public

confusion quite different from the confusion found in this case—reporting to the wrong ticket counter or attempting to retrieve baggage from the wrong carrier. By analogy to the § 5 cases, we have here a situation where a few prospective purchasers walked into the wrong store, but never made any purchases there.

I would affirm the judgment of the Court of Appeals.

UNITED STATES *v.* ZUCCA, ALIAS SARNI.

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

No. 213. Argued January 24–25, 1956.—Decided April 30, 1956.

1. Under § 340 (a) of the Immigration and Nationality Act of 1952, the filing of an "affidavit showing good cause" is a prerequisite to the maintenance of a denaturalization proceeding. Pp. 91–100.
   (a) This conclusion is in accord with the language of the statute. Pp. 94–96.
   (b) It is also in accord with the legislative history of the statute, its contemporaneous administrative construction, and the usual administrative practice thereunder. Pp. 96–98.
   (c) The filing of such an affidavit is not rendered unnecessary merely because the complaint itself is verified. Pp. 98–99.
2. Section 340 (a) is the only section under which a United States Attorney may institute denaturalization proceedings. *Bindczyck* v. *Finucane*, 342 U. S. 76. Pp. 95, 99.

221 F. 2d 805, affirmed.

J. F. Bishop argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Olney*, *Gray Thoron*, *Beatrice Rosenberg* and *L. Paul Winings*.

Orrin G. Judd argued the cause for respondent. With him on the brief was *Earle K. Moore*.

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

This is a denaturalization proceeding under § 340 (a) of the Immigration and Nationality Act of 1952.[1] The sole question is whether § 340 (a) makes the filing of the "affidavit showing good cause" a prerequisite to maintenance of the suit. The District Court held that it does

[1] 66 Stat. 163, 260, as amended, 68 Stat. 1232, 8 U. S. C. (Supp. II) § 1451 (a).

and ordered the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days. As this was not done, the complaint was dismissed without prejudice to the Government's right to institute an action to denaturalize the respondent upon filing the affidavit. 125 F. Supp. 551. On appeal by the Government the Court of Appeals for the Second Circuit affirmed, adopting the opinion of the District Court. 221 F. 2d 805. We granted certiorari, 350 U. S. 817, because of an asserted conflict with decisions of the Seventh [2] and Ninth [3] Circuits and because of the importance of the question in the administration of the immigration and naturalization laws.

Respondent Ettore Zucca was naturalized on January 4, 1944. In 1954, the United States Attorney for the Southern District of New York, proceeding under § 340 (a), filed a verified complaint in the United States District Court in his District seeking revocation of respondent's naturalization on the grounds of illegality, concealment of material facts, and willful misrepresentation.

The complaint alleged that respondent, at his naturalization hearing and in his petition for naturalization, had falsely sworn "that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country . . . ," that it was his "intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any [foreign powers] . . . ," and that he was and had been "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States." This was followed by

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[2] *United States* v. *Tuteur*, 215 F. 2d 415.

[3] *Schwinn* v. *United States*, 112 F. 2d 74, affirmed *per curiam*, 311 U. S. 616.

a general allegation of membership in the Communist Party and "other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947," and equally general allegations that respondent procured his naturalization by concealment and willful misrepresentation in that he concealed the facts relating to his membership in the Communist Party and affiliated organizations and otherwise swore falsely as to his intentions and beliefs. The pleader concluded that "good cause exists for the institution of this suit . . . ." The complaint, no part of which was alleged on information and belief, was verified by an Assistant United States Attorney. When respondent sought to take depositions of this Attorney, he was met with an affidavit in opposition denying personal knowledge.[4] Respondent then filed his motion to dismiss on the ground, *inter alia*, that § 340 (a) required the filing of an affidavit showing good cause and that this requirement had not been complied

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[4] The affidavit read as follows:

"GEORGE C. MANTZOROS, being duly sworn, deposes and says as follows:

"That he is one of the Assistant United States Attorneys on the staff of J. Edward Lumbard, United States Attorney for the Southern District of New York in charge of the above-entitled case.

"That the only knowledge or information which he has in this case has been obtained through files turned over to him for use in preparation of the complaint.

"That he has no personal knowledge of any of the facts herein and is not a prospective witness.

"That on information and belief his superior, the said J. Edward Lumbard likewise has no personal knowledge of any of the facts herein and is not a prospective witness.

"That he has carefully reviewed the files in this case and finds nothing therein which would indicate any special or unusual circumstances requiring the production of the documents requested by the defendant in his notice to take depositions, dated July 8, 1954.

"That many of the documents in said files are privileged because of their confidential nature." R. 8.

with. As stated above, the motion to dismiss was granted on this ground.

The Government argues that a reading of the statute and its legislative history leads to the conclusion that the filing of an "affidavit showing good cause" is not a prerequisite to maintaining denaturalization proceedings under § 340 (a). We do not agree.

The affidavit provision with which we are here concerned first appeared in § 15 of the Act of June 29, 1906.[5] Without substantial change, it was carried forward in the laws of 1940 [6] and 1952,[7] currently reading as follows:

> "SEC. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, *upon affidavit showing good cause therefor,* to institute proceedings in any court specified in subsection (a) of section 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, ..." (Emphasis added.)

Were we obliged to rely solely on the wording of the statute, we would have no difficulty in reaching the conclusion that the filing of the affidavit is a prerequisite to maintaining a denaturalization suit. This conclusion is not altered by a consideration of the Government's highly

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[5] 34 Stat. 596, 601.

[6] Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1137, 1158.

[7] 66 Stat. 163, 260, as amended, 68 Stat. 1232, 8 U. S. C. (Supp. II) § 1451 (a).

speculative suggestions as to the meaning of the legislative history. On the contrary, we think that it is entirely consistent with the Court's statement in *Bindczyck* v. *Finucane,* 342 U. S. 76, that Congress acted "[w]ith a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure . . . ." *Id.,* at 83.

The natural meaning of the language used in § 340 (a) is that filing of the affidavit is a procedural prerequisite to maintenance of the suit. In the *Bindczyck* case, this Court held that § 338 (a) of the Nationality Act of 1940, predecessor of § 340 (a), sets forth the exclusive procedure for denaturalization.[8] Despite that decision, the Government would have us hold now that the grant of power to maintain denaturalization suits is found in the general duty of United States Attorneys to prosecute all civil actions in which the United States is concerned,[9] and that § 340 (a) merely imposes the "additional duty . . . to act, not alone on their own knowledge and judgment, but on the basis of an affidavit of good cause furnished by private citizens." In effect the Government argues that the affidavit is required only when the proceeding is to be brought on the complaint of a private citizen. We need not decide whether a private citizen may ever file such a complaint. The short answer in this case is that the Government laid its complaint expressly under § 340 (a).

While arguing that the words of § 340 are words of limitation on the discretion of the United States Attorney, the Government apparently concedes that the

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[8] The specific holding, that § 338 (a) of the 1940 Act overrode local rules concerning time limitations upon the power of state courts to reopen their judgments, was abrogated by § 340 (j) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 262. The underlying philosophy of *Bindczyck* remains intact.

[9] 28 U. S. C. § 507 (a) (2).

venue and notice provisions of the Section are generally applicable to denaturalization proceedings. Its argument overlooks the fact that the affidavit and venue provisions are in the same sentence. If the affidavit were required only when the United States Attorney proceeded on the complaint of a private citizen, then only in such a case would the venue be restricted to the district of the defendant's residence. We could accept such a limiting construction of the statute only upon a very clear showing that Congress meant something other than what it said.

The original Act of 1906 was the culmination of many years of study by Congress and a commission of which the Attorney General was a leading spirit and his Assistant the Chairman. Shortly after its enactment, the same Attorney General rendered an opinion to the Secretary of Commerce and Labor to the effect that the filing of an affidavit was "necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate." [10] In such circumstances, a contemporaneous construction of a statute by the officer charged with its enforcement is entitled to great weight. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315. Over a period of years, however, there has been some conflict among the circuits concerning the affidavit requirement.[11] The Government

[10] Letter of Attorney General Bonaparte, March 26, 1907 (unpublished, National Archives), cited in a contemporary treatise by a recognized authority on the statute. Van Dyne, Law of Naturalization (1907), 138. The letter is reproduced at p. 50 of the Brief for the United States.

[11] The Courts of Appeals for the Third, Fifth, and District of Columbia Circuits had taken the position adopted by the Second Circuit in this case. *United States* v. *Richmond,* 17 F. 2d 28; *United States* v. *Salomon,* 231 F. 928; *Cohen* v. *United States,* 38 App. D. C. 123. The Seventh and Ninth Circuits favored the contrary position. *United States* v. *Tuteur,* 215 F. 2d 415; *Schwinn* v. *United States,*

relies particularly on our affirmance of the decision of the Court of Appeals for the Ninth Circuit in *Schwinn* v. *United States,* 311 U. S. 616. The Court decided that case on the sole ground of illegal procurement. Although the necessity of the affidavit was considered below in view of the Government's failure to offer proof in support of its allegation that an affidavit of good cause had been furnished, the question was not presented to this Court.[12]

Prior to the decision in the *Schwinn* case the practice of the Justice Department seems generally to have been to institute denaturalization proceedings upon affidavit showing good cause. The Government does not now contend that it has abandoned that practice. It merely claims the right not to do so when it chooses, as clearly appears from portions of a Department of Justice memorandum which has been brought to the Court's attention.[13]

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112 F. 2d 74, affirmed *per curiam,* 311 U. S. 616; *United States* v. *Knight,* 291 F. 129 (U. S. D. C. Mont.), affirmed 299 F. 571; *United States* v. *Leles,* 227 F. 189.

[12] On two prior occasions this Court has had occasion to notice the affidavit provision without suggesting that it was not an essential procedural step in the denaturalization proceeding. See *Johannessen* v. *United States,* 225 U. S. 227, 242; *Schneiderman* v. *United States,* 320 U. S. 118, 159, n. 54.

[13] "As indicated below in 'IV. Pre-Trial Procedure,' the defendant can probably obtain most of the government's evidence by a proper utilization of the methods of discovery provided in Rules 16, 33, and 34. It, therefore, may be advisable at the outset to furnish him with a reasonable amount of the government's evidence in order to reduce the chance of these discovery rules being employed, and thus avoid the ensuing delay. If this is done, it would seem that the affidavit rather than the complaint is the proper place in which to recite evidence.

"In the event it is decided in a given case to furnish the defendant with some of the government's evidence, it is recommended that an affidavit be prepared and served with the complaint and that in the affidavit there be recited briefly the nature of the evidence to be relied upon. This recitation of evidence should be of a general nature

We are unimpressed by the reasoning of that memorandum. We think that the public interest is not served by taking such liberties with a specific statutory requirement designed for the protection of naturalized citizens. And we fail to see that the requirement imposes a burden on the Government. At this Term, it has been represented to us that the usual practice is that, "if sufficient grounds are shown, an 'affidavit showing good cause' (see Section 340 (a) of the Act . . .) is prepared and executed, and is forwarded as an aid to the formal judicial proceedings . . . ." [14]

Lastly the Government contends, as an alternate ground for reversal, that no harm is done to the defendant because the complaint itself is verified and, therefore, accomplishes the function of the affidavit. With this we cannot agree. The complaint, under modern practice, is required merely

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but sufficient to reduce the ordinary chance of the discovery rules being employed and at the same time to reduce the likelihood of the government having to oppose a motion for a bill of particulars. On the other hand, it should not be so complete as to provide the defendant with the names of witnesses and possibly can be so phrased as not to disclose their identity. Similarly, it may be disadvantageous to make it so complete as to identify specific instruments or writings, for this may increase the likelihood of a demand for their production under Rule 34. It would seem sufficient to set out the general substance or type of statements or writings known to have been made without quoting them. It would also seem proper to aver generally membership and leadership in the German-American Bund or other un-American organizations, refusal of military service, general propaganda activities, etc.

"If it is believed undesirable to attach an affidavit to the complaint and to serve it upon the defendant, as discussed above, in that instance no reference should be made in the complaint to an affidavit having been prepared and as constituting the basis of the action." Circular No. 3663, Dept. of Justice, Supp. No. 9, April 6, 1943 (mimeographed), p. 87, printed in a supplemental memorandum filed by the Government in this case.

[14] Brief for the United States, *United States* v. *Minker*, 350 U. S. 179 (No. 35, October Term, 1955), at p. 34.

to allege ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship.[15]

In the *Bindczyck* case, *supra,* the Court summed up the purpose of and approach to denaturalization proceedings as follows:

> "[W]e cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, Congress formulated a self-contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15.
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> ". . . if citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in § 15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. Every national interest is thereby protected." 342 U. S., at 83, 84.

This proceeding was concededly brought under § 340 (a). We hold that this is the only Section under which a United States attorney may institute denaturalization proceedings, and that the affidavit showing good cause is a procedural prerequisite to the maintenance of proceedings thereunder.

The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if

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[15] *United States* v. *Richmond,* 17 F. 2d 28; *United States* v. *Salomon,* 231 F. 928.

his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause. The District Court below correctly dismissed the proceedings in this case because of the failure of the Government to file the required affidavit and the judgment of the Court of Appeals is therefore

Affirmed.

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

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

The Court's ruling today seriously obstructs the Government in filing denaturalization proceedings in this type of case. It reverses a long line of cases in the lower federal courts [1] and disregards a consistent administrative practice of over thirty years standing, a period which

[1] *Schwinn* v. *United States*, 112 F. 2d 74 (C. A. 9th Cir.), aff'd 311 U. S. 616; *United States* v. *Tuteur*, 215 F. 2d 415 (C. A. 7th Cir.); *United States* v. *Knight*, 291 F. 129 (D. C. Mont.), aff'd 299 F. 571 (C. A. 9th Cir.); *United States* v. *Collins*, 131 F. Supp. 545 (D. C. S. D. N. Y.); *United States* v. *Shinkevich*, 131 F. Supp. 547 (D. C. E. D. Pa.); *United States* v. *Jerome*, 115 F. Supp. 818 (D. C. S. D. N. Y.); *United States* v. *Lustig*, 110 F. Supp. 806 (D. C. S. D. N. Y.); *United States* v. *Schuchhardt*, 48 F. Supp. 876 (D. C. N. D. Ind.); *United States* v. *Leles*, 227 F. 189, 236 F. 784 (D. C. N. D. Calif.); *United States* v. *Radzie*, 14 F. R. D. 151 (D. C. S. D. N. Y.); *United States* v. *Favorito*, 7 F. R. D. 152 (D. C. N. D. Ohio).

includes two recodifications of the immigration laws. Furthermore, the identical point on which the case today is decided was present in two earlier cases where it apparently was not considered important enough to be presented to this Court.[2]

The only authority for the Court's action is an unpublished, informal, and somewhat ambiguous inter-departmental letter of the Attorney General written in 1907. While any Attorney General might well be proud to see his views given such lasting effect, he undoubtedly would be surprised to learn that the authority of such an informal statement could overrule later court decisions and a thirty-year, firmly established position of the Department of Justice. Many cases witness the fact that the Court has often given little or no weight to carefully drawn opinions of the Attorney General on questions of statutory interpretation.

But my major objection to the decision today is the extreme burden placed on the Government in cases such as this. The Court construes § 340 (a) of the Immigration and Nationality Act to require something more than was filed in the present case. The complaint here was verified; the Assistant United States Attorney swore that the facts alleged in the complaint were "true" and "that the sources of his information . . . are the records which are on file in his office." Thus the complaint in this case was supported by the jurat of a notary public

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[2] In *Schwinn* v. *United States,* 112 F. 2d 74, the Ninth Circuit held that the filing of the affidavit was not "jurisdictional," and passed on the merits. We granted certiorari and affirmed summarily "on the sole ground" that the certificate had been illegally procured. 311 U. S. 616. In *Schneiderman* v. *United States,* 320 U. S. 118, we considered the merits at length, even though the "affidavit" filed in that case by the Immigration Inspector revealed that his information was based, as here, solely on the Government's files, and was in exactly the form used here.

and the sworn statement of an Assistant United States Attorney who held office by virtue of his oath to carry out his official duties fairly and impartially. No more was present in *Schneiderman* v. *United States,* 320 U. S. 118.

The complaint alleged that Zucca had lied in his alien registration statement in 1940, and in his preliminary naturalization examination and testimony before a naturalization examiner in 1952. He is alleged to have stated under oath that "he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government." The complaint then alleges that Zucca "was a member of the Communist Party of the United States, including the Workers Communist Party . . . from 1925 to 1947." Under § 305 of the Nationality Act of 1940, the complaint continues, Zucca's naturalization was illegal.

But the majority declares that these sworn allegations are insufficient. It makes a vague reference to the pleading of "ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship." From this statement I can draw only one conclusion. As respondent contends, "good cause" means "that the Government must furnish the Court with sworn statements by persons having personal knowledge of the facts . . . Congress could not have intended that the courts be required to accept the second-hand statements of investigators . . . ." [3] Apparently neither the United States Attorney nor anyone in the Immigration Service or the FBI can make such an affidavit unless he has personal knowledge of the facts. This would limit verification by these officers to cases based on prior undis-

[3] The trial judge held "that before a United States Attorney may institute a denaturalization proceeding he must be furnished with an affidavit of good cause."

closed criminal convictions, arrival age where controlling, etc.

But in proceedings based solely on membership in the Communist Party substantially different conditions prevail. Invariably, membership can be proved only from the testimony of other members concerning attendance at meetings, payment of dues, etc. There are no membership cards in the Party and have been none for more than a decade. If these evidential methods of proof—the testimony and identity of undercover agents—must be disclosed in an affidavit, the Government must choose between foregoing denaturalization cases and drying up its source of information before the proceeding can be brought. It is common knowledge among law enforcement officers that witnesses are affidavit-shy, particularly in cases involving subversion. Often, testimony can be obtained only in court with the aid of compulsory process. The difficulties in requiring exposure by affidavit are overwhelming and decisive in cases of this type.

I do not believe Congress ever intended such a rule. To me § 340 (a) is clear and unambiguous. Its plain reading is that proceedings may be filed by the United States Attorney "upon affidavit showing good cause therefor." Here the Attorney swore to specific charges which certainly do constitute "good cause." The sworn statement that petitioner was a member of the Communist Party and the Workers Communist Party from 1925 to 1947 alleges a prima facie case. To me it seems obvious that the purpose of § 340 (a)—to reduce the possibility of spurious denaturalization proceedings—is fully served by such a sworn statement.

Nor did the Congress intend that there should be two trials of issues of fact in these cases. To require the filing of evidential affidavits implies, as Zucca contends, extensive testing of their sufficiency before trial. The defendant is thus given two chances at the Government's case.

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There is no comparable requirement for an indictment in a criminal prosecution, *Costello* v. *United States*, 350 U. S. 359. But denaturalization is only a civil proceeding to withdraw a privilege wrongfully obtained. There has always been the requirement of proof under cross-examination of charges against the naturalized citizen, but apparently in this case the Court authorizes an additional procedure. Before his trial in this denaturalization proceeding, Zucca may file a bill of particulars and take depositions of each witness signing a "good cause" affidavit. The scope and reliability of the affidavits are then made the subject of judicial inquiry.[4] If the Government proves its case at this stage, it may then go to trial, where the same evidence is considered again. To my way of thinking, this clearly frustrates an important congressional program, a part of the broader one designed to protect our country from Communist infiltration.

In my opinion § 340 (a) requires the United States Attorney to allege in a sworn complaint sufficient factual information to show a prima facie case for denaturalization. At most it should be sufficient for an officer of the Immigration and Naturalization Service familiar with the case to make such allegations under oath. If the Court would require this paper to be headed "Affidavit" and contained in a separate blue backing, I would have no objection, though I see nothing to be gained from such a technical labeling. But as I read the Court's decision today it goes much further than this, and it may well submerge the denaturalization procedure established by Congress in a morass of unintended procedural difficulties.

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[4] The trial judge held, "But, the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial."

NATIONAL LABOR RELATIONS BOARD *v.* BABCOCK & WILCOX CO.

NO. 250. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued January 25, 1956.—Decided April 30, 1956.

In the circumstances of these cases, the nondiscriminatory refusal of the employers to permit distribution of union literature by nonemployee union organizers on company-owned parking lots did not unreasonably impede their employees' right to self-organization in violation of § 8 (a) (1) of the National Labor Relations Act, because the locations of the plants and of the living quarters of the employees did not place the employees beyond the reach of reasonable efforts of the unions to communicate with them by other means. Pp. 106–114.

(a) An employer may validly post his property against nonemployee distribution of union literature, if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. P. 112.

(b) *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, distinguished. Pp. 112–113.

(c) The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available. Pp. 113–114.

222 F. 2d 316, affirmed.

222 F. 2d 858, affirmed.

222 F. 2d 543, reversed.

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*Together with No. 251, *Labor Board* v. *Seamprufe, Inc.*, on certiorari to the United States Court of Appeals for the Tenth Circuit, and No. 422, *Ranco, Inc.* v. *Labor Board*, on certiorari to the United States Court of Appeals for the Sixth Circuit, both argued January 26, 1956.

Dominick L. Manoli argued the causes for the National Labor Relations Board. With him on the briefs were *Solicitor General Sobeloff, Theophil C. Kammholz* and *David P. Findling.*

O. B. Fisher argued the cause and filed a brief for respondent in No. 250.

Karl H. Mueller argued the cause for respondent in No. 251. With him on the brief was *Howard Lichtenstein.*

Eugene B. Schwartz argued the cause for petitioner in No. 422. With him on the brief were *Harry E. Smoyer* and *V. Jay Einhart.*

Mr. Justice Reed delivered the opinion of the Court.

In each of these cases the employer refused to permit distribution of union literature by nonemployee union organizers on company-owned parking lots. The National Labor Relations Board, in separate and unrelated proceedings, found in each case that it was unreasonably difficult for the union organizer to reach the employees off company property and held that, in refusing the unions access to parking lots, the employers had unreasonably impeded their employees' right to self-organization in violation of § 8 (a)(1) of the National Labor Relations Act. *Babcock & Wilcox Co.,* 109 N. L. R. B. 485, 494; *Ranco, Inc., id.,* 998, 1007, and *Seamprufe, Inc., id.,* 24, 32.

The plant involved in No. 250, *Labor Board* v. *Babcock & Wilcox Co.,* is a company engaged in the manufacture of tubular products such as boilers and accessories, located on a 100-acre tract about one mile from a community of 21,000 people. Approximately 40% of the 500 employees live in that town and the remainder live within a 30-mile radius. More than 90% of them drive to work in private

automobiles and park on a company lot that adjoins the fenced in plant area. The parking lot is reached only by a driveway 100 yards long which is entirely on company property excepting for a public right-of-way that extends 31 feet from the metal of the highway to the plant's property. Thus, the only public place in the immediate vicinity of the plant area at which leaflets can be effectively distributed to employees is that place where this driveway crosses the public right-of-way. Because of the traffic conditions at that place the Board found it practically impossible for union organizers to distribute leaflets safely to employees in motors as they enter or leave the lot. The Board noted that the company's policy on such distribution had not discriminated against labor organizations and that other means of communication, such as the mail and telephones, as well as the homes of the workers, were open to the union.[1] The employer justified its refusal to allow distribution of literature on company property on the ground that it had maintained a consistent policy of refusing access to all kinds of pamphleteering and that such distribution of leaflets would litter its property.

The Board found that the parking lot and the walkway from it to the gatehouse, where employees punched in for work, were the only "safe and practicable" places for distribution of union literature. The Board viewed the

[1] "*Other union contacts with employees:* In addition to distributing literature to some of the employees, as shown above, during the period of concern herein the Union has had other contacts with some of the employees. It has communicated with over 100 employees of Respondent on 3 different occasions by sending literature to them through the mails. Union representatives have communicated with many of Respondent's employees by talking with them on the streets of Paris, by driving to their homes and talking with them there, and by talking with them over the telephone. All of these contacts have been for the purpose of soliciting the adherence and membership of the employees in the Union." 109 N. L. R. B., at 492–493.

place of work as so much more effective a place for communication of information that it held the employer guilty of an unfair labor practice for refusing limited access to company property to union organizers. It therefore ordered the employer to rescind its no-distribution order for the parking lot and walkway, subject to reasonable and nondiscriminating regulations "in the interest of plant efficiency and discipline, but not as to deny access to union representatives for the purpose of effecting such distribution." 109 N. L. R. B., at 486.

The Board petitioned the Court of Appeals for the Fifth Circuit for enforcement. That court refused enforcement on the ground the statute did not authorize the Board to impose a servitude on the employer's property where no employee was involved. *Labor Board* v. *Babcock & Wilcox Co.*, 222 F. 2d 316.

The conditions and circumstances involved in No. 251, *Labor Board* v. *Seamprufe, Inc.*, and No. 422, *Ranco, Inc.* v. *Labor Board,* are not materially different, except that *Seamprufe* involves a plant employing approximately 200 persons and in the *Ranco* case it appears that union organizers had a better opportunity to pass out literature off company property. The Board likewise ordered these employers to allow union organizers limited access to company lots. The orders were in substantially similar form as that in the *Babcock & Wilcox* case. Enforcement of the orders was sought in the Courts of Appeals. The Court of Appeals for the Tenth Circuit in No. 251, *Labor Board* v. *Seamprufe, Inc.*, 222 F. 2d 858, refused enforcement on the ground that a nonemployee can justify his presence on company property only "as it bears a cogent relationship to the exercise of the employees' guaranteed right of self-organization." These "solicitors were therefore strangers to the right of self-organization, absent a showing of nonaccessibility amounting to a handicap to self-organization." *Id.*, at 861. The Court of Appeals

for the Sixth Circuit in No. 422 granted enforcement. *Labor Board* v. *Ranco, Inc.,* 222 F. 2d 543. The *per curiam* opinion depended upon its decision in *Labor Board* v. *Monarch Tool Co.,* 210 F. 2d 183, a case in which only employees were involved; *Labor Board* v. *Lake Superior Lumber Corporation,* 167 F. 2d 147, an isolated lumber camp case; and our *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793. It apparently considered, as held in the *Monarch Tool* case, *supra,* at 186, that the attitude of the employer in the *Ranco* case was an "unreasonable impediment to the freedom of communication essential to the exercise of its employees' rights to self organization." Because of the conflicting decisions on a recurring phase of enforcement of the National Labor Relations Act, we granted certiorari. 350 U. S. 818, 894.

In each of these cases the Board found that the employer violated § 8 (a)(1) of the National Labor Relations Act, 61 Stat. 140, making it an unfair labor practice for an employer to interfere with employees in the exercise of rights guaranteed in § 7 of that Act. The pertinent language of the two sections appears below.[2] These holdings were placed on the Labor Board's determination in *LeTourneau Company of Georgia,* 54 N. L. R. B. 1253. In the *LeTourneau* case the Board balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time,

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[2] "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 . . . .

"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 . . . ." 61 Stat. 140, 29 U. S. C. §§ 157, 158 (a)(1).

with the employer's right to control the use of his property and found the former more essential in the circumstances of that case.[3] Recognizing that the employer could restrict employees' union activities when necessary to maintain plant discipline or production, the Board said: "Upon all the above considerations, we are convinced, and find, that the respondent, in applying its 'no-distributing' rule to the distribution of union literature by its employees on its parking lots has placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization," *LeTourneau Company of Georgia,* 54 N. L. R. B., at 1262. This Court affirmed the Board. *Republic Aviation Corp.*

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[3] "As previously indicated, the respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its subsidiary. Apart from U. S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. This, in itself, seriously limits the possibilities of effectively communicating with the bulk of the respondent's employees. This limitation would not, however, be too restrictive if the respondent's gate opened directly onto the highway, for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But at the respondent's plant the gate is 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or busses parked in the space between the gate and the highway, and presumably speed homeward, without ever setting foot on the highway. Distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is consequently seriously impeded. It is no answer to suggest that other means of disseminating union literature are not foreclosed. Moreover, the employees' homes are scattered over a wide area. In the absence of a list of names and addresses, it appears that direct contact with the majority of the respondent's employees away from the plant would be extremely difficult." *LeTourneau Company of Georgia,* 54 N. L. R. B., at 1260–1261.

v. *Labor Board,* 324 U. S. 793, 801 *et seq.* The same rule had been earlier and more fully stated in *Peyton Packing Co.,* 49 N. L. R. B. 828, 843–844.

The Board has applied its reasoning in the *LeTourneau* case without distinction to situations where the distribution was made, as here, by nonemployees. *Carolina Mills,* 92 N. L. R. B. 1141, 1149, 1168–1169.[4] The fact that our *LeTourneau* case ruled only as to employees has been noted by the Courts of Appeal in *Labor Board* v. *Lake Superior Lumber Corp.,* 167 F. 2d 147, 150, and *Labor Board* v. *Seamprufe, Inc.,* 222 F. 2d, at 860. Cf. *Labor Board* v. *American Furnace Co.,* 158 F. 2d 376, 380.

In these present cases the Board has set out the facts that support its conclusions as to the necessity for allowing nonemployee union organizers to distribute union literature on the company's property. In essence they are that nonemployee union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees. The force of this position in respect to employees isolated from normal contacts has been recognized by this Court and by others. See *Republic Aviation Corporation* v. *Labor Board, supra,* at 799, note 3; *Labor Board* v. *Lake Superior Lumber Corp., supra,* at 150. We recognize, too, that the Board has the responsibility of "applying the Act's general prohibitory language in the light of the infinite combinations of

[4] An element of discrimination existed in the *Carolina Mills* case, 92 N. L. R. B., at 1142, such as existed in *Labor Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 230, 233, but this was not relied upon in the opinion. See also *Caldwell Furniture Co.,* 97 N. L. R. B. 1501, 1502, 1509; *Monarch Machine Tool Co.,* 102 N. L. R. B. 1242, 1248, enforced, *Labor Board* v. *Monarch Tool Co.,* 210 F. 2d 183. For a collection of Board cases, see *Ranco, Inc.,* 109 N. L. R. B. 998, 1006, and Note, 65 Yale L. J. 423.

events which might be charged as violative of its terms." *Labor Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 231. We are slow to overturn an administrative decision.

It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.

This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole,[5] should be sustained by the courts unless its conclusions rest on erroneous legal foundations. Here the

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[5] *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491.

Board failed to make a distinction between rules of law applicable to employees and those applicable to non-employees.[6]

The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 803. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.

The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. See, *e. g.,* note 1, *supra.* The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. The Act re-

[6] In the *Seamprufe* case the examiner's report, approved by the Board, said: "To differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation. This conclusion is based on the belief that the rationale enunciated by the Supreme Court in the *LeTourneau* case, *supra,* is equally applicable in the case of solicitation by union representatives as well as where the solicitation is done by employees." 109 N. L. R. B., at 32. See also *Babcock & Wilcox Co., id.,* at 493, and *Ranco, Inc., id.,* at 1006.

quires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.

Labor Board v. *Babcock & Wilcox Co.*, No. 250, is

Affirmed.

Labor Board v. *Seamprufe, Inc.*, No. 251, is

Affirmed.

Ranco, Inc. v. *Labor Board*, No. 422, is

Reversed.

MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

Syllabus.

COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD.

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

No. 48. Argued November 17, 1955.—Decided April 30, 1956.

An order of the Subversive Activities Control Board that petitioner register with the Attorney General as a "Communist-action" organization, as required by the Subversive Activities Control Act of 1950, was appealed by petitioner to the Court of Appeals for the District of Columbia. While the appeal was pending, petitioner filed a motion for leave to adduce additional evidence pursuant to § 14 (a) of the Act, alleging *inter alia* that evidence which became available to petitioner subsequent to the administrative proceeding would establish that the testimony of three of the Attorney General's witnesses on which the Board relied was perjurious. The Government did not deny petitioner's allegations. The Court of Appeals denied the motion, upheld the constitutionality of the Act, and affirmed the Board's order. Both the Government and the Court of Appeals deemed the innocent testimony sufficient to sustain the Board's conclusion. *Held:* The Court of Appeals erred in refusing to return the case to the Board for consideration of the new evidence proffered by petitioner's motion and affidavit. Pp. 116–125.

(a) The case must be decided on the nonconstitutional issue, if the record calls for it, without reaching constitutional problems. P. 122.

(b) The testimony of the three allegedly perjurious witnesses was not inconsequential in relation to the issues on which the Board had to pass. Pp. 122–124.

(c) When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. Pp. 124–125.

(d) Since the basis for challenging the testimony was not in existence when the proceedings were concluded before the Board, petitioner should be given leave to make its allegations before the Board in a proceeding under § 14 (a) of the Act. P. 125.

(e) The Board must reconsider its original determination in the light of the record freed from the challenge that now beclouds it, and must base its findings upon untainted evidence. P. 125.
96 U. S. App. D. C. 66, 223 F. 2d 531, reversed and remanded.

John J. Abt and *Joseph Forer* argued the cause and filed a brief for petitioner.

Solicitor General Sobeloff argued the cause for respondent. With him on the brief were *Assistant Attorney General Tompkins, Harold D. Koffsky, Philip R. Monahan* and *George R. Gallagher.*

Briefs of *amici curiae* urging reversal were filed by *Osmond K. Fraenkel, Thomas I. Emerson, David L. Weissman* and *Murray A. Gordon* for the National Lawyers Guild; *Edward J. Ennis* for the American Civil Liberties Union; and *Royal W. France* for Aydelotte et al.

Herbert R. O'Conor, Julius Applebaum, William N. Bonner, Tracy E. Griffin, Clarence Manion, Paul W. Updegraff and *Robert W. Upton* filed a brief for the American Bar Association, as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is here to review the judgment of the Court of Appeals for the District of Columbia affirming an order of the Subversive Activities Control Board that petitioner register with the Attorney General as a "Communist-action" organization, as required by the Subversive Activities Control Act of 1950, Title I of the Internal Security Act of 1950, 64 Stat. 987. That Act sets forth a comprehensive plan for regulation of "Communist-action" organizations.[1] Section 2 of the Act describes a

[1] A "Communist-action" organization is defined in § 3 of the Act as:
"(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited

world Communist movement directed from abroad and designed to overthrow the Government of the United States by any means available, including violence. Section 7 requires all Communist-action organizations to register as such with the Attorney General. If the Attorney General has reason to believe that an organization, which has not registered, is a Communist-action organization, he is required by § 13 (a) to bring a proceeding to determine that fact before the Subversive Activities Control Board, a five-man board appointed by the President with the advice and consent of the Senate and created for the purpose of holding hearings and making such determinations. Section 13 (e) lays down certain standards for judgment by the Board.

If the Board finds that an organization is a Communist-action organization, it enters an order requiring the organization to register with the Attorney General. § 13 (g). Section 14 provides the right to file a petition for review of Board action in the Court of Appeals for the District of Columbia, with opportunity for review by this Court upon certiorari. Once an organization registers or there is outstanding a final order of the Board requiring it to register, several consequences follow with respect to the

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as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

"(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title." 64 Stat., at 989.

The Act also defines and regulates "Communist-front" organizations, but these sections of the Act are not involved in the present proceeding.

organization and its members, but these need not now be detailed. See §§ 4, 5, 6, 7, 8, 10, 11, 15, 22, 25.

Proceeding under § 13 (a) of this statute, the Attorney General, on November 22, 1950, petitioned the Board for an order directing petitioner to register pursuant to § 7 of the Act. Petitioner sought unsuccessfully by numerous motions before the Board and by proceedings in the United States District Court for the District of Columbia—one case is reported at 96 F. Supp. 47—to attack the validity of, and to abort, the hearing. The hearing began on April 23, 1951, before three members of the Board, later reduced to two, sitting as a hearing panel, and it terminated on July 1, 1952. Proposed findings of fact and briefs were filed by both parties, and oral argument was held before the hearing panel in August 1952. In October 1952 the hearing panel issued a recommended decision that the Board order petitioner to register as a Communist-action organization. Exceptions to the panel's findings were filed by both parties, and oral argument was held before the Board in January 1953. The Board filed its report, which occupies 251 pages of the record in this case, on April 20, 1953.

In its report the Board found that there existed a world Communist movement, substantially as described in § 2 of the Act, organized and directed by a foreign government. The Board detailed the history of the Communist Party of the United States and its close relation to the world Communist movement. It then set forth illustrative evidence and made findings with respect to the statutory criteria of § 13 (e) of the Act, which required the Board to consider "the extent to which" the organization met them.[2] The Board found that the conditions

[2] "In determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration—

"(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate

set forth in each of the paragraphs were applicable to petitioner. On the basis of these findings the Board concluded that petitioner was a Communist-action organization, as defined by § 3, and ordered it to register as such with the Attorney General.

Petitioner brought this order to the Court of Appeals for the District of Columbia for review. While the case was pending, it filed a motion, supported by affidavit,

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the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

"(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

"(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

"(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

"(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

"(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

"(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

"(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization." 64 Stat., at 999–1000.

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for leave to adduce additional evidence pursuant to § 14 (a) of the Act.[3] The basis of the motion was that the additional material evidence became available to the petitioner subsequent to the administrative proceeding and that this evidence would

> "establish that the testimony of three of the witnesses for the Attorney General, on which [the Board] relied extensively and heavily in making findings which are of key importance to the order now under review, was false. . . . In summary, this evidence will establish that Crouch, Johnson and Matusow, all professional informers heretofore employed by the Department of Justice as witnesses in numerous proceedings, have committed perjury, are completely untrustworthy and should be accorded no credence; that at least two of them are now being investigated for perjury by the Department of Justice, and that because their character as professional perjurors [*sic*] has now been conclusively and publicly demonstrated, the Attorney General has ceased to employ any of them as witnesses."

Petitioner listed a number of witnesses whom it proposed to call to substantiate its claim and also set forth a detailed affidavit in support of its allegations.

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[3] Section 14 (a) of the Act provides:

". . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. . . ." 64 Stat., at 1001–1002.

The Government did not deny these allegations. It filed a "Memorandum in Opposition to Motion for Leave to Adduce Additional Evidence," signed by the General Counsel to the Board and by officials of the Department of Justice. The memorandum asserted that the hearing should not be reopened for the receipt of evidence merely questioning, as it claimed, the credibility of some witnesses, but not any fact at issue, and it maintained that the findings of the Board were amply supported by evidence apart from the testimony of the three witnesses sought to be discredited. On December 23, 1954, this motion was formally denied by the Court of Appeals without opinion. In its full opinion on the merits, filed the same day, however, the Court of Appeals supported its rejection of petitioner's motion:

> "The Party attacks the credibility of the witnesses presented by the Government. In this connection it stresses that some of these witnesses . . . were under charges of false swearing. Full opportunity for cross examination of these witnesses was afforded at the hearing before the Board, and full opportunity was also afforded for the presentation of rebuttal testimony. The evaluation of credibility is primarily a matter for the trier of the facts, and a reviewing court cannot disturb that evaluation unless a manifest error has been made. Moreover the testimony of the witnesses against whom charges are said to have been made was consistent with and supported by masses of other evidence. . . ." 96 U. S. App. D. C. 66, 100, 223 F. 2d 531, 565.

The Court of Appeals affirmed the order of the Board. It sustained § 13 (e) against the contention that its standards were vague and irrational. It held that the findings of the Board had been established by a preponderance of the evidence, except that it struck, as not being

supported by a preponderance of the evidence, the finding that the secret practices were undertaken for the purpose of promoting the objectives, and concealing the true nature, of petitioner; and it also struck the finding in connection with reporting to a foreign government because the record supported only a finding of reporting by Party leaders "upon occasion," not a finding which implied a constant, systematic reporting. The court, however, found that the Board's conclusion was supported by the basic findings which it had affirmed. With respect to petitioner's other attacks on the constitutional validity of the statute, the court found it necessary to consider some of the so-called "sanction" sections, §§ 5, 6, 10, 11, 22, and 25, as well as § 7, the registration section. It held that they were all constitutional and therefore affirmed the order of the Board.[4]

The challenge to the Act on which the order was based plainly raises constitutional questions appropriate for this Court's consideration, and so we brought the case here. 349 U. S. 943. At the threshold we are, however, confronted by a particular claim that the Court of Appeals erred in refusing to return the case to the Board for consideration of the new evidence proffered by petitioner's motion and affidavit. This non-constitutional issue must be met at the outset, because the case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems. *Peters* v. *Hobby*, 349 U. S. 331.

In considering this non-constitutional issue raised by denial of petitioner's motion, we must avoid any intima-

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[4] Judge Bazelon dissented on the ground that the registration provision violated the Fifth Amendment's privilege against self-incrimination because it compelled the person signing it to identify himself as a Communist Party functionary and because it compelled a listing of officers and members. 96 U. S. App. D. C., at 111, 223 F. 2d, at 576.

tion with respect to the other issues raised by petitioner. We do not so intimate by concluding that the testimony of the three witnesses, against whom the uncontested challenge of perjury was made, was not inconsequential in relation to the issues on which the Board had to pass. No doubt a large part of the record consisted of documentary evidence. However, not only was the human testimony significant but the documentary evidence was also linked to the activities of the petitioner and to the ultimate finding of the Board by human testimony, and such testimony was in part that of these three witnesses. The facts bearing on the issue are not in controversy. The direct testimony of witness Crouch occupied 387 pages of the typewritten transcript; that of Johnson, 163 pages; and that of Matusow, 118 pages. The annotated report of the Board, in which citations to the evidence were made to illustrate the support for its findings, contained 36 references to the testimony of Crouch, 25 references to the testimony of Johnson, and 24 references to the testimony of Matusow. These references were made in support of every finding under the eight criteria of § 13 (e) and it is also not to be assumed that the evidence given by these three witnesses played no role in the Board's findings of fact even when not specifically cited.[5] Testimony, for example, directed toward proving

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[5] In this connection the following statement of the Board in its report should be noted:

"In making our findings herein, we have considered and weighed all the evidence of record. In weighing [the Attorney General's] evidence, we have considered that certain of [his] witnesses fall into the category of 'informers' and we have scrutinized their testimony accordingly; we have considered and resolved the inconsistencies in the testimony of certain of [the Attorney General's] witnesses; we have considered the testimony of [the Attorney General's] witnesses against the background of their various organizational positions and activities in the CPUSA which afforded the

that the Communist Party of the United States was an agency utilized by a foreign government to undermine the loyalty of the armed forces, and to be in a position to paralyze shipping and prevent transportation of soldiers and war supplies through the Panama Canal, Hawaii, and the ports of San Francisco and New York in time of war, cannot be deemed insignificant in such a determination as that which the Board made in this proceeding.

This is a proceeding under an Act which Congress conceived necessary for "the security of the United States and to the existence of free American institutions . . . ." 64 Stat., at 989. The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. We

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sources of their knowledge; and we have had the benefit of the Panel's observation of their demeanor while testifying. Viewing these considerations in the light of the whole record, we find no basis for disregarding the substance of their testimony."

cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it. Since reversal is thus demanded, however, we do not reach the constitutional issues.

The basis for challenging the testimony was not in existence when the proceedings were concluded before the Board. Petitioner should therefore be given leave to make its allegations before the Board in a proceeding under § 14 (a) of the Act. The issue on which the case must be returned to the Board lies within a narrow compass and the Board has ample scope of discretion in passing upon petitioner's motion. The purpose of this remand, as is its reason, is to make certain that the Board bases its findings upon untainted evidence. To that end it may hold a hearing to ascertain the truth of petitioner's allegations, and if the testimony of the three witnesses is discredited, it must not leave that testimony part of the record. Alternatively, the Board may choose to assume the truth of petitioner's allegations and, without further hearing, expunge the testimony of these witnesses from the record. In either event, the Board must then reconsider its original determination in the light of the record as freed from the challenge that now beclouds it.

The case is reversed and remanded for proceedings in conformity with this opinion.

Reversed and remanded.

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

On November 22, 1950, the Attorney General petitioned the Subversive Activities Control Board for an order directing the Communist Party to register as a Communist-action organization, pursuant to the provisions of

the Internal Security Act of 1950. On April 20, 1953, the Board unanimously directed the Communist Party to register, finding "upon the overwhelming weight of the evidence . . . [the Communist Party] is substantially directed, dominated, and controlled by the Soviet Union . . . and . . . operates primarily to advance the objectives of such world Communist movement."

Nearly two years later, while the matter was before the Court of Appeals, the Communist Party filed a motion for leave to adduce additional evidence under § 14 (a) of the Internal Security Act. The "new evidence" attacked the credibility of witnesses Crouch, Johnson, and Matusow, 3 of the 22 witnesses for the Government. The motion charged that Crouch and Johnson had perjured themselves in their testimony in such other cases as *United States* v. *Kuzma, United States* v. *Bridges, In re Burck,* and *United States* v. *Weinberg.* It also charged that Matusow had recanted his testimony in Communist cases and was writing a book entitled "Blacklisting (or Blackmailing) Was My Business."

The Board opposed the motion, stating that the testimony of the three witnesses could "be ignored in toto and the ultimate determination . . . will remain amply supported by evidence both testimonial and documentary in character. . . . The [Communist Party] would still be found a Communist-action organization by overwhelming evidence."

The Court of Appeals denied the motion without opinion. However, in its opinion on the merits, the court pointed out that similar attacks had been made on the credibility of these as well as other witnesses before the Board. For example, in 194 pages of cross-examination before the Board, the Party charged that witness Johnson had committed perjury in *Pennsylvania* v. *Nelson, In re Yanish, In re Dmytryshyn, United States* v. *Eisler,* and in testimony before the Un-American Activities Commit-

tee. The 112-page cross-examination of Matusow likewise was largely devoted to charges of perjury before various boards and committees. Crouch was cross-examined for 810 pages, practically all of which was devoted to an attack on his credibility through his testimony in other proceedings. As the Court of Appeals concluded, "Full opportunity for cross examination of these witnesses was afforded at the hearing before the Board, and full opportunity was also afforded for the presentation of rebuttal testimony. . . . Moreover the testimony of the witnesses against whom charges are said to have been made was consistent with and supported by masses of other evidence." 96 U. S. App. D. C., at 100, 223 F. 2d, at 565. Not only did little of the cross-examination relate to the evidence offered on direct, but the Party introduced only three witnesses in rebuttal and none refuted any specific testimony of the witnesses now challenged. The Court of Appeals affirmed the issuance of the order by the Board.

The Communist Party brought the case here on April 13, 1955, by petition for certiorari. The relative unimportance of this motion in the eyes of the Party is shown by the fact that its 131-page petition devotes but 2 pages to a discussion of this point. The Party's brief devotes only 4½ of its 270 pages to the motion. Still the Court now says the Court of Appeals "erred" in its denial of the motion and remands the case directly to the Board for it to determine again the credibility of these three witnesses. It refuses to pass on the important questions relating to the constitutionality of the Internal Security Act of 1950, a bulwark of the congressional program to combat the menace of world Communism. Believing that the Court here disregards its plain responsibility and duty to decide these important constitutional questions, I cannot join in its action.

I have not found any case in the history of the Court where important constitutional issues have been avoided on such a pretext. Certainly *Peters* v. *Hobby,* 349 U. S. 331, is no authority for this action, since that case could be and was finally disposed of *without* reaching the constitutional issues. Here the case will be finally decided only *after* our decision on the constitutional questions. The action today is taken merely for delay and can result only in the Board reaffirming the action. In fact it so advised the Court of Appeals and that court found that all of the testimony of the questionable witnesses was supported by "masses of other evidence."

The allegations of the motion itself are entirely inadequate in that they point to no particular testimony before the Board as being false. There is no offer to disprove any testimony given, and no fact at issue in the proceeding is controverted. As to Crouch and Johnson, the motion merely cites additional cases in which it is alleged that their testimony was conflicting. These allegations are purely cumulative of the witnesses' cross-examination before the Board. With regard to Matusow, the motion mentions only newspaper reports and a press release referring to the statements of certain persons that Matusow had told them that he had lied. Ignoring the obvious inadequacy of this allegation, we may take judicial notice of the two cases where Matusow submitted affidavits stating that he had lied during the trial, *United States* v. *Jencks* and *United States* v. *Flynn.* In the *Jencks* case, the trial judge concluded that Matusow had been paid by a Communist source to recant and that his original testimony was true. The motion based entirely on Matusow's recantation was denied. This was affirmed by the Court of Appeals, *Jencks* v. *United States,* 226 F. 2d 540, cert. granted, 350 U. S. 980. In the *Flynn* case, 130 F. Supp. 412, the trial judge denied a similar motion as to 11 of the

13 defendants. Two of the defendants in *Flynn* were granted a new trial only because Matusow had testified specifically to private conversations with these defendants which demonstrated their advocacy of the forcible overthrow of the Government. Matusow's general testimony against other defendants was not disturbed. These cases make it clear that, except for the special circumstances of two defendants in the *Flynn* case, the lower courts have not granted new trials in criminal proceedings despite the retraction by Matusow of specific sworn testimony given at the trials. See also *United States* v. *Parker,* 103 F. 2d 857.[1] But these were criminal cases where proof of guilt must be beyond a reasonable doubt. Here, only a preponderance of the evidence is required.

Motions to adduce additional evidence under § 14 (a) are similar to motions to adduce evidence under § 10 (e) of the NLRA and the scope of our review is the same. Such motions are addressed to the sound discretion of the Courts of Appeals. In order to reverse we must find more than that the court below erred, because it "must not only have been in error but must also have abused its judicial discretion." *Labor Board* v. *Indiana & M. Electric Co.,* 318 U. S. 9, 16. In this case the motion itself was wholly inadequate and even if the testimony of all three challenged witnesses were omitted from the record the result could not have been different. There is no reasonable basis on which we could say that the Court of Appeals has abused its discretion.

I abhor the use of perjured testimony as much as anyone, but we must recognize that never before have mere allegations of perjury, so flimsily supported, been considered grounds for reopening a proceeding or granting

[1] Despite the direct allegations of perjury in this case, this Court refused to review the denial of the motion for a new trial. 307 U. S. 642.

a new trial.[2] The Communist Party makes no claim that the Government knowingly used false testimony, and it is far too realistic to contend that the Board's action will be any different on remand. The only purpose of this procedural maneuver is to gain additional time before the order to register can become effective. This proceeding has dragged out for many years now, and the function of the Board remains suspended and the congressional purpose frustrated at a most critical time in world history.

Ironically enough, we are returning the case to a Board whose very existence is challenged on constitutional grounds. We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so. The constitutional questions are fairly presented here for our decision. If all or any part of the Act is unconstitutional, it should be declared so on the record before us. If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress. I would decide the questions presented by this record.

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[2] In at least three cases this Term we declined to review state criminal convictions in which much stronger allegations of perjury were made. See *Reynolds* v. *Texas*, 350 U. S. 863; *Whitener* v. *South Carolina*, 350 U. S. 861; and *Coco* v. *Florida*, 350 U. S. 828.

BERRA *v.* UNITED STATES.

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

No. 60. Argued March 26, 1956.—Decided April 30, 1956.

Petitioner was indicted for wilfully attempting to evade federal income taxes by filing with the Collector "false and fraudulent" tax returns in violation of 26 U. S. C. (1952 ed.) § 145 (b). This, it is here assumed, is also a violation of 26 U. S. C. (1952 ed.) § 3616 (a), the penalty for the violation of which is lesser than for a violation of § 145 (b). Petitioner was convicted and sentenced to imprisonment greater than the maximum possible had the conviction been under § 3616 (a). *Held:* It was not error for the trial judge to refuse to give to the jury an instruction requested by petitioner that a verdict of guilty of the "lesser crime" under § 3616 (a) would be permissible. Pp. 132–135.

(a) It is here assumed, *arguendo,* that § 3616 (a) is applicable to income tax returns. P. 133.

(b) The contention that, since there was no difference in the proof required to establish violations of §§ 145 (b) and 3616 (a), the indictment must be taken as charging violations of both sections, and that under Rule 31 (c) of the Federal Rules of Criminal Procedure the jury should have been permitted to make the choice between the two crimes, cannot be sustained. Pp. 133–134.

(c) Rule 31 (c) was not intended to change the jury's traditional function of deciding only the issues of fact and taking the law as given by the court. P. 134.

(d) Whether § 3616 (a) rather than § 145 (b) should apply was not for the jury to determine. Pp. 134–135.

221 F. 2d 590, affirmed.

Stanley M. Rosenblum argued the cause for petitioner. With him on the brief were *Mark M. Hennelly* and *Sidney M. Glazer.*

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Acting Assistant Attorney General Rice, Joseph M. Howard* and *Dickinson Thatcher.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was charged, in a three-count indictment, with wilfully attempting to evade federal income taxes for 1951, 1952, and 1953 by filing with the Collector "false and fraudulent" tax returns, "in violation of Section 145 (b), Title 26, United States Code." [1] That section of the Internal Revenue Code of 1939, 53 Stat. 63, provided:

> "Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3616 (a) of the 1939 Code, 53 Stat. 440, also made it a crime for any person to deliver to the Collector "any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made . . . ." The penalty for violation of § 3616 (a), however, was a fine of not more than $1,000, or imprisonment not exceeding one year, or both, together with the costs of prosecution.

At the close of the trial judge's charge to the jury, petitioner asked that the jury be instructed with respect to each count that a verdict of guilty of the "lesser crime" under § 3616 (a) would be permissible.[2] No motions

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[1] This case arises under the Internal Revenue Code of 1939. The sections involved have been changed in the 1954 Code; see §§ 7201, 7207, 68A Stat. 851, 853.

[2] "Defendant's Requested Instruction No. 12.

"Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the income tax indictment.

"The statute upon which the lesser crime is based, omitting that

addressed to the validity of the indictment, judgment of conviction, or sentence under § 145 (b) were made before, during, or after trial, and we read the requested instruction as aimed at leaving to the jury the question of whether the defendant should be convicted under § 145 (b) or § 3616 (a), if the jury found him guilty. The instruction was refused, and, after conviction, petitioner was sentenced to four years' imprisonment on each count, the sentences to run concurrently. Thus petitioner has been sentenced to imprisonment greater than the maximum possible had the conviction been under § 3616 (a) alone. The Court of Appeals affirmed, 221 F. 2d 590, and we granted certiorari, 350 U. S. 910, limited to the question of whether it was error for the trial judge to refuse to give the requested instruction.

The Court of Appeals, in affirming the conviction, held that § 3616 (a) did not apply to income tax returns, and that any instruction relating to that section would therefore have been irrelevant under the evidence in this case.[3] Both parties agree, however, that § 3616 (a) *was* applicable to income tax returns, and we shall assume, *arguendo*, the correctness of that interpretation of the statute.

Rule 31 (c) of the Federal Rules of Criminal Procedure provides that a defendant may be found guilty of an

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part of the act which does not apply in this case, reads as follows:

"Whenever any person . . . delivers or discloses to a collector . . . any false or fraudulent . . . return . . . with intent to defeat or evade the . . . assessment intended to be made, shall be guilty of a misdemeanor.

"Under Count I if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime." (This paragraph was repeated for Counts II and III.)

[3] In so holding the Court of Appeals followed its earlier decision in *Dillon* v. *United States*, 218 F. 2d 97.

offense "necessarily included in the offense charged." [4] In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See *Stevenson* v. *United States,* 162 U. S. 313. But this is not such a case. For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner "willfully" attempted to evade taxes by filing a false return (§ 145 (b)) were identical with those required to prove that he delivered a false return with "intent" to evade taxes (§ 3616 (a)). In this instance §§ 145 (b) and 3616 (a) covered precisely the same ground.[5]

Petitioner contends that he was nevertheless entitled to the requested instruction. He argues that since there was no difference in the proof required to establish violations of §§ 145 (b) and 3616 (a), the indictment must be taken as charging violations of both sections, and the jury under Rule 31 (c) should have been permitted to make the choice between the two crimes. We do not agree.

The role of the jury in a federal criminal case is to decide only the issues of fact, taking the law as given by the court. *Sparf* v. *United States,* 156 U. S. 51, 102. Certainly Rule 31 (c) was never intended to change this traditional function of the jury.[6] Here, whether

[4] "Rule 31. VERDICT . . . (c) CONVICTION OF LESS OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

[5] Compare § 7207 of the Internal Revenue Code of 1954, under which the wilful filing of a false return no longer requires the element of an "intent to defeat or evade" taxes, as was so under the former § 3616 (a).

[6] The Notes of the Advisory Committee state that Rule 31 (c) "is a restatement of existing law." The preceding "lesser offense" stat-

§ 145 (b) or § 3616 (a) be deemed to govern, the factual issues to be submitted to the jury were the same; the instruction requested by petitioner would not have added any other such issue for the jury's determination.[7] When the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt.[8] Whatever other questions might have been raised as to the validity of petitioner's conviction and sentence, because of the assumed overlapping of §§ 145 (b) and 3616 (a), were questions of law for the court. No such questions are presented here.

The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616 (a) rather than § 145 (b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction.

Affirmed.

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

The petitioner here was convicted on three counts under an indictment charging that he "did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife . . . by filing . . . a false and fraudulent joint income tax

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utes were Act of June 1, 1872, 17 Stat. 196; R. S. § 1035; 18 U. S. C. § 565. Cf. *Stevenson* v. *United States, supra,* at pp. 315, 322, 323; *Sparf* v. *United States, supra,* at p. 103; *Ekberg* v. *United States,* 167 F. 2d 380, 385.

[7] Indeed, had there been any separate factual issues under § 3616 (a), it is plain that the requested instruction would have been inadequate to raise them for the jury.

[8] Cf. *Andres* v. *United States,* 333 U. S. 740.

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return . . . . In violation of Section 145 (b), Title 26, United States Code." Section 145 (b) provides that:

> "any person who willfully attempts *in any manner* to evade or defeat any tax imposed by this chapter . . . shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." (Emphasis added.)[1]

The offense charged in the indictment, filing a fraudulent return, could be held to be proscribed by § 145 (b) because of the phrase "in any manner." But certainly it falls squarely within the specific language of 26 U. S. C. § 3616 (a), which provides that any person who

> "Delivers or discloses to the collector or deputy any false or *fraudulent* list, *return,* account, or statement, with intent to defeat or evade the . . . assessment intended to be made . . . shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution." (Emphasis added.)[2]

At an appropriate time the petitioner asked the trial judge to charge the jury that if the allegations of the indictment had been proven they should find the petitioner guilty of a misdemeanor under § 3616 (a). Although § 3616 (a) unambiguously makes the conduct charged a misdemeanor punishable by no more than one year in prison, the trial judge apparently felt that he was compelled to treat the offense as a felony because of the statement in the indictment that the conduct charged

[1] Internal Revenue Code of 1939, 53 Stat. 63. Cf. § 7201, Internal Revenue Code of 1954, 68A Stat. 851.

[2] Internal Revenue Code of 1939, 53 Stat. 440. Cf. §§ 7206 (1), 7207, Internal Revenue Code of 1954.

was "In violation of Section 145 (b) . . . ." [3] The judge not only refused the requested instruction, but after the jury returned a verdict of guilty, he sentenced petitioner to serve four years in prison on each of the three counts, the sentences to run concurrently.

Regardless of whether it was error to refuse the requested instruction, the record raises a serious question as to whether the four-year sentence on each count was lawfully imposed. The Court's opinion takes the position that no proper challenges to the sentence under the felony statute were raised below and hence that "No such questions are presented here." [4] In my judgment the requested instruction was adequate to call the trial judge's attention to petitioner's contention that the offense charged was not a felony but a misdemeanor. But even if the question should have been raised again when the judge announced the sentence, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rules Crim. Proc., 52 (b). See also *Wiborg* v. *United States,* 163 U. S. 632, 658. Since I think petitioner is right in saying the offense charged was only a misde-

[3] But see *Williams* v. *United States,* 168 U. S. 382, 389; *United States* v. *Hutcheson,* 312 U. S. 219, 229; Fed. Rules Crim. Proc., 7 (c), which provides in part that: "The indictment . . . shall state for each count the official or customary citation of the statute . . . which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment . . . or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." Cf. *Cole* v. *Arkansas,* 333 U. S. 196.

[4] Apparently the Court means by this to leave open to petitioner the opportunity to challenge his sentence by a motion to correct it under 28 U. S. C. § 2255. Of course I agree that a motion under that section would be appropriate, but I think petitioner is entitled to have it settled now.

meanor, I think we should correct the plain error of the trial judge in sentencing petitioner under the felony statute.

The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616 (a) and a felony under § 145 (b). The Government argues that the action of the trial judge must be upheld because "the Government may choose to invoke either applicable law," and "the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor." Election by the Government of course means election by a prosecuting attorney or the Attorney General.[5] I object to any such interpretation of §§ 145 and 3616. I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145 (b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly.

So far as I know, this Court has never approved the argument the Government makes here. It certainly did not do so in *United States* v. *Beacon Brass Co.*, 344 U. S.

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[5] This would always follow where an information is used. And where there is an indictment by grand jury of course the indictment is drawn by the prosecuting attorney, since grand juries normally are not familiar with the applicable statutes. Thus where a prosecuting officer seeks an indictment under a statute making an attempt to evade taxes in any manner a felony, it would be a rare grand juror indeed who would be sufficiently familiar with the Internal Revenue Code to suggest that it might be better to bring the indictment under § 3616 (a).

43, upon which the Government seems to rely. In that case the Court said:

> "We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. . . ." 344 U. S., at 45.

Here, however, under the Court's opinion and the Government's argument, two statutes proscribe identical conduct and no "different proof" was required to convict petitioner of the felony than would have been required to convict him of the misdemeanor. The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.

A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered.[6] This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370.

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[6] See, *e. g., International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Connally* v. *General Construction Co.,* 269 U. S. 385, 391–392.

A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions. Of course it is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here. See dissenting opinion in *Rosenberg* v. *United States,* 346 U. S. 273, 306.

The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice.

I would reverse this case or at least remand for resentencing under the misdemeanor statute, § 3616 (a).

Syllabus.

COVEY, COMMITTEE, *v.* TOWN OF SOMERS.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 380. Argued March 29, 1956.—Decided May 7, 1956.

Under Article VII–A, Title 3, of the New York Tax Law, a town proceeded to foreclose a lien for delinquent taxes on the real estate of a long-time resident. In accordance with the statute, the taxpayer was given no notice except by mail, posting notice at the post office and publication in two local newspapers. She filed no answer; judgment of foreclosure was entered; and a deed to her property was delivered to the town. A few days later, she was adjudged insane and committed to a hospital for the insane. Subsequently, appellant was appointed committee of her person and property, and he filed a motion in the trial court where the judgment of foreclosure had been entered to have the default opened, the judgment vacated and the deed set aside. He alleged that, prior to entry of the judgment of foreclosure, the taxpayer was well known by town officials to be financially able to meet her obligations but mentally incompetent to handle her affairs or to understand the meaning of any notice served upon her and that no attempt had been made to have a committee appointed for her person or property. *Held:* Assuming the truth of these allegations, the notice provided under the statute was inadequate as applied to this incompetent taxpayer, and the taking of her property would violate the Due Process Clause of the Fourteenth Amendment. Pp. 142–147.

(a) It appears that, in an action to set aside the deed (which is contemplated by the statute), only such irregularities as failure to observe the statutory procedure may be attacked. The state court has recognized the existence of equitable power to entertain a motion to open a default in an *in rem* tax proceeding, and the State Court of Appeals amended its remittitur in this case to disclose that a constitutional question was presented and necessarily decided on the appeal to that Court. Therefore, the constitutional question is properly before this Court. Pp. 143–144.

(b) Notice to a person known to be an incompetent and without the protection of a guardian does not measure up to the requirements of the Due Process Clause of the Fourteenth Amendment. Pp. 146–147.

308 N. Y. 798, 941, 125 N. E. 2d 862, 127 N. E. 2d 90, reversed and remanded.

Samuel M. Sprafkin argued the cause for appellant. With him on the brief were *Adolph I. King* and *Mandel Matthew Einhorn.*

Otto E. Koegel argued the cause and filed a brief for appellee.

John R. Davison, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With him on the brief were *Jacob K. Javits,* Attorney General, and *James O. Moore, Jr.,* Solicitor General.

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

The application of Article VII–A, Title 3, of the New York Tax Law to the mentally incompetent ward of appellant is challenged as being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The statute, in § 165 *et seq.,* provides for the judicial foreclosure of tax liens on real property. The filing at the county clerk's office of a list of taxes delinquent more than four years constitutes the filing of a notice of *lis pendens* and of a complaint, and commences an action against the property. Provision is made for notice by publication, by posting, and by mailing. The prescribed notice is to the effect that, unless the amount of unpaid tax liens, together with interest and penalties which are a lien against the property, are paid within 7 weeks, or an answer interposed within 20 days thereafter, any person having the right to redeem or answer shall be forever foreclosed of all his right, title, and interest and equity of redemption in and to the delinquent property. Provision is made for entry of a judgment of foreclosure awarding possession of the property to the tax district

and directing execution of a deed conveying an estate in fee simple absolute to the district. The provisions of Title 3 purport to be applicable to and valid and effective with respect to all defendants, even though one or more of them be infants, incompetents, absentees, or nonresidents of the State of New York.

Section 165–h (7) makes the deed presumptive evidence of the regularity of the proceedings. After two years this presumption becomes conclusive. The Section further provides that no action to set aside the deed may be maintained unless commenced and a *lis pendens* notice filed prior to the time the presumption becomes conclusive.

We are met at the outset with the contention of appellee and the State of New York, *amicus curiae,* that an action, as distinguished from the motion in the original proceeding here utilized, was the exclusive remedy in this case. The statute itself contains no suggestion that a new action is the exclusive remedy; it merely limits the time within which *an* action may be brought to set aside the deed. The Second Department of the Appellate Division, which decided this case, has recognized the existence of equitable power to entertain a motion to open a default in an *in rem* tax proceeding.[1] If that were not enough, appellee, on oral argument, conceded that in an action of the sort contemplated by § 165–h (7), the appellant would have been able to attack the deed only on the ground of alleged irregularities in the assessment and foreclosure proceedings. Although the Attorney General of New York has supported a contrary position, it was

[1] *Nelson* v. *City of New York,* 283 App. Div. 722, 127 N. Y. S. 2d 854. A subsequent motion to open the default was denied, 284 App. Div. 894, 134 N. Y. S. 2d 597. That action was affirmed by the Court of Appeals, 309 N. Y. 94, 127 N. E. 2d 827, and the case is pending on appeal to this Court, No. 636, O. T. 1955.

admitted at the argument that there was no decision to support his view. Our conclusion that the constitutional question was properly raised by appellant's motion is reinforced by the action of the Court of Appeals which amended its remittitur to disclose that a constitutional question was presented and necessarily decided on the appeal to that court. 308 N. Y. 941, 127 N. E. 2d 90. Manifestly, no constitutional question could have been reached if the Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy.

This proceeding started on May 8, 1952. The Town of Somers instituted it to foreclose many tax liens, one of which was its lien against the parcel of real property owned by the incompetent. In compliance with the statute, notice was given to the incompetent taxpayer by mail, by posting a notice at the post office, and by publication in two local newspapers. No answer having been filed by the incompetent, judgment of foreclosure was entered on September 8, 1952, and on October 24, 1952, a deed to her property was delivered to the town. Five days later, on October 29, 1952, Nora Brainard was certified by the County Court as a person of unsound mind, and one week later, November 6, 1952, she was committed to the Harlem Valley State Hospital for the insane. Thereafter, on February 13, 1953, appellant filed bond pursuant to an order appointing him Committee of the person and property of the incompetent.

Sometime prior to September 22, 1953, the town offered the incompetent's property for sale at a minimum bid price of $6,500. The unpaid taxes, interest, penalties, costs of foreclosure, attorney's fees, and maintenance charges on the property to September 22, 1953, aggregated $480. On that date, appellant's attorney appeared before the Town Board and offered to repay the town the amount due on the property in consideration

of its return to the incompetent's estate. The offer was refused.[2]

Appellant then filed a motion in the County Court of Westchester County, where the judgment of foreclosure had been entered, for an order to show cause why the default should not be opened, the judgment vacated and the deed set aside, and permission granted "to answer or appear or otherwise move with respect to" the notice of foreclosure. He alleged in a supporting affidavit that, although Nora Brainard's incompetency was known to the town officials, no guardian was appointed until shortly after the foreclosure. Appellant contended that the notice given to Nora Brainard, although in compliance with the statute, was inadequate in the case of a known incompetent, and, therefore, that the statute as applied was repugnant to the Fourteenth Amendment.

The trial court, finding that the incompetent had not been deprived of her constitutional rights and that the statute is valid, denied the motion. The Appellate Division of the Supreme Court, one judge dissenting, affirmed on the ground that the rights of the parties are fixed after expiration of the 7 weeks and 20 days provided for redemption or answer in § 165–a of the tax law. 283 App. Div. 883, 129 N. Y. S. 2d 537. The Court of Appeals, which, as noted before, certified that a question under the Fourteenth Amendment was raised and necessarily decided, likewise affirmed. 308 N. Y. 798, 125 N. E. 2d 862. We noted probable jurisdiction. 350 U. S. 882.

At this stage of the proceedings we are bound, as were the courts below, to assume that the facts are as disclosed by the uncontroverted affidavits filed with appellant's motion for an order to show cause. From these it appears that Nora Brainard was a long-time resident of the Town

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[2] Thereafter the town rescheduled the sale of the property at a minimum bid price of $3,500.

of Somers in the State of New York, and a person of means at all times financially able to meet her obligations, owning four pieces of improved real property in addition to the home property which has been taken by foreclosure. She lived alone, however, and had no relative in the State of New York or any other person present or available to assist her or to act in her behalf in connection with her taxes, despite the fact that she was and for upwards of 15 years had been an incompetent. Although she was known by the officials and citizens of the Town of Somers to be a person without mental capacity to handle her affairs or to understand the meaning of any notice served upon her, no attempt was made to have a Committee appointed for her person or property until after entry of the judgment of foreclosure in this proceeding.

Appellee argues that the Fourteenth Amendment does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314–315.

Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncon-

tradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law. The question was appropriately raised and the issue improperly decided against the appellant. The judgment must, therefore, be reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER.

If the Court of Appeals saw the case as this Court sees it, reversal of its judgment, for the reasons given in the Court's opinion, would be required. My difficulty arises from the fact that this is so clear that I am compelled to wonder whether the New York Court of Appeals whose judges again and again have evinced due regard for due process would, by a summary disposition, sanction such a denial of due process. This Court has had frequent occasion to advert to the darkness which confronts us in trying to determine the meaning of state legislation and the scope of state remedies. This is particularly true when we are vouchsafed no light either from the Appellate Division or the Court of Appeals regarding the availability of subdivision 7 of § 165–h of the New York Tax Law in a situation, like the present, so obviously calling for relief as a matter of due process. The uncertainties of state law are not removed by conflicting views expressed at the bar of this Court by New York counsel.

Nor is my difficulty dissipated by the amended remittitur of the New York Court of Appeals. It reads as follows:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of the petitioner." 308 N. Y. 798, 125 N. E. 2d 862, as amended in 308 N. Y. 941, 127 N. E. 2d 90.

To be sure, the Court of Appeals thus held "that there was no denial of any constitutional right of the petitioner." But, as that court said, it was only answering the question that was before it, namely, whether "on this record" there was "a deprivation of due process." The court may have reached the conclusion it did because, as a matter of state law, the only thing it deemed before it was a re-opening of the judgment of foreclosure under § 165–a, and that remedy was barred by the statute of limitations. Since the State has power to put a time limit on the re-opening of the judgment of foreclosure under that provision, such action is not a violation of the Fourteenth Amendment. The amended remittitur, thus read, does not preclude a setting aside of the foreclosure deed in a separate proceeding in accordance with § 165–h (7), on a recital of circumstances such as those which lead this Court to find a violation of due process.

If this hypothesis was in fact the basis of the judgment of the Court of Appeals, I assume it to be within the power of that court, when the case is returned, to allow full scope to state remedies still open to the petitioner.

NATIONAL LABOR RELATIONS BOARD *v.* TRUITT MANUFACTURING CO.

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

No. 486. Argued March 29, 1956.—Decided May 7, 1956.

In the circumstances of this case, where the employer claimed that it could not afford to pay higher wages but refused the union's request to produce financial data to substantiate this claim, the National Labor Relations Board was justified in finding that the employer had not bargained in good faith and, therefore, had violated § 8 (a) (5) of the National Labor Relations Act. Pp. 149–154.

224 F. 2d 869, reversed.

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

R. D. Douglas, Jr. argued the cause for respondent. With him on the brief was *Whiteford S. Blakeney.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of his employees.[1]

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[1] "SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the 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

The question presented by this case is whether the National Labor Relations Board may find that an employer has not bargained in good faith where the employer claims it cannot afford to pay higher wages but refuses requests to produce information substantiating its claim.

The dispute here arose when a union representing certain of respondent's employees asked for a wage increase of 10 cents per hour. The company answered that it could not afford to pay such an increase, it was undercapitalized, had never paid dividends, and that an increase of more than 2½ cents per hour would put it out of business. The union asked the company to produce some evidence substantiating these statements, requesting permission to have a certified public accountant examine the company's books, financial data, etc. This request being denied, the union asked that the company submit "full and complete information with respect to its financial standing and profits," insisting that such information was pertinent and essential for the employees to determine whether or not they should continue to press their demand for a wage increase. A union official testified before the trial examiner that "[W]e were wanting anything relating to the Company's position, any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give any more money." The company refused all the requests, relying solely on the statement that "the information . . . is not pertinent to

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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 . . . ." 49 Stat. 452–453, as amended, 61 Stat. 140–142, 29 U. S. C. §§ 158 (a)(5), 158 (d).

this discussion and the company declines to give you such information; You have no legal right to such."

On the basis of these facts the National Labor Relations Board found that the company had "failed to bargain in good faith with respect to wages in violation of Section 8 (a)(5) of the Act." 110 N. L. R. B. 856. The Board ordered the company to supply the union with such information as would "substantiate the Respondent's position of its economic inability to pay the requested wage increase." The Court of Appeals refused to enforce the Board's order, agreeing with respondent that it could not be held guilty of an unfair labor practice because of its refusal to furnish the information requested by the union. 224 F. 2d 869. In *Labor Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, the Second Circuit upheld a Board finding of bad-faith bargaining based on an employer's refusal to supply financial information under circumstances similar to those here. Because of the conflict and the importance of the question we granted certiorari. 350 U. S. 922.

The company raised no objection to the Board's order on the ground that the scope of information required was too broad or that disclosure would put an undue burden on the company. Its major argument throughout has been that the information requested was irrelevant to the bargaining process and related to matters exclusively within the province of management. Thus we lay to one side the suggestion by the company here that the Board's order might be unduly burdensome or injurious to its business. In any event, the Board has heretofore taken the position in cases such as this that "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." [2] And in this case the Board has held

[2] *Old Line Life Ins. Co.*, 96 N. L. R. B. 499, 503; *Cincinnati Steel Castings Co.*, 86 N. L. R. B. 592, 593.

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substantiation of the company's position requires no more than "reasonable proof."

We think that in determining whether the obligation of good-faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result. Section 204 (a)(1) of the Act admonishes both employers and employees to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions . . . ." [3] In their effort to reach an agreement here both the union and the company treated the company's ability to pay increased wages as highly relevant. The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations.[4] Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions.[5]

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to pre-

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[3] 61 Stat. 154, 29 U. S. C. § 174 (a)(1).

[4] See Sherman, Employer's Obligation to Produce Data for Collective Bargaining, 35 Minn. L. Rev. 24; Dunlop, The Economics of Wage-Dispute Settlement, 12 Law & Contemp. Prob. 281, 290; What Kind of Information Do Labor Unions Want in Financial Statements?, 87 J. Accountancy 368; How Collective Bargaining Works (Twentieth Century Fund, 1942) 453.

[5] Daily Labor Report, No. 156: A4–A5 (Bureau of National Affairs, Aug. 12, 1954); 35 Lab. Rel. Rep. 106; Union Votes Wage Freeze to Aid Rice-Stix, St. Louis Globe-Democrat, Nov. 25, 1954, p. 1, col. 4; Studebaker Men Vote for Pay Cuts, N. Y. Times, Aug. 13, 1954, p. 1, col. 5.

sent in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. Such has been the holding of the Labor Board since shortly after the passage of the Wagner Act. In *Pioneer Pearl Button Co.*, decided in 1936, where the employer's representative relied on the company's asserted "poor financial condition," the Board said: "He did no more than take refuge in the assertion that the respondent's financial condition was poor; he refused either to prove his statement, or to permit independent verification. This is not collective bargaining." 1 N. L. R. B. 837, 842–843. This was the position of the Board when the Taft-Hartley Act was passed in 1947 and has been its position ever since.[6] We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.

The Board concluded that under the facts and circumstances of this case the respondent was guilty of an unfair labor practice in failing to bargain in good faith. We see no reason to disturb the findings of the Board. We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts.[7] The inquiry must always be whether or not under the circumstances of the particular case the

[6] See, *e. g.*, *Southern Saddlery Co.*, 90 N. L. R. B. 1205, 1206–1207; *McLean-Arkansas Lumber Co.*, 109 N. L. R. B. 1022, 1035–1038; *Jacobs Manufacturing Co.*, 94 N. L. R. B. 1214, 1221–1222, enforced, 196 F. 2d 680; and cases therein cited.

[7] See *Labor Board* v. *American Ins. Co.*, 343 U. S. 395, 409–410.

statutory obligation to bargain in good faith has been met. Since we conclude that there is support in the record for the conclusion of the Board here that respondent did not bargain in good faith, it was error for the Court of Appeals to set aside the Board's order and deny enforcement.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK and MR. JUSTICE HARLAN join, concurring in part and dissenting in part.

This case involves the nature of the duty to bargain which the National Labor Relations Act imposes upon employers and unions. Section 8 (a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees," and § 8 (b)(3) places a like duty upon the union *vis-à-vis* the employer. Section 8 (d) provides that "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 . . . ." 61 Stat. 142, 29 U. S. C. § 158 (d).

These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. "Good faith" means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily

incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation. See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

An examination of the Board's opinion and the position taken by its counsel here disclose that the Board did not so conceive the issue of good-faith bargaining in this case. The totality of the conduct of the negotiation was apparently deemed irrelevant to the question; one fact alone disposed of the case. "[I]t is settled law [the Board concluded], that when an employer seeks to justify the refusal of a wage increase upon an economic basis, as did the Respondent herein, good-faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof." 110 N. L. R. B. 856.

This is to make a rule of law out of one item—even if a weighty item—of the evidence. There is no warrant for this. The Board found authority in *Labor Board* v. *Jacobs Mfg. Co.,* 196 F. 2d 680. That case presented a very different situation. The Jacobs Company had engaged in a course of conduct which the Board held to be a violation of § 8 (a)(5). The Court of Appeals agreed that in light of the whole record the Board was entitled to find that the employer had not bargained in good faith. Its refusal to open its "books and sales records" for union

perusal was only part of the recalcitrant conduct and only one consideration in establishing want of good faith.* The unfair labor practice was not founded on this refusal, and the court's principal concern about the disclosure of financial information was whether the Board's order should be enforced in this respect. The court sustained the Board's requirement for disclosure which "will be met if the respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands." 196 F. 2d 680, 684. This is a very far cry indeed from a ruling of law that failure to open a company's books establishes lack of good faith. Once good faith is found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion. Neither *Jacobs* nor any other court of appeals' decision which has been called to our attention supports the rule of law which the Board has fashioned out of one thread drawn from the whole fabric of the evidence in this case.

The Labor Board itself has not always approached "good faith" and the disclosure question in such a mechanical fashion. In *Southern Saddlery Co.*, 90 N. L. R. B. 1205, the Board also found that § 8 (a)(5)

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* "The respondent contends that it was under no statutory duty to confer with the union after the second meeting since all of the issues had been fully explored and the position of both parties expressed. Whether this was true, however, was a question of fact which the Board found adversely to the respondent. Since at both the meetings the respondent took the position that discussion of wage increases would be futile because it was financially unable to make them, and since it refused to discuss the other subjects at all, the Board was justified in concluding that the respondent had refused to bargain in good faith as the Act requires. Collective bargaining in compliance with the statute requires more than virtual insistence upon a prejudgment that no agreement could be reached by means of a discussion." *Labor Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, at 683.

had been violated. But how differently the Board there considered its function.

> "Bargaining in good faith is a duty on both sides to enter into discussions with an open and fair mind and a sincere purpose to find a basis for agreement touching wages and hours and conditions of labor. In applying this definition of good faith bargaining to any situation, the Board examines the Respondent's conduct as a whole for a clear indication as to whether the latter has refused to bargain in good faith, and the Board usually does not rely upon any one factor as conclusive evidence that the Respondent did not genuinely try to reach an agreement." 90 N. L. R. B. 1205, 1206.

The Board found other factors in the *Southern Saddlery* case. The employer had made no counter-proposals or efforts to "compromise the controversy." Compare, *McLean-Arkansas Lumber Co., Inc.*, 109 N. L. R. B. 1022. Such specific evidence is not indispensable, for a study of all the evidence in a record may disclose a mood indicative of a determination not to bargain. That is for the Board to decide. It is a process of inference-drawing, however, very different from the *ultra vires* law-making of the Board in this case.

Since the Board applied the wrong standard here, by ruling that Truitt's failure to supply financial information to the union constituted *per se* a refusal to bargain in good faith, the case should be returned to the Board. There is substantial evidence in the record which indicates that Truitt tried to reach an agreement. It offered a 2½-cent wage increase, it expressed willingness to discuss with the union "at any time the problem of how our wages compare with those of our competition," and it continued throughout to meet and discuss the controversy with the union.

Because the record is not conclusive as a matter of law, one way or the other, I cannot join in the Court's disposition of the case. To reverse the Court of Appeals without remanding the case to the Board for further proceedings, implies that the Board would have reached the same conclusion in applying the right rule of law that it did in applying a wrong one. I cannot make such a forecast. I would return the case to the Board so that it may apply the relevant standard for determining "good faith."

GENERAL BOX CO. *v.* UNITED STATES.

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

No. 383. Argued March 28, 1956.—Decided May 7, 1956.

Petitioner owned timber on "batture," land located between low- and high-water mark on the Mississippi River in Louisiana, which was subject to a servitude of the State for levee purposes. The rights of the State had been donated to the United States. Without notice to petitioner, the timber was destroyed by a government contractor in levee-building operations, and petitioner sued in the federal court under the Tucker Act to recover its value. *Held:*

1. This Court accepts the determination of the Court of Appeals that, under Louisiana law, prior notice to petitioner was not a prerequisite to an appropriation of its timber for levee purposes. Pp. 164–166.

2. Petitioner's property was effectively appropriated by state authorities pursuant to the servitude, and therefore the United States is not liable to petitioner for its value. Pp. 166–167.

3. The State having donated to the United States its rights as against petitioner's timber, the United States could exercise those rights to the fullest extent without incurring liability, just as the State could have done. P. 167.

4. The destruction of petitioner's timber was not a taking by the United States in the exercise of the power of eminent domain for which the Fifth Amendment required compensation. P. 167.

224 F. 2d 7, affirmed.

Edward Donald Moseley and *Ross R. Barnett* argued the cause for petitioner. On the brief with *Mr. Moseley* was *Fred G. Benton*. *P. Z. Jones* and *Carl A. Chadwick* entered an appearance for petitioner.

S. Billingsley Hill argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Morton, John R. Benney* and *Roger P. Marquis*.

Fred S. LeBlanc, Attorney General, and *John L. Madden,* Assistant Attorney General, filed a brief for the State of Louisiana, as *amicus curiae,* urging affirmance.

MR. JUSTICE REED delivered the opinion of the Court.

General Box Company, an owner of trees of commercial value along the main stem of the Mississippi River in Louisiana, brought this action to recover from the United States the value of its timber destroyed by the Government through its duly authorized agent, a contractor.

The trees grew upon land belonging to others and located between the low- and high-water mark of the river. Such land is known in Louisiana as "batture." [1] Since colonial days batture has been subject to a servitude of the State for use in the construction and maintenance of levees. It may be used for these purposes without the payment of compensation to the owner.[2] The United States cooperates with Louisiana in the containment of the Mississippi within levees.[3] To carry out federal plans in the area in controversy, the United States requires,[4] and Louisiana agrees to furnish,[5] the necessary rights-of-way "without cost" for the construction of levees. Louisiana has given general authority to its Levee Boards to donate to the United States the necessary "lands, movable

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[1] Batture is "that part of the river bed which is uncovered at the time of low water, but is covered annually at the time of ordinary high water." (Italics omitted.) *Boyce Cottonseed Oil Mfg. Co.* v. *Board of Comm'rs,* 160 La. 727, 734, 107 So. 506, 508.

[2] See *Wolfe* v. *Hurley,* 46 F. 2d 515, affirmed, 283 U. S. 801; *Dickson* v. *Board of Comm'rs,* 210 La. 121, 26 So. 2d 474; *Pruyn* v. *Nelson Bros.,* 180 La. 760, 157 So. 585; *Mayer* v. *Board of Comm'rs,* 177 La. 1119, 150 So. 295; *Peart* v. *Meeker,* 45 La. Ann. 421, 12 So. 490; La. Civil Code, 1945, Art. 665; La. Const., 1921, Art. XVI, § 6.

[3] Federal Flood Control Act of May 15, 1928, 45 Stat. 534, as amended, 33 U. S. C. § 702a *et seq.*

[4] 33 U. S. C. § 702c.

[5] La. Const., 1921, Art. XVI, § 5. And see note 6, *infra.*

or immovable property, rights of way, or servitudes" for flood control use.[6] The Fifth Louisiana Levee District, the one here involved, agreed to meet the requirements of the Federal Flood Control Act.[7]

The location of the operation giving rise to this action was at the Brabston Levee in the Fifth Louisiana Levee District. The first step taken by the United States to obtain the permission of the State to use the State's servitude in the batture here in issue was the filing of the federal plans with the State District Engineer. The plans were approved by the Engineer and the local Levee Board was so notified.[8] On June 10, 1947, the Levee Board received the drawings from the United States District Engineer with the following request for authority:

> "It is desired that this District be furnished a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board."

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[6] Act No. 75, Acts of 1940, La. Rev. Stat., 1950, 52:2. And see Act No. 76, Acts of 1938, La. Gen. Stat., 1939, § 6869.3.

[7] The Board of Commissioners of the Fifth Louisiana Levee District adopted general resolutions in 1928 and 1929, in consideration of the benefits of the Flood Control Act, agreeing to "[p]rovide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

[8] On May 19, 1947, the State District Engineer wrote to the President of the Levee Board as follows:

"We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U. S. Engineers, dated May 9 together with project plans of the proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.

"We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee."

Under a standing resolution, adopted September 12, 1945, the President of the Board was empowered to honor applications for such authority.[9] On June 12, 1947, the Board President responded to the United States Engineer, quoting the words of the request and adding:

> "The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible."

On July 9 that letter was spread upon the minutes of the Board. We accept that, as did the Court of Appeals, as a ratification by the Board of the act of its President. On July 10 the contractors who were to execute the levee work were authorized by the United States to proceed within 20 days, and the clearing of the batture was commenced on July 22.

No notice was given to petitioner of the intention to bulldoze its trees off the batture. On September 12 the petitioner discovered that the trees were being destroyed, and an objection was promptly made. The contractor, however, refused to halt its operations, relying upon its contract with the Government.

Petitioner brought two actions in the District Court under the Tucker Act, 28 U. S. C. § 1346 (a)(2), to recover the value of the destroyed timber.[10] The suits

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[9] "Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-ways until the next regular Board meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Commissioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meeting."

[10] Although alternative claims were made under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), they were abandoned while the cases were still in the District Court. See 107 F. Supp. 981.

were consolidated for trial, and ultimately a single judgment was entered against the United States in the amount of $10,801 plus interest.[11] Both the United States and petitioner took appeals to the Court of Appeals, the former on the merits and the latter from so much of the judgment as fixed the interest at 4% from date of judgment. The Court of Appeals reversed, holding the United States to be free from liability.[12] We granted certiorari to examine the liability of the United States for proceeding to clear this land without notice to petitioner, the owner of the trees, and thus without granting petitioner a reasonable opportunity to salvage the timber.[13]

One of the defenses relied upon by the United States throughout this litigation is a claim that it is not liable to petitioner for the timber losses because it received rights-of-way on the land involved from the Levee Board, and that the Levee Board legally appropriated those rights-of-way without compensation under its riparian servitude. Petitioner concedes that under the civil law of Louisiana the property on which its trees were standing, being batture, is subject to a riparian servitude for use by the State of Louisiana in constructing and repairing levees, and that historically the owner of such

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[11] 119 F. Supp. 749. See also prior opinions of the District Court in this case at 94 F. Supp. 441 and 107 F. Supp. 981.

[12] 224 F. 2d 7.

[13] 350 U. S. 882.

The Board of Commissioners of the Fifth Levee District was made a third party defendant in the District Court pursuant to a motion of the United States. It was and is the Government's position that, if it is liable to petitioner, it is entitled to judgment over against the Board. The District Court ruled that the United States was liable and that it, and not the Levee Board, must pay the award. 119 F. Supp. 749. The Court of Appeals did not reach the question of the liability of the Board over to the United States since that court held that the United States was not liable at all. In view of our disposition of the case, we likewise need not reach that question.

property has been required to permit State use without compensation of such part thereof as might be needed for levee purposes. And it is not denied that the timber on this land, as well as the land itself, is subject to the exercise of the servitude for levee purposes.[14]

Petitioner in effect does claim, however, that the State did not effectively exercise the riparian servitude for the reason that the appropriation here was arbitrary and therefore beyond the power of the State. This contention is based upon the fact that no notice of the proposed destruction was given to petitioner. It is argued that under Louisiana law, which of course defines the bounds of the riparian servitude, the power possessed by the State by reason of the servitude is not an unlimited and arbitrary power; [15] that it would be arbitrary, oppressive and unjust to exercise the State's rights under the servitude in the circumstances of this case without prior notice to petitioner; that therefore the attempt by the State to exercise the servitude without such notice was ineffective to cause an appropriation of the timber pursuant to the

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[14] Cf. *Lacour* v. *Red River, A. & B. B. Levee Dist.*, 158 La. 737, 104 So. 636; La. Const., 1921, Art. XVI, § 6; Louisiana Civil Code, 1945, Art. 665.

Petitioner suggests that the destruction of the timber in this case was not for "levee purposes," but rather was undertaken merely for the purpose of saving the Government money. This contention is based on the fact that the only reason the trees were destroyed was because the contractors were permitted under their contract to bulldoze the standing trees—a less expensive method for clearing land than removing the stumps of cut timber. But in order for the use of the timber to be for "levee purposes," it is not necessary that the trees themselves be employed in the construction or improvement of the levee. It is sufficient if the trees were destroyed in connection with a levee project. Cf. *Lacour* v. *Red River, A. & B. B. Levee Dist., supra;* La. Const., 1921, Art. XVI, § 6.

[15] Petitioner relies on language in *Peart* v. *Meeker,* 45 La. Ann. 421, 426, 12 So. 490, 492; and in *Pruyn* v. *Nelson Bros.*, 180 La. 760, 768, 157 So. 585, 587.

servitude. If Louisiana could not exercise its rights under the servitude without first giving notice to petitioner, the timber here involved was never successfully taken by the State free of an obligation to compensate for the taking.[16] It would follow that the United States received no rights from the Levee Board permitting destruction of the trees by it free of that obligation. The Court of Appeals held, based upon its analysis of Louisiana law, that prior notice to petitioner was not a prerequisite to an appropriation of its timber for levee purposes. We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here. *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

The Louisiana courts have made no pronouncement which directly controls this question. But see *Board of Comm'rs* v. *Trouille*, 212 La. 152, 31 So. 2d 700. The Supreme Court of Louisiana has, however, as recently as 1946, reviewed the long history of the riparian servitude. *Dickson* v. *Board of Comm'rs*, 210 La. 121, 26 So. 2d 474. In that case it was noted that:

> ". . . while in all of the remaining states of the Union lands necessary for levee purposes can only be used after expropriation and proper indemnification, in Louisiana the state has the right to act first, i. e., the authority to appropriate such land to a use to which it is subject under its very title, and talk later.
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> ". . . And however unfair it may seem to the owners of this type of land they are without right to complain because their acquisition of such land was subject by law to this ancient servitude and the

[16] La. Const., 1921, Art. I, § 2.

> private mischief must be endured rather than the public inconvenience or calamity." 210 La., at 132, 136, 26 So. 2d, at 478, 479.

The court further stated that the rights of the State under the servitude can be exercised in the way found to be "most expeditious from an engineering, economical, and practical standpoint." 210 La., at 138, 26 So. 2d, at 480; *Board of Comm'rs* v. *Franklin,* 219 La. 859, 866, 54 So. 2d 125, 127–128. The levee enlargement plan here called for bulldozing standing timber for reasons of economy—that operation admittedly being a less expensive method for clearing land than removing the stumps of cut timber. The servitude was developed so as to insure "that the shores of navigable rivers and streams in this state would always be kept free for the public for levee . . . purposes." 210 La., at 131–132, 26 So. 2d, at 478. This historical background makes clear that the rights of the State in property subject to the servitude are very broad. By law, and for the good of all, lands were made available to the State for levee purposes in as convenient a manner to the State as was necessary for the public welfare, and with little regard for the severity of the obligations imposed on the individual property owner. Nothing in the development of the servitude indicates that, before the State can exercise its obviously comprehensive rights, it must provide an opportunity to remove timber from batture.

Since, as we hold, petitioner's property was effectively appropriated by state authorities pursuant to the servitude, the United States cannot be liable to petitioner for the value of the property. The State, as owner of the servitude, legally could have destroyed the timber without prior notice and without any opportunity for mitigation of losses, and yet be free of liability to petitioner. The destruction, it seems to us, was consistent with the

rights of the State under the servitude. Rather than undertake the levee project itself, Louisiana, through one of its agencies, donated its rights as against petitioner's timber to the United States. The United States, as donee of those rights, could exercise them to their full extent without incurring liability, just as its donor could have done.

The petitioner sought compensation for the destruction of the trees based upon a claim that the "destruction of said timber was [a] taking . . . within the meaning of the Fifth Amendment to the Federal Constitution." But this property was not taken by the United States in the exercise of its power of eminent domain. In effect, the timber was "owned" by Louisiana for levee purposes, and the United States succeeded to that "ownership" by "conveyance." Louisiana furnished its batture as required by the law of both the United States and Louisiana for use in protecting the property in the State from floods. Petitioner did not assert in its complaints or in its question presented on petition for certiorari that the destruction violated the Due Process Clause of the Fifth Amendment.[17]

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

The conflicting views between two members and the rest of this Court on the law of Louisiana relevant to the issue in this case prove once more what a precarious business it is for us to adjudicate a federal issue dependent on what the Court finds to be state law, when the highest court of a State has not given us authoritative

[17] Cf. *Eldridge* v. *Trezevant,* 160 U. S. 452; *Mayor of Vidalia* v. *McNeely,* 274 U. S. 676; *Wolfe* v. *Hurley,* 46 F. 2d 515, aff'd, 283 U. S. 801; *Board of Comm'rs* v. *Franklin,* 219 La. 859, 54 So. 2d 125, appeal dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant, supra,* and *Wolfe* v. *Hurley, supra.*

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guidance regarding its law. In like situations I have, from time to time, suggested that legal procedure is not without resources for enabling us to found our decision securely on state law. See, *e. g., Propper* v. *Clark,* 337 U. S. 472, 493 (dissenting in part). By means of the declaratory judgment (it is available in Louisiana, La. Rev. Stat., 1950, 13:4231 *et seq.*) or otherwise, it ought to be possible to suspend definitive judgment on the federal issue until a pronouncement can be had from the state court on controlling state law. For myself I am prepared so to proceed here. In default of it, I concur in the opinion and judgment of the Court.

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

We have at the root of this case a question of Louisiana law—whether the timber grown on batture is "property" and, if so, whether it may be confiscated without any opportunity to the owner to salvage or remove it. The timber concededly is of value. It is bought and sold and plays a significant role in the conduct of commercial enterprises.[1] The Court apparently concedes that the timber is "property" within the meaning of the Fifth Amendment. Otherwise the Court would not reserve decision on whether the Due Process Clause of the Fifth Amendment has been violated. If the timber is "property" so far as the Due Process Clause is concerned, it

[1] The timber which was destroyed was on two tracts of land. In 1946 petitioner purchased the entire fee of one tract for $30,000 and resold it for $15,000 two months later, reserving the timber rights for 20 years. In 1947 petitioner purchased the timber rights on the second tract for a period of 10 years, paying $36,000 for these rights. The trial judge found that the total value of the timber destroyed was $10,801, and he entered a judgment for that amount plus interest.

would seem to be "property" within the meaning of the Just Compensation Clause of the same Amendment. The question then comes down to whether the timber may be confiscated without any notice to the owner. If Louisiana could not confiscate the timber, then the United States certainly may not. For the United States has succeeded to such ownership as Louisiana has.

Concededly this land between low- and high-water mark—the batture—may be used as the State chooses for the construction and maintenance of levees without compensation to anyone. But we have it on excellent authority that, under Louisiana law, private property on the batture may not be confiscated without reasonable opportunity of the owner to salvage it. The authority is the eminent district judge who decided this case, Hon. Ben C. Dawkins. Judge Dawkins, who was appointed to the federal bench in 1924, was a Louisiana lawyer of distinction. He not only practiced law in that State. From 1912–1918 he was a state district judge and from 1918–1924 an associate justice of Louisiana's Supreme Court. He was a member of the Louisiana Constitutional Convention in 1921. Indeed, Judge Dawkins was the author of Art. XVI, § 6 of the Louisiana Constitution, which provides that batture may be taken for levee purposes without compensation. See *General Box Co.* v. *United States,* 107 F. Supp. 981, 983. Judge Dawkins held that, under Louisiana law, notice to the owner of the timber was necessary. There is no square holding of the Louisiana courts on the point. The problem lies in the penumbra of Louisiana law, making all the more difficult a prediction as to what the Louisiana courts would hold. On questions far less complicated or obscure than this one, we have deferred to decisions of the lower federal judge on the local law of his own State. See *MacGregor* v. *State Mutual Co.,* 315 U. S. 280, 281; *Huddleston* v.

Dwyer, 322 U. S. 232, 237; *Hillsborough* v. *Cromwell,* 326 U. S. 620, 630; *Steele* v. *General Mills,* 329 U. S. 433, 439; *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530, 534; *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 204.

Judge Dawkins relied on *Pruyn* v. *Nelson Bros.,* 180 La. 760, 768, 157 So. 585, 587, where the Louisiana Supreme Court in reviewing the servitude governing batture said:

> "This servitude is limited only by the reasonableness of its use, and the administrative officers of the state of Louisiana are charged with determining that limit, subject to review by the courts only when oppression or injustice is shown and proved."

Judge Dawkins ruled that what was done in this case amounted to "oppression or injustice" within the meaning of the *Pruyn* case. See 119 F. Supp. 749, 751. I would defer to his judgment. We are dealing with nuances of local law that only one trained in it can evaluate.[2] The difficulty is compounded for common-law lawyers. For this is civil law that has overtones from distinct languages and history.

Mr. Justice Holmes wrote, in a case from Puerto Rico, of the special deference due local judges on rulings upon matters under the civil law. *Diaz* v. *Gonzalez,* 261 U. S. 102, 105–106:

> "This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying

[2] None of the judges either of the Circuit Court or of this Court who voted to reverse Judge Dawkins is from the Louisiana Bar.

> emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."

I cannot read the Louisiana decisions without feeling that Judge Dawkins was right on the law.[3] The servitude governing batture is dominant but not absolute. Private property must give way before it—but only to the extent that the public welfare demands. As stated in *Peart* v. *Meeker,* 45 La. Ann. 421, 426, 12 So. 490, 492:

> "It is undoubtedly the duty of public officers charged by the State with the execution of its police power to make no greater sacrifice of private rights than the public welfare demands. In several cases this court has said that the power so conferred is not arbitrary, and that the citizen is not without remedy to subject it to judicial control in proper cases."

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[3] No Louisiana cases have been found in which notice was not given in time to allow property to be salvaged from the batture. In *Board of Levee Commissioners* v. *Kelly,* 225 La. 411, 73 So. 2d 299, 30 days notice was given to batture dwellers to remove their structures and possessions. And see *Board of Commissioners* v. *Franklin,* 219 La. 859, 863–864, 54 So. 2d 125, 127–128; *Board of Commissioners* v. *Trouille,* 212 La. 152, 157–158, 31 So. 2d 700, 701–702; *Peart* v. *Meeker,* 45 La. Ann. 421, 424, 12 So. 490, 491, in each of which notice was given.

In the present case, written notice was sent to the owners after the clearing in question was completed. In this notice, the owners were warned that work would begin on another levee. The letter-notice said, "We respectfully request that any buildings, timber or other obstacles which might be within the rights-of-way be removed prior to the time that the contractor begins work."

The Court quotes from *Dickson* v. *Board of Comm'rs,* 210 La. 121, 26 So. 2d 474, to the effect that the State may "appropriate such land . . . and talk later." But the *Dickson* case involved consequential damages to riparian land resulting from a change in a river channel, not a taking of land or other property.

If the State destroyed a home or other structure in the batture without notice to the owner, I think Louisiana would grant a remedy—provided of course the State was not confronted with an emergency and did not have to act with speed. But, where there is time to give notice, it is "oppressive" not to do so, as Judge Dawkins said.

Even if I am mistaken in this view of the Louisiana law, I would hold as a matter of federal law that the United States cannot rely on the state-created servitude to justify its own action, which borders on the wanton destruction of the property interests of the private owners of the timber. For all that appears, General Box was prepared to remove the timber without additional expense or delay to the United States.

The requirement of notice is deeply engrained in our system of jurisprudence. *Mullane* v. *Central Hanover Bank,* 339 U. S. 306; *Covey* v. *Town of Somers,* decided this day, *ante,* p. 141. The taking of property without notice where notice can reasonably be given, and with the result that the owner is deprived of the chance to salvage the property, is sheer confiscation.

HATAHLEY ET AL. *v.* UNITED STATES.

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

No. 231. Argued March 26–27, 1956.—Decided May 7, 1956.

Petitioners, Navajo Indians living in southeastern Utah, sued under the Federal Tort Claims Act to recover for the confiscation and destruction by federal agents of their horses, which were grazing on public lands of the United States. The Government defended on the ground that the federal agents were acting pursuant to the Utah abandoned horse statute. The trial court awarded petitioners jointly a lump-sum judgment for $100,000 and enjoined the Government and its agents from further interference with petitioners. *Held:* On the record in this case, petitioners are entitled to a judgment for damages, which must be apportioned among them; but they are not entitled to an injunction. Pp. 174–182.

(a) The trial was not conducted so improperly as to vitiate the trial court's findings of fact. P. 177, note 3.

(b) Under the Taylor Grazing Act and the Federal Range Code issued thereunder, government agents may invoke local impoundment laws only after complying with §§ 161.11 (a) and (b) of the Federal Range Code. Since the federal agents did not give petitioners the written notice required by the Federal Range Code, there was not such compliance here, and they acted without statutory authorization. Pp. 177–180.

(c) In attempting to enforce a federal statute which they administer, the federal agents were acting within the scope of their employment, and the Government is liable under the Federal Tort Claims Act for their wrongful and tortious acts. Pp. 180–181.

(d) The exceptions set forth in 28 U. S. C. § 2680 do not bar recovery, because the federal agents were not "exercising due care" and were not performing a "discretionary function or duty" within the meaning of that Section. P. 181.

(e) Under the Federal Tort Claims Act, any findings of damages must be made with sufficient particularity so that they may be reviewed. The findings in this case and the award of damages in a lump sum to petitioners jointly did not meet this requirement, and the case must be remanded to the District Court for appropriate findings in this regard. P. 182.

(f) The District Court had no power to enjoin the United States or its individual agents over whom that Court never acquired personal jurisdiction. P. 182.

220 F. 2d 666, reversed and remanded.

Norman M. Littell argued the cause for petitioners. With him on the brief were *Marvin J. Sonosky* and *Frederick Bernays Wiener.*

Roger P. Marquis argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Morton* and *S. Billingsley Hill.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioners, eight families of Navajo Indians, seek damages under the Federal Tort Claims Act for the destruction of their horses by agents of the Federal Government. The District Court allowed damages of $100,000 and enjoined the Government and its agents from further interference with petitioners. The Court of Appeals for the Tenth Circuit reversed, 220 F. 2d 666, on the ground that the Utah abandoned horse statute, Utah Code Ann., 1953, 47–2, was properly invoked by the government agents. We do not agree with the Court of Appeals.

Petitioners are wards of the Government. They have lived from time immemorial in stone and timber hogans on public land in San Juan County, Utah. This bleak area in the southeastern corner of the State is directly north of the Navajo Indian Reservation. While some Indian families from the reservation come into the area to graze their livestock, petitioners claim to have always lived there the year round. They are herdsmen and for generations they have grazed their livestock on this land. They are a simple and primitive people. Their living is derived entirely from their animals, from the little corn they are able to grow in family plots, and the wild game and pine nuts that the land itself affords.

The District Court found that horses, as petitioners' beasts of burden and only means of transportation, were essential to their existence.[1]

In 1934 the Government enacted the Taylor Grazing Act, 48 Stat. 1269, 43 U. S. C. § 315, which provided for the regulation and use of these public lands. Grazing permits were issued to white livestock operators, and for a number of years these permittees grazed their livestock in common with petitioners, who continued in peaceable occupation and use of the land they claimed as their ancestral home. Limited forage made disputes between the stockmen and the Indians inevitable, and about 1950 both the Government and the white livestock operators filed suits to remove the Indians from this land.[2] In

[1] For example, No. 13 of the Findings of Fact made by the District Court states: "Wood is the only fuel available to plaintiffs as a fuel for their fires, and it is necessary at certain times to travel by horse up to 15 or 20 miles to drag or haul wood to the camps or hogans. Water is also scarce and this must be carried by horse and burro for distances up to 10 miles from the camps. Trips to reach the pine nuts areas often require trips by horse for 150 miles, and to reach sites of certain ceremonies and other functions among the Navajo people often require plaintiffs and their families to travel on their horses for 150 miles. Seventy-five mile trips are required in their hunting expeditions which can only be done on horses. That the same use is made of burros as of horses by plaintiffs and the burro is held in the same esteem by them as are horses."

[2] The suit by the United States was dismissed by the District Court, 93 F. Supp. 745. The Court of Appeals reversed the dismissal and reinstated the complaint, *United States* v. *Hosteen Tse-Kesi,* 191 F. 2d 518. The suit was later dismissed by the District Court on June 27, 1953, for the reason that it was moot because the Indians had moved to the reservation and were no longer on the public lands. The suit brought by several white stockmen in a Utah state court resulted in an order enjoining certain Navajo Indians, including some of the petitioners, from trespassing and grazing livestock on the lands in question. *Young* v. *Felornia,* 121 Utah 646, 244 P. 2d 862. A petition for certiorari in this suit was pending before this Court at the time the roundup was started. Certiorari was subsequently denied, 344 U. S. 886.

addition to legal proceedings, another method was employed by the government agents. Beginning in September 1952 and continuing until sometime after the present suit was filed in the District Court, the Department of Interior's range manager vigorously prosecuted a campaign to round up and destroy petitioners' horses. This action was taken pursuant to the Utah abandoned horse statute, Utah Code Ann., 1953, 47–2, which provides that the Board of County Commissioners may authorize the elimination of "abandoned" horses on the open range. An "abandoned" horse is defined as one running at large on the open range which is either not branded or, if branded, one on which the tax for the preceding year has not been paid. During the roundup a total of 115 horses and 38 burros belonging to petitioners were taken and sold or destroyed. Some horses were sold locally. Some were shot and their carcasses left on the range. Most of the animals, however, were trucked some 350 miles away to Provo, Utah, where they were sold to a horse-meat plant or a glue factory. The total amount derived from such sales, about $1,700, has been retained by the District Advisory Board composed of local stockmen. No part of it has been paid or offered to petitioners.

There is considerable evidence in the record to show that the Utah abandoned horse statute was applied discriminatorily against the Indians. In one instance the assistant range manager watched from a bluff while petitioner Hosteen Sakezzie released his horses from their corral. Later, a short distance away, the same government agent supervised a roundup of these horses and drove them 35 miles through the night to another corral from which they were loaded into trucks for the horse-meat plant. Sakezzie and three other Indians trailed the horses to the entrucking point but were not allowed to reclaim them. On another occasion five horses taken during the roundup which belonged to white stockmen

were returned to their owners on the payment of a nominal $2.50 a head, but petitioner Little Wagon was told that to reclaim his horses the charge would be $60 a head, an amount known to be far above his means. For the most part, these and other facts found by the District Court were unchallenged in the Court of Appeals and are unchallenged here.[3]

The Court of Appeals did not reach the question of liability under the Federal Tort Claims Act, since it concluded that the government agents' actions were authorized by the Utah abandoned horse statute. We cannot dispose of this case so easily.

The Taylor Grazing Act seeks to provide the most beneficial use of the public range and to protect grazing rights in the districts it creates. *Chournos* v. *United States,* 193 F. 2d 321. Section 2 of the Act, 48 Stat. 1270, 43 U. S. C. § 315a, provides that the Secretary of the Interior shall "make such rules and regulations . . . and do any and all things necessary to accomplish the purposes of this Act." Pursuant to this authorization the Secretary has issued the Federal Range Code, 43 CFR § 161.1 *et seq.* Unauthorized grazing on the federal range and the removal of trespassing livestock is expressly provided for by § 161.11 (b) of this Code:

> "(b) *Unlawful grazing on Federal range; removal of livestock; impoundment.* Whenever the charge consists of unlawfully grazing livestock on the Fed-

[3] While the Government does not challenge particular findings, it does level a general charge that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied on. The Court of Appeals noted "that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality." 220 F. 2d, at 670. After oral argument and a thorough consideration of the record, however, we do not find that the trial was conducted so improperly as to vitiate these findings. See *Labor Board* v. *Donnelly Co.,* 330 U. S. 219, 236–237.

> eral range, the notice served on the alleged violator . . . will order the alleged violator to remove the livestock or to cause them to be removed immediately or within such reasonable time as may be specified. If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator."

Whenever the charge consists of unlawfully grazing livestock, this section requires that written notice, as provided by § 161.11 (a),[4] together with an order to remove the livestock, be served on the alleged violator. Only "if the alleged violator fails to comply with the notice" may the range manager proceed under local impoundment law and procedure. It is clear that both the written notice and failure to comply are express conditions precedent to the employment of local procedures. The Code is, of course, the law of the range, and the activities of federal agents are controlled by its provisions.[5] They are required to follow the procedures there established.

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[4] "§ 161.11 *Procedure for enforcement of rules and regulations*— (a) *Service of notice.* Whenever it appears that there has been any willful violation of any provision of the act or of the Federal Range Code for Grazing Districts, the range manager will cause the alleged violator . . . to be served with a written notice, which will set forth the act or acts constituting such violation and in which reference will be made to the provision or provisions of the act or the Federal Range Code for Grazing Districts alleged to have been violated. Such notice may be served in person or by registered mail and the affidavit of the person making personal service or the registry receipt shall be preserved."

[5] Section 16 of the Taylor Grazing Act, 48 Stat. 1275, 43 U. S. C. § 315n, reserves the power of the States to enforce "statutes enacted

The Court of Appeals held that there was no inconsistency between the federal regulation and the state statute because the regulation pertained to individual owners while the statute was aimed at "abandoned" horses running loose on the range. We cannot agree. As we read it, the Utah statute is directed not to horses abandoned in the sense that they are ownerless, or that their owners cannot be located, but rather to horses considered "abandoned" under an express statutory definition. As applied to horses "at large upon the open range," this definition depends only on branding and payment of prior tax assessment without any consideration of whether the horses are owned by someone and, if so, whether such owner is known or can be located. As the Court of Appeals itself recognized: "The dictionary definition of the term 'abandoned' has no application." 220 F. 2d, at 672. Furthermore, the record is replete with evidence that in this case the government agents actually did know that the horses belonged to petitioners and had not been abandoned. The District Court found that, "said agents knew beyond any possible doubt to whom said horses belonged"; that "the said agents and employees of defendant knew these brands to be the brands used by plaintiffs as well as they knew that the horses belonged to plaintiffs"; and concluded that the horses "were used daily in the performance of the work of their owners, the plaintiffs, and this was well known by defendant's said agents and employees." In the face of these findings, not disturbed by the Court of Appeals, it cannot be contended that the government agents were unable to comply with the specific provision for notice which regulated their actions. Nor has the Government contended that there

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for police regulation" on the public range. Section 161.11 (b) of the Range Code provides the exclusive procedure for the invocation of such state statutes by federal agents.

was an attempt at any time to comply with the notice provisions of the Federal Range Code.

For these reasons we hold that the Utah abandoned horse statute was not properly invoked. The circumstances of this case were specifically provided for by § 161.11 (b) of the Federal Range Code, and the government agents failed to comply with the terms of that section because the requisite notice was not given.

But, having concluded that there was no statutory authority, we are faced with the question whether the Government is liable under the Federal Tort Claims Act for wrongful and tortious acts of its employees committed in an attempt to enforce a federal statute which they administer. We believe there is such liability in the circumstances of this case.

Section 1346 (b) of Title 28, United States Code, authorizes suits against the Government for "loss of property . . . caused by the negligent or wrongful act . . . 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 . . . occurred." It is clear that the federal agents here were acting within the scope of their employment under both state and federal law. Under the law of Utah an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment. Cf. *Barney* v. *Jewel Tea Co.*, 104 Utah 292, 139 P. 2d 878. Both of these conditions obtained here. The federal agents were attempting to enforce the federal range law, and such enforcement must contemplate at least the force used in removal of stock from the range. The fact that the agents did not have actual authority for the procedure they employed does not affect liability.

There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment. We note also that § 1346 (b) provides for liability for "wrongful" as well as "negligent" acts. In an earlier case the Court has pointed out that the addition of this word was intended to include situations like this involving " 'trespasses' which might not be considered strictly negligent." *Dalehite* v. *United States,* 346 U. S. 15, 45.

Nor does 28 U. S. C. § 2680 bar liability here. This section provides that:

> "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 first portion of section (a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law. "Due care" implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners. Nor can the second portion of (a) exempt the Government from liability. We are here not concerned with any problem of a "discretionary function" under the Act, see *Dalehite* v. *United States, supra.* These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.

The District Court awarded damages in the lump sum of $100,000, the amount sought by petitioners jointly. Apparently this award was based on the value of the horses, consequential damages for deprivation of use and for "mental pain and suffering." Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed, 28 U. S. C. § 1346 (b), subject to the limitations that the United States shall not be liable for "interest prior to judgment or for punitive damages," 28 U. S. C. § 2674. But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed. Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. There can be no apportionment of the award among the petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard.

Since the District Court did not possess the power to enjoin the United States, neither can it enjoin the individual agents of the United States over whom it never acquired personal jurisdiction. That part of the Court of Appeals judgment dissolving the injunction is affirmed. The remainder of the judgment is reversed and remanded to the District Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

CAHILL *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

ON A MOTION TO RECALL AND AMEND THE JUDGMENT.

No. 436. Decided May 14, 1956.

1. The motion of respondent to recall the judgment of this Court in this case is granted, and the judgment is amended to provide for a remand of the cause to the Court of Appeals for further proceedings. Pp. 183–184.
2. The original order entered by the Court in this case, 350 U. S. 898, is deemed erroneous and it is recalled in the interest of fairness. P. 184.
3. Even when a petition for rehearing has been denied, Rule 58 (4) of the Rules of this Court, barring consecutive and out-of-time petitions for rehearing, does not preclude a motion to correct the kind of error involved in the Court's original order in this case. P. 184.
4. This cause is not moot, though the judgment has been paid. P. 184.

350 U. S. 898, judgment recalled and amended.

William T. Griffin and *Herbert Burstein* for movant.

Randolph J. Seifert in opposition.

PER CURIAM.

Respondent filed a motion to recall and amend the judgment in the above-entitled cause, 350 U. S. 898, for the purpose of remanding the cause to the United States Court of Appeals for the Second Circuit for further proceedings. Prior to the filing of this motion, and after the District Court denied an application for a stay of execution, the judgment was satisfied; but petitioner was informed that respondent intended to pursue its remedies notwithstanding payment of the judgment.

The motion of respondent to recall the judgment is granted. It is ordered that the certified copy of the judg-

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ment 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 Second Circuit for further proceedings. *Boudoin* v. *Lykes Brothers S. S. Co.*, 348 U. S. 336, 350 U. S. 811; Rule 58 (4), Supreme Court Rules.

We deem our original order erroneous and recall it in the interest of fairness. Similar relief was requested by respondent in a petition for rehearing, denied in 350 U. S. 943. Rule 58 (4) bars consecutive and out-of-time petitions for rehearing. The *Boudoin* case, however, concerned a motion to recall a judgment that asked for almost identical relief. Yet, if it had been considered a petition for rehearing, it was filed out of time. The grant of the motion in the *Boudoin* case shows that Rule 58 (4) does not prohibit motions to correct this kind of error.

Compare as to mootness, *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437, 442; *Dakota County* v. *Glidden*, 113 U. S. 222, 224. The problems that may arise from demand for repayment are not before us.

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

In the interest of fairness we would not remand this case to the Court of Appeals. Cahill brought this action under the Federal Employers' Liability Act [1] to recover for injuries sustained while working as a railroad brakeman. He was hurt on a busy highway which had railroad tracks running down its center. While flagging traffic behind a train stalled on these tracks Cahill was struck by a truck which started up suddenly. His complaint charged that the railroad was negligent in sending him to work in such a dangerous place without proper

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

warning or instructions. The jury found for Cahill and awarded him damages. The railroad asked the Court of Appeals to reverse Cahill's judgment on two grounds: (1) there was insufficient evidence to permit submission of the case to the jury; (2) the trial judge erroneously admitted evidence of prior accidents at the scene of Cahill's injury offered to show the railroad's negligence in failing to warn him of dangers such as had brought about those accidents.

The Court of Appeals reversed on the ground that there was not sufficient evidence to support the verdict. 224 F. 2d 637. Having taken this action the Court of Appeals expressly stated that it did not find it necessary to pass on the alleged error in admitting the evidence of prior accidents. Cahill then asked us for certiorari. On November 21, 1955, we granted his petition and reversed the Court of Appeals' judgment, thereby reinstating the judgment of the District Court. 350 U. S. 898. MR. JUSTICE REED dissented. MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN expressed the view that certiorari should have been denied; they did not participate in the decision on the merits.[2] In a timely petition for rehearing the railroad called our attention to the fact that its objection to the evidence of prior accidents had never been passed on by the Court of Appeals, urging that we reconsider our judgment and modify it to the extent necessary to remand the cause to the Court of Appeals to pass on the question it had left undecided. This Court denied the petition for rehearing. 350 U. S. 943.

The railroad's present "motion to recall" presents precisely the same contention which was raised in its peti-

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[2] See *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 438–439; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 527; and cases there cited.

tion for rehearing. We are asked once more to remand the case to the Court of Appeals for the Second Circuit for that court to determine whether there was error in admitting the evidence of prior accidents. Thus the "motion to recall" turns out to be a petition for rehearing of a former petition for rehearing. Or in somewhat plainer language, the motion to recall turns out to be a second petition for rehearing. But Rule 58 (4) of this Court declares that: "Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received." What is in fact a second petition for rehearing should not be received simply because it is labeled a "motion to recall."

There can be no possible doubt that a proper way to raise the sort of question here presented is by filing a petition for rehearing. Our records are filled with proof of this. The latest example is our action in *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U. S. 962, decided February 27, 1956. We granted relief in that case of precisely the same kind that the railroad here asked us to grant in its petition for rehearing and asks us again to grant in its "motion to recall." There is nothing new about granting the relief here requested in response to a petition for rehearing. Upon one occasion Mr. Justice Bradley, speaking from the bench, said:

> "It ought to be understood, or at least believed, whether it is true or not, that this Court, being a Court of last resort, gives great consideration to cases of importance and involving consequences like this, and there should be a finality somewhere. This custom of making motions for a rehearing is not a custom to be encouraged. It prevails in some States as a matter of ordinary practice to grant a rehearing on a mere application for it, but that practice we do not consider a legitimate one in this Court. It is

> possible that in the haste of examining cases before us, we sometimes overlook something, and then we are willing to have that pointed out, but to consider that this Court will reexamine the matter and change its judgment on a case, it seems to me, is not taking a proper view of the functions of this Court. . . ." [3]

This was an early recognition of the appropriateness of a motion for rehearing to raise points that have been overlooked. Thus, *assuming* that the point raised here was overlooked originally, it was correctly raised in the first petition for rehearing and that should end the matter if this Court's Rule 58 (4) is to be followed.

Mr. Justice Bradley dealt with the problem of successive petitions for rehearing in *Williams* v. *Conger,* 131 U. S. 390. There the litigant claimed that a clerical error had been made in an opinion. A rehearing was asked on that ground but was denied. The Court concluded that "no modification of the judgment was required, and no rehearing was necessary or called for. . . ." 131 U. S., at 391. Later the same request was again made. Mr. Justice Bradley, speaking for the Court, expressed its strong lack of patience at the "persistent renewal of the application . . . especially upon the same reasons once overruled . . . ." *Ibid.* One would judge from the tone of the opinion in that case that the Court would not have reached a different result had the second motion for rehearing been labeled a "motion to recall the judgment."

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[3] Charles Evans Hughes, The Supreme Court of the United States (1928), 71–72. See also Frankfurter and Landis, The Business of the Supreme Court at October Term, 1931, 46 Harv. L. Rev. 226, 237: "Of course, to deny a rehearing may conceivably be only an obstinate adherence to error. But surely, barring very exceptional circumstances, a rehearing implies a serious lack in the adjudicating process, a failure in mastering either the record or the pertinent legal considerations that govern the issues. . . ."

Our action in *Boudoin* v. *Lykes Bros. S. S. Co.*, 350 U. S. 811, does not justify the Court in granting this motion to rehear a petition for rehearing formerly denied. In that case Boudoin appealed from a judgment of the District Court in his favor, claiming: (a) the amount of damages awarded him was inadequate; and (b) the term of maintenance determined by the trial court was insufficient and should be extended and increased. The Court of Appeals undercut both of these alleged errors by holding that Boudoin was entitled to recover nothing at all. We reversed. 348 U. S. 336. Boudoin filed no petition for rehearing. He did ask us to amend our judgment so that the Court of Appeals could adjudicate the question of the amount of damages and we granted that motion. But our action there is not comparable to the action requested here. Had we denied Boudoin's motion and had he filed a later motion of the same kind I suppose we would not have considered it a second time. But here the Court is asked to review its judgment of reversal a second time. The substance of the pleadings and not their labels should govern our action. We should not grant what is in effect a second petition for rehearing unless the Court is willing to admit that it is refusing to give the rule against successive petitions for rehearing its literal meaning. There are strong arguments for allowing a second petition for rehearing where a rigid application of this rule would cause manifest injustice. Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556–559. But this is no such case.

We have never held that in every instance where the Court of Appeals has failed to decide a point, we must remand the cause to that Court. Such a rigid rule would be most undesirable and would bring about interminable delays with most unjust results. In *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, a suit for injuries under the Safety Appliance Act, this Court, after reversing the

Court of Appeals on one question, went on to decide a second question which the Court of Appeals had expressly left undecided. Mr. Justice Harlan, speaking for the Court, said: "As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done . . . ." 220 U. S., at 588.[4] More recently in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, this Court again decided a question left undecided by the Court of Appeals. MR. JUSTICE FRANKFURTER, speaking for the Court, said: "In this instance, however, we have a slim record and the relevant standard is not difficult to apply; and we think the litigation had better terminate now. Accordingly we have ourselves examined the record to assess the sufficiency of the evidence." 340 U. S., at 508. At least where there are unsubstantial points left undecided below this Court should not remand the case for consideration of those points.

Certainly there is no error asserted here that justifies sending this case back to the Court of Appeals. The error claimed relates to the admissibility of evidence concerning prior accidents. Cahill's case against the railroad was based in large part on the failure to give him proper instructions before sending him to work in a dangerous place when he had never done such work before. This made the railroad's knowledge of the danger of highway traffic at that location highly relevant in proving the railroad negligent. What better proof could there

[4] See also *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 287; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267–268; *Lamar* v. *United States*, 241 U. S. 103, 110–111; *Camp* v. *Gress*, 250 U. S. 308, 318; *Langnes* v. *Green*, 282 U. S. 531, 536–539; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567–568.

be than the fact that the railroad knew there had been repeated accidents at the same location of the kind that brought about Cahill's injury? No fair system of evidence would exclude such testimony when issues are raised like those involved here. As Mr. Justice Field, speaking for the Court, said in *District of Columbia* v. *Armes,* 107 U. S. 519, 525: "The frequency of accidents at a particular place would seem to be good evidence of its dangerous character,—at least, it is some evidence to that effect." [5]

We are told in this case that the railroad has already paid the judgment. For all we know that judgment was paid directly to Cahill. It is the general rule that voluntary payment of a judgment amounts to accord and satisfaction. *Thorp* v. *Bonnifield,* 177 U. S. 15, 18–19. Payment under duress is of course a different matter. We do not know whether this judgment was paid under duress. It is true there is a statement in respondent's brief that it informed petitioner of its intention to pursue whatever remedies it had notwithstanding payment of the judgment. And the brief also states that the District Court declined to agree to a stay of execution. This statement is certainly not sufficient to show the kind of duress that ought to justify setting aside the payment of a judgment.[6] Even if the facts alleged were sufficient,

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[5] See also the interesting discussion and cases cited in 2 Wigmore, Evidence (3d ed. 1940), §§ 252, 458. And see Notes: 65 A. L. R. 380, 81 A. L. R. 685, 128 A. L. R. 595, and cases there cited.

[6] "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." *Railroad Co.* v. *Commissioners,* 98 U. S. 541, 543–544. See also *Little* v. *Bowers,* 134 U. S. 547, 554–558.

the question should be tried as one of fact before this Court takes the drastic action of trying to make a plaintiff pay back money that he has received under an order of this Court. *Dakota County* v. *Glidden,* 113 U. S. 222.[7] If such summary action as here requested can be taken with reference to a judgment paid only a few days ago, why could it not be taken with reference to a judgment paid a year ago? [8] Yet the Court, without investigating these problems, summarily grants the motion to recall and remands the case to the Court of Appeals.

I think the Court should deny this motion.

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[7] "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal." 113 U. S., at 225. See also *Wood-paper Co.* v. *Heft,* 8 Wall. 333.

[8] The expiration of a Term of this Court is apparently no longer relevant. See 28 U. S. C. § 452.

UNITED STATES ET AL. *v.* STORER BROADCASTING CO.

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

No. 94. Argued February 28–29, 1956.—Decided May 21, 1956.

After rulemaking proceedings under the Communications Act of 1934, as amended, in which respondent appeared, filed written objections and argued orally, the Federal Communications Commission amended its rules so as to provide, in effect, that it would issue no license for an additional television broadcast station to any party already having five such stations. On the same day, applying this rule, the Commission dismissed, without hearing, respondent's application for a license for an additional television broadcast station, because respondent already had five such stations. Under the Communications Act, the Administrative Procedure Act and 5 U. S. C. § 1034, respondent applied to the Court of Appeals for review of the Commission's order amending its rule. *Held:*

1. Though the question of respondent's right to appeal was not raised by either party or by the Court of Appeals, it may be considered by this Court. P. 197.

2. Respondent had standing to bring this action. Pp. 198–200.

(a) The process of rulemaking having been completed, the amended rules constituted final agency action within the meaning of the Administrative Procedure Act. Pp. 198–199.

(b) The amended rules presently "aggrieve" respondent. Pp. 199–200.

3. Section 309 (b) of the Communications Act, which requires a "full hearing" before denial of an application for a license, does not prevent the Commission from adopting the rules here involved limiting the number of broadcast stations that will be licensed to any one party. Pp. 200–206.

(a) Section 309 (b) entitles each applicant for a license to a "full hearing," including the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. P. 202.

(b) However, § 309 (b) does not withdraw from the Commission the rulemaking authority necessary for the orderly conduct of its business. Pp. 202–203.

(c) Nor does § 309 (b) bar rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control." Pp. 203–205.

(d) The Act and rules are to be read as providing a "full hearing" for applicants who have reached the existing limit of stations, upon presentation of proper applications that set out adequate reasons why the rules should be waived or amended. The Act, considered as a whole, requires no more. P. 205.

95 U. S. App. D. C. 97, 220 F. 2d 204, reversed and remanded.

Warren E. Baker argued the cause for petitioners. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, Ralph S. Spritzer, Daniel M. Friedman, J. Smith Henley, Richard A. Solomon* and *Daniel E. Ohlbaum.*

Albert R. Connelly argued the cause for respondent. With him on the brief were *Thomas H. Wall, John E. McCoy* and *John D. Calhoun.*

MR. JUSTICE REED delivered the opinion of the Court.

The Federal Communications Commission issued, on August 19, 1948, a notice of proposed rulemaking under the authority of 47 U. S. C. §§ 303 (r), 311, 313 and 314 (Communications Act of 1934, as amended, 47 U. S. C. § 301 *et seq.*). It was proposed, so far as is pertinent to this case, to amend Rules 3.35, 3.240 and 3.636 relating to Multiple Ownership of standard, FM and television broadcast stations. Those rules provide that licenses for broadcasting stations will not be granted if the applicant, directly or indirectly, has an interest in other stations beyond a limited number. The purpose of the limitations is to avoid overconcentration of broadcasting facilities.

As required by 5 U. S. C. § 1003 (b), the notice permitted "interested" parties to file statements or briefs. Such parties might also intervene in appeals. 47 U. S. C. § 402 (d) and (e). Respondent, licensee of a number of radio and television stations, filed a statement objecting to the proposed changes, as did other interested broad-

casters. Respondent based its objections largely on the fact that the proposed rules did not allow one person to hold as many FM and television stations as standard stations. Storer argued that such limitations might cause irreparable financial damage to owners of standard stations if an obsolescent standard station could not be augmented by FM and television facilities.

In November 1953 the Commission entered an order amending the Rules in question without significant changes from the proposed forms.[1] A review was sought

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[1] Section 3.636 will illustrate the problem:

"§ 3.636 *Multiple ownership.* (a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if:

"(1) Such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

"(2) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. *The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.*" * (The italicized material is common to all three Rules.)

* "In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 per cent or more of the outstanding voting stock." 47 CFR, Rev. 1953.

The standard and FM Rules limited stations to seven.

in due course by respondent in the Court of Appeals for the District of Columbia Circuit under 5 U. S. C. § 1034,[2] 47 U. S. C. § 402 (a),[3] and 5 U. S. C. § 1009 (a), (c).[4] Respondent alleged it owned or controlled, within the meaning of the Multiple Ownership Rules, seven standard radio, five FM radio and five television broadcast stations. It asserted that the Rules complained of were in conflict with the statutory mandates that applicants should be granted licenses if the public interest would be served and that applicants must have a hearing before denial of an application. 47 U. S. C. § 309 (a) and (b).[5]

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[2] "Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. . . ."

[3] "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5."

[4] "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . . . .

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . ."

[5] 47 U. S. C. § 309:

"(a) Examination; action by Commission.

"If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

"(b) Notification of denial; contents; reply; hearing; intervention.

"If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such

Respondent also claimed:

> "The Rules, in considering the ownership of one (1%) per cent or more of the voting stock of a broadcast licensee corporation as equivalent to ownership, operation or control of the station, are unreasonable and bear no rational relationship to the national Anti-Trust policy."

This latter claim was important to respondent because allegedly 20% of its voting stock was in scattered ownership and was traded in by licensed dealers. This stock was thus beyond its control.

Respondent asserted it was a "party aggrieved" and a "person suffering legal wrong" or adversely affected under the several statutes that authorize review of FCC action. See notes 2, 3 and 4, *supra*. It stated its injuries from the Rules thus:

> "Storer is adversely affected and aggrieved by the Order of the Commission adopted on November 25, 1953, amending the Multiple Ownership Rules, in that:
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> "(a) Storer is denied the right of a full and fair hearing to determine whether its ownership of an interest in more than seven (7) standard radio and five (5) television broadcast stations, in light of and upon a showing of all material circumstances, will

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finding. . . . Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant . . . specifying with particularity the matters and things in issue . . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

thereby serve the public interest, convenience and necessity.

"(b) The acquisition of Storer's voting stock by the public under circumstances beyond the control of Storer, may and could be violative of the Multiple Ownership rules, as amended, and result in a forfeiture of licenses now held by Storer, with resultant loss and injury to Storer and to all other Storer stockholders."

On the day the amendments to the Rules were adopted, a pending application of Storer for an additional television station at Miami was dismissed on the basis of the Rules.

While the question of respondent's right to appeal has not been raised by either party or by the Court of Appeals, our jurisdiction is now mooted. It may be considered. *Federal Communications Comm'n* v. *National Broadcasting Co.,* 319 U. S. 239, 246. Jurisdiction depends upon standing to seek review and upon ripeness. If respondent could not rightfully seek review from the order adopting the challenged regulations, it must await action to its disadvantage under them, and neither the Court of Appeals nor this Court has jurisdiction of the controversy. Under the above-cited Code sections, review of Commission action is granted any party aggrieved or suffering legal wrong by that action.[6]

[6] Legal wrong, as a ground for standing to appeal, was introduced by the Administrative Procedure Act, § 10 (a). 60 Stat. 243. In explanation the reports of the Senate, No. 752, 79th Cong., 1st Sess. 26, and the House, No. 1980, 79th Cong., 2d Sess. 42, define "legal wrong":

"The phrase 'legal wrong' means such a wrong as is specified in section 10 (e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect."

Section 10 (e) of the bill required reviewing courts to "hold unlawful any action . . . (3) contrary to statutes or statutory right." Section 10 (e) of the Act is now in substantially the same language. 5 U. S. C. § 1009 (e).

We think respondent had standing to sue at the time it exercised its privilege. The process of rulemaking was complete. It was final agency action, 5 U. S. C. § 1001 (c) and (g), by which Storer claimed to be "aggrieved." When the authority to appeal was substantially the same, we held that an appellant who complained of the grant of a license to a competitor because it would reduce its own income had standing to appeal against a contention, admittedly sound, that such economic injury to appellant was not a proper issue before the Commission. We said:

> "Congress had some purpose in enacting § 402 (b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal." *Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U. S. 470, 477.

We added that such an appellant could raise any relevant question of law in respect to the order.

Again in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, this Court considered the problem of standing to review Commission action under the then existing § 402 (a), 48 Stat. 1093, and the Urgent Deficiencies Act, 38 Stat. 219. CBS there sought review of the adoption of Chain Broadcasting Regulations by the Commission. Against the contention that the adoption of regulations did not command CBS to do or refrain from doing anything (dissent 316 U. S., at 429), this Court held that the order promulgating regulations was

reviewable because it presently affected existing contractual relationships. It said:

> "The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for noncompliance." *Id.*, at 417–418.

The Court said that the regulations "presently determine rights." *Id.*, at 421.

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." *Id.*, at 422.

See *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, 289, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 18–19.

The regulations here under consideration presently aggrieve the respondent. The Commission exercised a power of rulemaking which controls broadcasters. The Rules now operate to control the business affairs of Storer. Unless it obtains a modification of this declared adminis-

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trative policy, Storer cannot enlarge the number of its standard or FM stations. It seems, too, that the note to Rule 3.636 (n. 1, *supra*) endangers Storer's stations as alleged in its petition for review. See this opinion, *supra*, p. 197, at (b). Commission hearings are affected now by the Rules. Storer cannot cogently plan its present or future operations.[7] It cannot plan to enlarge the number of its standard or FM stations, and at any moment the purchase of Storer's voting stock by some member of the public could endanger its existing structure. These are grievances presently restricting Storer's operations. In the light of the legislation allowing review of the Commission's actions, we hold that Storer has standing to bring this action.

In its petition for review Storer prayed the court to vacate the provisions of the Multiple Ownership Rules insofar as they denied to an applicant already controlling the allowable number of stations a "full and fair hearing" to determine whether additional licenses to the applicant would be in the public interest.[8] The Court of Appeals struck out, as contrary to § 309 (a) and (b) of the Communications Act (n. 5, *supra*), the words italicized in Rule 3.636 (n. 1, *supra*) and the similar words in Rules 3.35 and 3.240. The case was remanded to the Commission with directions to eliminate these words. 95 U. S. App. D. C. 97, 220 F. 2d 204. We granted certiorari. 350 U. S. 816.

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[7] Cf. *Frozen Food Express* v. *United States*, 351 U. S. 40, 43–44.

[8] Storer also attacked the 1% ownership provision that appears as a note to Rule 3.636, n. 1, *supra*. This was not passed upon by the Court of Appeals. 95 U. S. App. D. C. 97, 220 F. 2d 204. Its judgment leaves that portion of the Rule unaffected. As there was no cross petition for certiorari, we leave open the question of its validity.

The Commission asserts that its power to make regulations gives it the authority to limit concentration of stations under a single control.[9] It argues that rules may go beyond the technical aspects of radio, that rules may validly give concreteness to a standard of public interest, and that the right to a hearing does not exist where an applicant admittedly does not meet those standards as there would be no facts to ascertain. The Commission shows that its regulations permit applicants to seek amendments and waivers of or exceptions to its Rules.[10] It adds:

> "This does not mean, of course, that the mere filing of an application for a waiver . . . would necessarily require the holding of a hearing, for if that were the case a rule would no longer be a rule. It means

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[9] "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U. S. C. § 154 (i).

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . . . .

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: . . . .

. . . . . .

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, ..." 47 U. S. C. § 303.

[10] 47 CFR, Rev. 1953, § 1.361 (c):

"(c) Applications which, because of the nature of the particular rule, regulation, or requirement involved, are patently not in accordance with the Commission's rules, regulations, or other requirements will be considered defective and will be dismissed unless accompanied by a request of the applicant for waiver of, or exception to, any rule,

only that it might be an abuse of discretion to fail to hear a request for a waiver which showed, on its face, the existence of circumstances making application of the rule inappropriate."

Respondent defends the position of the Court of Appeals. It urges that an application cannot be rejected under 47 U. S. C. § 309 without a "full hearing" to applicant. We agree that a "full hearing" under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Cf. 5 U. S. C. § 1006 (c). Such a hearing is essential for wise and just application of the authority of administrative boards and agencies.

We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business. As conceded by Storer, "Section 309 (b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest." [11] The challenged Rules contain limi-

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regulation, or requirement with which the application is in conflict. Such requests shall show the nature of the waiver or exception desired and set forth the reasons in support thereof."

Section 1.702:

"*Petition for amendment or waiver of rules.* Any interested person may petition for issuance, amendment, repeal or waiver of any rule or regulation. Such petition shall show the text of the proposed rule, or its change, and set forth the reason in support of the petition."

See also 47 CFR, 1941 Supp., §§ 1.72, 1.81.

[11] See 47 U. S. C. §§ 310 and 311. Cf. *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U. S. 327, 333, n. 9; and 47

tations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U. S. C. § 154 (i) and § 303 (r) grant general rulemaking power not inconsistent with the Act or law.

This Commission, like other agencies, deals with the public interest. *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U. S. 4, 14. Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret § 309 (b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control." It is but a rule that announces the Commission's attitude on public protection against such concentration.[12] The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.[13] We think the Multiple Ownership Rules, as adopted, are reconcilable with the Com-

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CFR, Rev. 1953, § 1.724; *Felman* v. *United States*, 339 U. S. 973; *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284.

[12] See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 196. We said last Term that determination of improper concentration of control was for appraisal by the Commission after hearing. *Federal Communications Comm'n* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 363–364.

[13] See *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 508.

munications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control.

In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, similar rules prohibiting certain methods of chain broadcasting were upheld despite a claim that the Rules caused licenses to be denied without "examination of written applications presented . . . as required by §§ 308 and 309." *Id.,* at 230.[14] The *National Broadcasting* case validated numerous regulations couched in the prohibitory language of the present regulations. The one in the margin will serve as an example.[15]

In the *National Broadcasting* case we called attention to the necessity for flexibility in the Rules there involved.

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[14] Point III of the National Broadcasting Company brief argued the matter under this heading, "The Commission Cannot Escape Its Duty to Evaluate and Decide Each License Application on Its Own Facts." At that time § 309 (a) had the hearing provision. It read:

"SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe." 48 Stat. 1085.

Change to the present form was merely for more certainty and clarification to avoid the possibility of arbitrary Commission action. See S. Rep. No. 44, 82d Cong., 1st Sess. 8.

[15] "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization." *Id.,* at 200; 47 CFR, 1941 Supp., § 3.101.

The "Commission provided that 'networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable.' " *Id.,* at 207. We said:

> "The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *Id.,* at 225.

That flexibility is here under the present § 309 (a) and (b) and the FCC's regulations. See n. 10, *supra.* We read the Act and Regulations as providing a "full hearing" for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361 (c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309 (b), n. 5, *supra,* would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections to the Multiple Ownership Rules.

Reversed and remanded.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The Court has properly deemed it necessary to question *sua sponte* the jurisdiction of the Court of Appeals to entertain this case,[1] but I am unable to agree with its decision that such jurisdiction existed. In my view, Storer was not a "party aggrieved by a final order" of the Commission, within the meaning of 5 U. S. C. § 1034, and hence was not entitled to invoke the jurisdiction of the Court of Appeals. Accordingly, I would vacate the judgment below and remand the case to the Court of Appeals with directions to dismiss the petition for lack of jurisdiction.

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[1]Although the question of reviewability was not raised below or argued here, there can be no doubt of the power of the Court to consider the issue *sua sponte*, since it goes to the jurisdiction of the Court of Appeals and of this Court. Cf. *Federal Communications Comm'n* v. *National Broadcasting Co.*, 319 U. S. 239, 246; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 128, n. 3; *American Federation of Labor* v. *Labor Board*, 308 U. S. 401, 404. The jurisdiction of the Courts of Appeals to review orders of the Federal Communications Commission, other than those granting or denying licenses, is granted by the Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. §§ 1031–1042. Section 1032, which confers the jurisdiction, provides that "Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034." Section 1034, in turn, provides that "Any party aggrieved by a final order . . . may, within sixty days after entry of such order, file in the court of appeals . . . a petition to review such order." In short, the court's jurisdiction may be invoked only upon the petition of a "party aggrieved by a final order."

1. These regulations do not, in my view, constitute an "order" within the meaning of § 1034. They simply establish certain standards to be followed by the Commission in the future exercise of its licensing powers; they do not require any licensee to do or to refrain from doing anything, attach no consequences to his action or inaction, and determine no questions as to his legal status. As such they are quite unlike the Chain Broadcasting regulations which were held to be a reviewable "order" in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, in a proceeding comparable to this one. Those regulations were held reviewable, not because every Commission action in the form of a regulation was considered to be an "order," but for the specific reason that they proscribed certain kinds of contracts between licensees and the national networks and, by prescribing the sanction of license cancellation for noncompliance, operated to coerce action by the licensees and to determine the legal status of the networks' contracts. Of their own force and with no further administrative action being taken, the regulations induced licensees to cancel existing network contracts and deterred them from entering into new ones. That coercive effect of the regulations on present conduct, the very characteristic which led the Court to regard the Chain Broadcasting regulations as an "order" despite their form, is totally lacking here.[2]

[2] Insofar as the Multiple Ownership regulations provide for the revocation of existing licenses upon the purchase by a licensee of a stock interest in more than the maximum number of stations, they could arguably be deemed an "order" forbidding licensees, under pain of license revocation, to engage in stock transactions the result of which would violate the numerical limitations. Storer is not complaining, however, of any such deterrent effect of the regulations and does not allege that it desires either to buy or to sell stock in any licensee. It objects only to the possibility of a future loss of a license should persons beyond its control—and, by hypothesis, *not* deterred by the regulations—purchase its stock. See paragraph (b) of Storer's allegations, p. 208, *infra*.

2. A second obstacle to review of the regulations here is that, even if they be deemed an "order," Storer has not shown that it is "aggrieved" by them.

In assessing the character of Storer's grievance, we must put aside the Commission's order, made simultaneously with its promulgation of the challenged regulations, which denied a pending application by Storer for a sixth television license. That order was reviewable only by a direct appeal within 30 days under 47 U. S. C. § 402 (b), (c), *Federal Communications Comm'n* v. *Columbia Broadcasting System,* 311 U. S. 132, and became final and conclusive upon Storer's failure to appeal from it. Since that order cannot be reviewed, and no relief from it may be granted in this proceeding, it is only of the prospective effect of the regulations, not their past application, that Storer may complain. And it is by that effect that Storer must show it is "aggrieved."

In its petition for review, Storer alleged that it was aggrieved by the regulations in that:

> "(a) Storer is denied the right of a full and fair hearing to determine whether its ownership of an interest in more than seven (7) standard radio and five (5) television broadcast stations, in light of and upon a showing of all material circumstances, will thereby serve the public interest, convenience and necessity.
>
> "(b) The acquisition of Storer's voting stock by the public under circumstances beyond the control of Storer, may and could be violative of the Multiple Ownership rules, as amended, and result in a forfeiture of licenses now held by Storer, with resultant loss and injury to Storer and to all other Storer stockholders."

However these allegations are read, they assert no more than that the Commission may in the future take action

pursuant to the regulations to deny or revoke a license. Of course, if such action should ever be taken, Storer would then be "aggrieved." But by the same token it would then have a complete remedy through a direct appeal from such action under § 402 (b). Until such time as the regulations are applied to it, however, Storer will not have been "aggrieved" and hence will not be entitled to review. Indeed, in this case we do not even reach the often difficult problem whether an alleged injury is sufficient or of such a nature as to entitle the complaining party to review; here we have that rare case in which no present injury of any kind is even alleged.

It is said, however, that the regulations "now operate to control the business affairs of Storer," despite the absence of any such allegation by Storer. Since the regulations do not have any coercive effect, I take that to mean only that Storer, if it exercises prudent business judgment, will take into account the announced policy of the Commission in deciding whether or not to apply for an additional license. No doubt that is true, but I fail to see how Storer has been "aggrieved" by being told in advance one of the factors that will govern the disposition of any future license application on its part. If anything, Storer is now able to make a more enlightened judgment as to the probabilities of success in obtaining a further license.

3. So clear is it, in fact, that Storer has not been "aggrieved" by the mere issuance of the regulations, that the Court's grant of review in this case must be premised not upon the effect of the regulations themselves, but simply upon Storer's interest in knowing whether or not a future application of them would be valid. The result is that the statutory procedure for obtaining relief from a present injury caused by an order has been converted into something quite different—namely, a procedure for obtaining a declaratory judgment as to the validity of a

future application of new regulations. Not only is such a proceeding not authorized by the statute, however, but Storer would not have standing to invoke it even if it were.

That declaratory relief from future orders is not contemplated by § 1034 seems clear. That section authorizes review only of an "order," only if the order is "final," and only at the instance of one aggrieved "by" the challenged order itself. The regulations here are not an "order"; if they were it would not be "final" since further administrative action must be taken before Storer will be affected; and Storer's grievance, if any, will be caused not "by" the regulations but only by their future application. Moreover, quite apart from these obstacles, the procedure provided for by § 1034 is inappropriate for anticipatory equitable relief. That section requires, for example, that petitions for review be filed within 60 days after the order is issued. While such a time limitation is clearly appropriate to a procedure for relief from an injury already suffered, there seems no justification for so limiting the availability of declaratory relief from future action. Why should declaratory relief be denied as the threat of the future injury becomes more imminent, or be granted to those who have a sufficient interest to seek review immediately while being denied to those who later acquire a similar or even greater interest? Finally, no reason is apparent why existing procedures for declaratory judgments are not adequate; to construe § 1034 as an alternative declaratory judgment procedure simply produces the incongruous result of authorizing declaratory relief in the Courts of Appeals within 60 days after the order is issued and in the District Courts thereafter.

In the second place, even if § 1034 is to be construed as authorizing declaratory relief, I see no reason why the usual requirements for invoking equity jurisdiction should not be as applicable to such a proceeding as they are to

an ordinary declaratory judgment action or to a proceeding to set aside a Commission order under the Urgent Deficiencies Act, the predecessor to § 1034 under which the *CBS* case arose. In that case, CBS's right to equitable relief in advance of the application of the regulations was expressly based on the irreparable injury it would suffer—the wholesale cancellation of its contracts with licensees—before any further administrative action was taken and for which there was no other adequate remedy. Unless these requirements for equitable relief are to be abandoned, there can be no right to relief here, for Storer alleges no threatened injury of any kind, other than the possibility of future administrative action for which there would be a complete remedy by appeal.

It is said, however—again without support of any allegations by Storer—that Storer "cannot cogently plan its present or future operations" unless it is advised whether or not the regulations are valid. But plans for expansion of communications facilities have always had to be made subject to the contingency that the Commission might refuse to grant the necessary license for any one of a number of reasons. Storer's position in this respect is now no different than it was before the regulations were issued: any plan to acquire a new station must simply take into account, among the several contingencies, the likelihood that a denial of a license under the regulations would be upheld on appeal. What this argument comes down to, therefore, is that Storer needs to know whether or not it can validly be denied a license under the regulations so that, if it can, it need not make an application. That is, the injury that Storer will have suffered if the decision on the validity of the regulations is postponed until Storer in fact applies for a license is the expense of making that very application, the same injury that is suffered by all unsuccessful license applicants. Until today, I should not have thought argument was necessary to reject such

a basis for declaratory relief. Declaratory relief has been denied persons whose only alternative was to risk both dismissal from public employment and the imposition of criminal penalties, *United Public Workers* v. *Mitchell*, 330 U. S. 75, yet it is granted here to relieve Storer of the mere burden of making an application for a license.[3]

4. The holding of the Court today amounts to this: that regulations which impose no duty and determine no rights may be reviewed at the instance of a person who alleges no injury, to settle whether a future application of the regulations that may never occur would be valid. The lack of support for this decision is disclosed by the Court's primary reliance on *CBS*,[4] a case which in my view not only fails to support the Court's conclusion but is persuasive, if not controlling, authority for precisely the opposite result.[5] In my opinion, the implications of the

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[3] The recent holding of this Court in *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express, ante*, p. 49, does not support the result reached here. In that case the declaratory interpretation of the Interstate Commerce Act—sought by way of review of the Commission's interpretative regulations in a proceeding under the Urgent Deficiencies Act—was considered justified because of the possibility of criminal penalties being imposed for violations of the Act and the risk of loss of substantial investments in operations that might subsequently be enjoined by the Commission. No such necessity for declaratory relief is even alleged here; there is no threat of criminal prosecutions and, since a license is always a condition precedent to acquisition of a new station, there is no danger of the loss of investments to be made prior to the future administrative action.

[4] Of the other cases cited by the Court, only *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, involved a similar situation, and there the jurisdictional problem was neither raised by the parties nor noted by the Court.

[5] Throughout the opinion in the *CBS* case, the Court emphasized the exceptional circumstances which justified immediate review of the Chain Broadcasting regulations and distinguished them from regulations of the sort here involved. See, *e. g.*, 316 U. S., at 424–425:

"We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because

decision undermine much of the settled law on reviewability of administrative action, and it is the more unfortunate because made without the benefit of briefs or argument by the parties. I cannot concur in that part of the Court's opinion.

The Court having decided, however, that the Court of Appeals had jurisdiction, I concur with the Court on the merits.

MR. JUSTICE FRANKFURTER, dissenting.

While I agree that the amendatory Rules promulgated by the Federal Communications Commission relating to Multiple Ownership of standard, FM and television stations constitute a reviewable "order" within the meaning of 5 U. S. C. § 1034, my Brother HARLAN's reasoning convinces me that the respondent was not on the record before us a "party aggrieved" under that section. Therefore the court below should not have entertained the petition to review the Commission's order.

Procedural and jurisdictional limitations on judicial action by the federal courts are not playthings of lawyers nor obstructions on the road of justice. Whether formulated by the Constitution, congressional enactments or settled judicial precedents, they are means designed to keep the courts within appropriate limits and to enforce

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they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

rights according to general standards and not have them depend on the impact of the individual case. To be sure, dealing as we are with general standards, differences of views regarding their scope and applicability are bound to arise from time to time. Who is a "party aggrieved" or a "party in interest" turns on the context, often confused and dubious, of a particular set of circumstances and therefore raises issues on which judges not unnaturally divide, as they do on other unmathematical problems of the law. See *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295.

To the laity such matters may seem technicalities in a derogatory sense of the term. But this is only one phase of an attitude of mind that thinks ill of law which does not accord with private wishes. When informed by a legal adviser that to carry out his desires would encounter "technical legal difficulties," a strenuous President of the United States impatiently observed that "all law is technicality." But even professionally competent officials are at times impatient with decisions that fail to adjudicate substantive issues on which light is sought. It seems to me important, therefore, not to minimize the function of jurisdictional limitations upon adjudication by expressing views on the merits. There are, of course, exceptional situations where it is proper for a dissenter to go to the merits when a majority of the Court removes from the case threshold objections of procedure and jurisdiction. See, *e. g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341. This is not such a case.

JOHNSTON ET AL. *v.* UNITED STATES.

NO. 643. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued May 2–3, 1956.—Decided May 21, 1956.

These registrants under the Universal Military Training and Service Act were classified as conscientious objectors and were ordered by their local draft boards to report for civilian work at state hospitals located in judicial districts other than those in which they resided and were registered and where their orders were issued. They refused to report for work at the places designated, and each was indicted for a violation of § 12 (a) of the Act. *Held:* The venue for their trials was in the judicial districts where the civilian work was to be performed—not in the judicial districts in which they resided and where their orders were issued. Pp. 216–223.

(a) The general rule is that, where the crime charged is a failure to do a legally required act, the place fixed for its performance determines the situs of the crime. P. 220.

(b) The possibility that registrants might be ordered to report to points remote from the situs of draft boards neither allows nor requires judicial changes in the law of venue. P. 220.

(c) The venue requirements of Article III of the Constitution and the Sixth Amendment state the public policy that fixes the situs of a trial in the vicinage of the crime rather than where the accused is a resident; and a variation from that rule for the convenience of the prosecution or the accused is not justified. Pp. 220–221.

227 F. 2d 745, affirmed.

229 F. 2d 257, reversed.

Hayden C. Covington argued the causes and filed a brief for petitioners in No. 643 and respondent in No. 704.

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*Together with No. 704, *United States* v. *Patteson*, on certiorari to the United States Court of Appeals for the Tenth Circuit.

380673 O—56——18

Carl H. Imlay argued the causes for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

MR. JUSTICE REED delivered the opinion of the Court.

These two cases concern the prosecution of three defendants for violations of the provisions of the Universal Military Training and Service Act. 50 U. S. C. App. § 451 *et seq.* We must determine the proper venue for the trial of these crimes.

Defendants Johnston and Sokol resided in the Western Judicial District of Pennsylvania and registered there with the local draft boards. Both were classified 1–O (conscientious objectors) and both were ordered to report to the boards for assignment of civilian work in lieu of induction. They were instructed to report to separate state hospitals situated in the Eastern Judicial District of Pennsylvania. They reported to the boards but personally refused to comply with the instructions. They were indicted in the Eastern District of Pennsylvania and the indictments were dismissed for lack of jurisdiction on the ground that venue could only be in the Western District. 131 F. Supp. 955. The Court of Appeals for the Third Circuit reversed and remanded the case for trial. That court reasoned that venue was where the defendants failed to report. 227 F. 2d 745.

Defendant Patteson, likewise classified 1–O, was ordered to report to his local board in Oklahoma for similar assignment. He, too, reported to the board and there personally refused to comply with instructions to report at the Topeka, Kansas, State Hospital. After indictment in Kansas, the Kansas District Court ordered the case transferred to Oklahoma under Rule 21 (b), Fed. Rules

Crim. Proc.[1] The Oklahoma court retransferred the case to Kansas as it thought the venue was there. The Kansas court thereupon dismissed the indictment on the ground that the venue was in Oklahoma. 132 F. Supp. 67. The judgment was affirmed by the Court of Appeals for the Tenth Circuit. 229 F. 2d 257.

Each registrant received an order, the pertinent parts of which follow:

"SELECTIVE SERVICE SYSTEM

"ORDER TO REPORT FOR CIVILIAN WORK AND STATEMENT OF EMPLOYER

. . . . . .

"You are ordered to report to the local board named above at m. on the day of , 195 , where you will be given instructions to proceed to the place of employment.

"You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

"You will be instructed as to your duties at the place of employment.

"Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment

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[1] "(b) OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

. . . . . .

"(Clerk or Member of the Local Board)

"STATEMENT OF EMPLOYER

. . . . . .

"Failed to report

. . . . . .

"Personnel Director" [2]

None of the registrants entered the district of his indictment after receiving his orders.

The indictment in each case charges the registrant, a conscientious objector,[3] with violation of § 12 (a) of the Act.[4] In the Johnston indictment the pertinent language is:

". . . did knowingly neglect to perform a duty imposed upon him by the provision of said Act in that

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[2] The stipulations in the *Johnston* and *Sokol* cases show the use of this form. The *Patteson* case also was argued on this understanding and defendant's motion to dismiss was sustained on allegations of fact that confirm our assumption that his order also was on the same form.

[3] 50 U. S. C. App. § 456 (j):

". . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall . . . in lieu of such induction, be ordered by his local board . . . to perform . . . such civilian work . . . as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, . . . to have knowingly failed or neglected to perform a duty required of him under this title. . . ."

[4] 50 U. S. C. App. § 462 (a):

"Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in

> he failed and refused to obey an order of Local Board 87, New Castle, Pennsylvania, directing him to report for employment at Norristown State Hospital, Norristown, Pennsylvania, and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended."

In the Sokol case it is:

> ". . . did knowingly neglect to perform a duty . . . in that he failed to report to the Philadelphia State Hospital, . . . for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest, in lieu of induction; in violation of Title 50 Appx. Secs. 456 (j) and 462."

In the Patteson case it is:

> ". . . did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital at the time and place so designated in said order."

The question at issue in these three cases is fairly presented by the registrants Johnston and Sokol in their petition for certiorari. It reads thus:

> "Where each petitioner resided in the Western District of Pennsylvania, the Selective Service local board of each was located in the Western District of Pennsylvania, the orders to perform work were issued in the Western District of Pennsylvania and each petitioner did not go beyond his local board in the Western District of Pennsylvania and at all times refused to leave the Western District of Pennsylvania

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the execution of this title . . . , or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

and did not proceed to the Eastern District of Pennsylvania, were the offenses committed in the Western District of Pennsylvania and not in the Eastern District and, therefore, does it violate rights guaranteed by the Sixth Amendment to the Constitution to indict and prosecute each petitioner in the Eastern District of Pennsylvania?"

Our analysis of the law and the facts in these cases convinces us that the venue of these violations of the orders lies in the district where the civilian work was to be performed, that is, for Patteson in Kansas, and the Eastern District of Pennsylvania for Johnston and Sokol.

We are led to this conclusion by the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime.[5] The possibility that registrants might be ordered to report to points remote from the situs of draft boards neither allows nor requires judicial changes in the law of venue. No showing of any arbitrary action appears in these cases. Article III of the Constitution and the Sixth Amendment fix venue "in the State" and "district wherein the crime shall have been committed." The venue of trial is thereby predetermined, but those provisions do not furnish guidance for determination of the place of the crime. That place is determined by the acts of the accused that violate a statute. This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the

[5] *Rumely* v. *McCarthy,* 250 U. S. 283; *United States* v. *Lombardo,* 241 U. S. 73; *Jones* v. *Pescor,* 169 F. 2d 853; *New York Central & H. R. Co.* v. *United States,* 166 F. 267. See cases cited in *United States* v. *Anderson,* 328 U. S. 699, 705, n. 14, and see *United States* v. *Wyman,* 125 F. Supp. 276, 280. Compare state court decisions which hold that a State may punish a father for nonsupport of his child even though the defendant is outside the State while committing the offense. Comment, 6 Stan. L. Rev. 709.

residence of the accused. Cf. *United States* v. *Anderson,* 328 U. S. 699, 705. A variation from that rule for convenience of the prosecution or the accused is not justified. The result would be delay and confusion.[6]

This rule was followed in *United States* v. *Johnson,* 323 U. S. 273, relied on by the registrants, where a maker and shipper of dentures mailed in Illinois was charged in Delaware, the State of receipt by a consignee, with violating the law by "use" of the mails "for the purpose of sending or bringing into" a State such dentures. *Id.,* at 274. This Court, by interpretation of the statute, restricted prosecution of the shipper to the State of the shipment saying:

> "It is a reasonable and not a strained construction to read the statute to mean that the crime of the sender is complete when he uses the mails in Chicago, and the crime of the unlicensed dentist in California or Florida or Delaware, who orders the dentures from Chicago, is committed in the State into which he brings the dentures. As a result, the trial of the sender is restricted to Illinois and that of the unlicensed dentist to Delaware or Florida or California." *Id.,* at 277–278.[7]

Venue for these prosecutions lies where, under § 12 (a), *supra,* the registrants did "knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , or rules, regulations, or directions made pursuant to this title . . . ." These reg-

[6] Cf. *United States* v. *Lombardo,* 241 U. S. 73, 78; *Haas* v. *Henkel,* 216 U. S. 462.

[7] See also *United States* v. *Wilson* and *United States* v. *Purchasing Corp.,* 344 U. S. 923, where in an interpretation of a statutory duty to "forward" a report of shipments under the Tobacco Tax Act, 63 Stat. 884, we approved the District Court judgment that venue for prosecution was in the district of the shipper rather than the district of the receiver of the report.

istrants were made subject to § 12 (a) by § 6 (j), which declares that a conscientious objector who fails or neglects to obey an order of his local board shall be deemed to have "failed or neglected to perform a duty required of him" by § 12.[8]

The orders set out above, p. 217, could only be the basis of one conviction but they directed the registrant to perform two duties. The first is to report to the local board. This was done by each registrant. The second is to report for employment and to remain there in employment for 24 consecutive months. The "instructions to proceed" given by the board and the statement that "failure . . . to proceed to the place of employment pursuant to instructions" would constitute a crime, are for the registrant's information. They did not create another duty. This appears emphatically from the characterization in the explanatory paragraph that failure to report or proceed to the place of employment would be a violation of orders. The crimes charged arise from failure to complete the second duty—report for employment. Accordingly venue must lie where the failure occurred. See cases cited above, n. 5.

It will be noted that the indictments set out the place of the alleged crimes in the terms of the orders and give jurisdiction for trial in the Eastern District of Pennsylvania and the District of Kansas. In each instance, the charge is failure to perform a "duty" in that the registrant

[8] We ruled in the case of *Dodez* v. *United States*, 329 U. S. 338, that Dodez had exhausted his administrative remedies and therefore could defend on indictment his failure when he violated an order to report to the local board for work of national importance. Venue was laid in the District of the Board. No question was raised or decided here as to venue. Petition for certiorari, p. 2; Brief of the United States. Furthermore, as the United States points out in this case, at the time of Dodez' breach, the Government delivered the conscientious objector registrants to the place of work. See Order to Report for Work, R. 155, No. 86, 1946 Term.

failed "to report" to the respective hospitals. Thus, the indictments, based on the charged violation of the order, follow, as we see it, the requirements of law for trial in the State and district where the crime was committed.

We affirm the Court of Appeals for the Third Circuit in No. 643, *Johnston* and *Sokol,* and reverse the Court of Appeals for the Tenth Circuit in No. 704, the *Patteson* case.

No. 643, affirmed.
No. 704, reversed.

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

Patteson, who lives in Oklahoma and defied his draft board there, is required to stand trial in Kansas. Johnston and Sokol, who live in the Western District of Pennsylvania and defied their draft board there, are forced by this decision to stand trial in the Eastern District. Yet each defied the law at home, not in the distant place. Unlike *United States* v. *Anderson,* 328 U. S. 699, no act of any kind was committed in the distant district. Unlike *Rumely* v. *McCarthy,* 250 U. S. 283, and *United States* v. *Lombardo,* 241 U. S. 73, Congress has not specifically selected the failure to perform an act in the distant district and made it a crime. The statutory crime is the failure of a conscientious objector, directed to perform civilian work, "to obey any such order from his local board." 62 Stat. 612, as amended, 65 Stat. 86, 50 U. S. C. App. § 456 (j). The argument in the case has been like a theological debate over the number of angels who can stand on the head of a pin. Of course, the duty to obey can be divided up into a whole series of duties. But, when the registrant is adamant in his refusal to budge from his home town and stays at home defying the local authorities, the crime he has committed has been committed at home.

Any doubts should be resolved in favor of the citizen. We should construe the statute against two historic constitutional provisions. Article III, § 2, cl. 3, provides 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 guarantees an accused "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 . . . ." While we have here a statutory problem, not a constitutional one, the history of the two constitutional guarantees throws light on the problem of venue. When the British Parliament proposed taking Americans abroad or to another colony for trial, the Virginia Resolves of May 16, 1769, voiced the unanimous view that "thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused." *

The boys in the present cases suffer comparably. For their defiance of their local boards they are sent to distant places for trial where they have no friends, where they are unknown, and to which all witnesses must be transported. Congress would have the power to fix the venue there. But it has not done so unambiguously. Cf. *United States* v. *Midstate Co.*, 306 U. S. 161, 166; *United States* v. *Johnson,* 323 U. S. 273, 276. I would read the statute with an eye to history and try the offenders at home where our forefathers thought that normally men would receive the fairest trial.

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*Journals of the House of Burgesses of Virginia, 1766–1769, p. 214.

Syllabus.

RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 451. Argued May 2, 1956.—Decided May 21, 1956.

Claiming that a "union shop" agreement between an interstate railroad and unions of its employees made pursuant to § 2, Eleventh, of the Railway Labor Act, which expressly authorizes such agreements notwithstanding any state law, violated the First and Fifth Amendments of the Federal Constitution and the "right to work" provision of the Nebraska Constitution, nonunion employees of the railroad sued in a Nebraska state court to enjoin enforcement of such an agreement. *Held:* On the record in this case, the agreement is valid and enforceable as to these employees. Pp. 227–238.

1. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction. Pp. 231–232.

2. Since § 2, Eleventh, of the Railway Labor Act expressly permits "union shop" agreements notwithstanding any state law, an agreement made pursuant thereto has the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Art. VI of the Constitution, could not be invalidated or vitiated by any state law. P. 232.

3. On the record in this case, the requirement for financial support of a collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendment. Pp. 233–238.

(a) Enactment of the provision of § 2, Eleventh, of the Railway Labor Act authorizing union shop agreements between interstate railroads and unions of their employees was a valid exercise by Congress of its powers under the Commerce Clause, and it does not violate the Due Process Clause. Pp. 233–235.

(b) The only conditions to union membership authorized by § 2, Eleventh, of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments," which relate to

financial support of the work of the union in the realm of collective bargaining, and this involves no violation of the First or the Fifth Amendment. Pp. 235–238.

(c) Judgment is reserved as to the validity or enforceability of a union or closed shop agreement if other conditions of union membership are imposed or if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First or the Fifth Amendment. P. 238.

160 Neb. 669, 71 N. W. 2d 526, reversed.

Lester P. Schoene argued the cause for appellants. With him on the brief was *Milton Kramer*.

Edson Smith argued the cause and filed a brief for Hanson et al., appellees.

By special leave of Court, *Robert A. Nelson,* Assistant Attorney General, argued the cause for the State of Nebraska, as *amicus curiae*. With him on the brief was *Clarence S. Beck,* Attorney General, for the State of Nebraska, *Richard W. Ervin,* Attorney General, for the State of Florida, and *Joe T. Patterson,* Attorney General, for the State of Mississippi. *William B. Rodman, Jr.,* Attorney General, also joined in the brief for the State of North Carolina.

Briefs of *amici curiae* urging affirmance were filed for the States of South Dakota, by *Phil Saunders,* Attorney General; Texas, by *John Ben Shepperd,* Attorney General, joined by *Eugene Cook,* Attorney General, and *E. Freeman Leverett* and *Robert H. Hall,* Assistant Attorneys General, for the State of Georgia; Utah, by *E. R. Callister,* Attorney General, and *Raymond W. Gee,* Assistant Attorney General; South Carolina, by *T. C. Callison,* Attorney General; Virginia, by *J. Lindsay Almond, Jr.,* Attorney General; and also by *Allen A. Lauterbach* for the American Farm Bureau Federation; *E. Smythe Gambrell, W. Glen Harlan* and *Whiteford S. Blakeney* for Bradford et al.; *William B. Barton* and

Milton A. Smith for the Chamber of Commerce of the United States; *Harry J. Harman* for Hooser et al.; *Lambert H. Miller* for the National Association of Manufacturers of the United States; *John C. Gall, John F. Lane, William F. Howe* and *Jerome Powell* for the National Right To Work Committee; *E. A. Simpson* for Sandsberry et al.; *J. C. Gibson, R. S. Outlaw, Wm. J. Milroy, C. G. Niebank, Jr., Donald R. Richberg, A. J. Folley* and *Preston Shirley* for the Gulf, Colorado & Santa Fe Railway Co. et al.; and *Tyre Taylor* for the Southern States Industrial Council.

Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for the Railway Labor Executives' Association.

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit brought in the Nebraska courts by employees of the Union Pacific Railroad Co. against that company and labor organizations representing various groups of employees of the railroad to enjoin the application and enforcement of a union shop agreement entered into between the railroad company and the labor organizations. Plaintiffs are not members of any of the defendant labor organizations and desire not to join. Under the terms of the union shop agreement all employees of the railroad, as a condition of their continued employment, must become members of the specified union within 60 days and thereafter maintain that membership. It is alleged that failure on their part to join the union will mean the loss of their employment together with seniority, retirement, pension, and other rights.

The employees claim that the union shop agreement violates the "right to work" provision of the Nebraska Constitution (Art. XV, § 13), which provides: [1]

> "No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization."

They ask for an injunction restraining the railroad company from enforcing and applying the union shop agreement.

The answers deny that the Nebraska Constitution and laws control and allege that the union shop agreement is authorized by § 2, Eleventh of the Railway Labor Act, as amended, 64 Stat. 1238, 45 U. S. C. § 152, Eleventh, which provides that, notwithstanding the law of "any State," a carrier and a labor organization may make an agreement requiring all employees within a stated time to become members of the labor organization, provided there is no discrimination against any employee and pro-

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[1] This constitutional provision is implemented by Neb. Rev. Stat., 1943, § 48-217, which provides:

"Labor organizations; no denial of employment; closed shop not permitted. To make operative the provisions of Sections 13, 14 and 15 of Article 15 of the Constitution of Nebraska, no person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization."

vided that membership is not denied nor terminated "for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." [2]

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[2] Section 2, Eleventh reads as follows:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or

The Nebraska trial court issued an injunction. The Supreme Court of Nebraska affirmed. It held that the union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining. The Nebraska Supreme Court, therefore, held that there is no valid federal law to supersede the "right to work" provision of the Nebraska Constitution. 160 Neb. 669, 71 N. W. 2d 526. The case is here by appeal. 28 U. S. C. § 1257 (1) and (2). We noted probable jurisdiction. 350 U. S. 910.

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hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act, in conflict herewith are to the extent of such conflict amended."

The union shop [3] provision of the Railway Labor Act was written into the law in 1951. Prior to that date the Railway Labor Act prohibited union shop agreements. 48 Stat. 1186, 45 U. S. C. § 152, Fourth and Fifth; 40 Op. Atty. Gen. 254. Those provisions were enacted in 1934 when the union shop was being used by employers to establish and maintain company unions, "thus effectively depriving a substantial number of employees of their right to bargain collectively." S. Rep. No. 2262, 81st Cong., 2d Sess., p. 3. By 1950, company unions in this field had practically disappeared. *Id.* Between 75 and 80% of railroad employees were members of labor organizations. H. R. Rep. No. 2811, 81st Cong., 2d Sess., p. 4. While nonunion members got the benefits of the collective bargaining of the unions, they bore "no share of the cost of obtaining such benefits." *Id.*, at 4. As Senator Hill, who managed the bill on the floor of the Senate, said, "The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions." 96 Cong. Rec., Pt. 12, p. 16279.

The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska nevertheless took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor

[3] The union shop is a variant of the closed shop, since union membership is required of every employee after the 60-day period designated in the Act.

In 1954 the Bureau of Labor Statistics made an analysis of 1,716 collective-bargaining agreements in effect in industries not regulated by the Railway Labor Act. Of the 7,405,000 workers covered by the agreements studied, 64% were employed under union shop provisions. 78 Monthly Labor Review, No. 6, 649.

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Act, sought to strike down inconsistent laws in 17 States. Cf. *Hudson* v. *Atlantic Coast Line R. Co.*, 242 N. C. 650, 89 S. E. 2d 441; *Otten* v. *Baltimore & O. R. Co.*, 205 F. 2d 58. The Supreme Court of Nebraska said, "Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein." 160 Neb., at 698, 71 N. W. 2d, at 547. We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. Cf. *Smith* v. *Allwright*, 321 U. S. 649, 663. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.[4] Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 198–199, 204; *Railroad Trainmen* v. *Howard*, 343 U. S. 768; *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 462. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

As already noted, the 1951 amendment, permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." § 2, Eleventh.[5] A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State.

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[4] Once courts enforce the agreement the sanction of government is, of course, put behind them. See *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24; *Barrows* v. *Jackson*, 346 U. S. 249.

[5] The parallel provision in § 14 (b) of the Taft-Hartley Act (61 Stat. 151, 29 U. S. C. § 164 (b)) makes the union shop agreement give way before a state law prohibiting it.

We come then to the merits.

In the absence of conflicting federal legislation, there can be no doubt that it is within the police power of a State to prohibit the union or the closed shop. We so held in *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, and in *American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538, against the challenge that local "right to work" laws, including Nebraska's, violated the requirements of due process. But the power of Congress to regulate labor relations in interstate industries is likewise well-established. Congress has authority to adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570. These measures include provisions that will encourage the settlement of disputes "by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them" (*Virginian R. Co.* v. *Federation,* 300 U. S. 515, 548), and that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 33. Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained.

The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one. Much might be said *pro* and *con* if the policy issue were before us. Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-management relations prior to his appointment to

the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute "tyranny of the employee" for "tyranny of the employer." [6] But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.

It is said that the right to work, which the Court has frequently included in the concept of "liberty" within the meaning of the Due Process Clauses (see *Truax* v. *Raich*, 239 U. S. 33; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410), may not be denied by the Congress. The question remains, however, whether the long-range interests of workers would be better served by one type of

[6] See Mason, Brandeis, A Free Man's Life (1946), pp. 303–304, which quotes a letter of February 26, 1912, from Brandeis to Lincoln Steffens:

". . . But the American people should not, and will not, accept unionism if it involves the closed shop. They will not consent to the exchange of the tyranny of the employer for the tyranny of the employee. Unionism therefore cannot make a great advance until it abandons the closed shop; and it cannot accept the open shop as an alternative. The open shop means the destruction of the union.

"The advance of unionism demands therefore some relation between the employer and the employee other than either the closed or open shop, and I feel confident that we have found a solution in the preferential union shop."

union agreement or another. That question is germane to the exercise of power under the Commerce Clause—a power that often has the quality of police regulations. See *Cleveland* v. *United States*, 329 U. S. 14, 19. One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work. See Webb, History of Trade Unionism; Gregory, Labor and the Law. To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here. The only conditions to union membership authorized by § 2, Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of "fines and penalties" precludes the imposition of financial burdens for disciplinary purposes. If "assessments" are in fact imposed for purposes not germane to collective bargaining,[7] a different problem would be presented.

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[7] A number of appellant unions have broad powers to levy assessments for unspecified purposes. For example, the bylaws of the Railroad Yardmasters of America authorize the Executive Board to "levy assessments upon all the members affected when in its opinion such assessments are necessary." § 26. And § 27 provides: "Local lodges may levy such assessments upon their respective memberships as may be found necessary . . . ." The General Committee of a Subordinate Division of the Order of Railroad Telegraphers is authorized "to levy such assessments upon the members employed upon the transportation company over which it has jurisdiction as may be necessary to carry on its work." Subordinate Division Statutes, § 42 (H). And see Constitution of the Brotherhood of

Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.[8] It is said that once a man becomes a

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Railroad Signalmen of America, Art. I, § 6; Constitution of the American Railway Supervisors Association, Art. XVI, § 7.

[8] The constitutions and bylaws of several appellant unions place restrictions on the individual members.

A. Some disqualify persons from membership for their political views and associations. Art. XIII, § 4, of the Constitution of the Brotherhood of Maintenance of Way Employes bars from membership anyone who is a member of the Communist Party. Another constitution renders ineligible for membership any person who is "a member of the Communist Party or of any other subversive group, or who subscribes to the doctrines of any such groups." Subordinate Lodge Constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, Art. VI, § 1. And see Subordinate Lodge Constitution of the Brotherhood Railway Carmen of America, § 6 (a). Art. 16, § 1 (a), of the Constitution of the Sheet Metal Workers' International Association provides: "No member of the communist party or any person who advocates the objectives thereof, and no person who belongs to or supports the policies of any other organization or group which advocates the overthrow of the United States government or the government of the Dominion of Canada by force shall be eligible" for membership.

The constitution of one of appellant unions provides that no person shall be eligible for union office "if such person associates himself with Communist, Fascist or similar organizations, or the Ku Klux Klan, or Columbians. Such eligibility shall likewise be denied where a person associates himself with, lends support or subscribes to the subversive doctrines of the organizations enumerated herein, similar organizations, or any organization or group that expounds or promotes any doctrine or philosophy inimical or subversive to the fundamental purposes of the constitution of the Government of the United States." Constitution of the Hotel & Restaurant Employees and Bartenders International Union, Art. XI, § 18. The Constitution of the International Association of Machinists, Art. I, § 5, provides: "A member who advocates or encourages communism, fascism,

member of these unions he is subject to vast disciplinary control [9] and that by force of the federal Act unions now can make him conform to their ideology.

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nazism, or any other totalitarian philosophy, or who, by other actions, gives support to these 'philosophies' or 'isms' is not eligible to hold office in the I. A. M."

B. The Grand Lodge Constitution of the Brotherhood Railway Carmen of America prohibits members from "interfering with legislative matters affecting national, state, territorial, dominion or provincial legislation, adversely affecting the interests of our members." § 64.

The Constitution of the International Brotherhood of Electrical Workers, another of the appellant unions, forbids any member from "creating or attempting to create dissatisfaction or dissension among any of the members or among L. U.'s [Local Unions] of the I. B. E. W." Art. XXVII, § 2 (8). The same article and section further prohibits any member from

"(15) Attending or participating in any gathering or meeting whatsoever, held outside meetings of a L. U., at which the affairs of the L. U. are discussed, or at which conclusions are arrived at regarding the business and the affairs of a L. U., or regarding L. U. officers or a candidate or candidates for L. U. office.

"(16) Mailing, handing out, or posting cards, handbills, letters, marked ballots or political literature of any kind, or displaying streamers, banners, signs or anything else of a political nature, or being a party in any way to such being done in an effort to induce members to vote for or against any candidate or candidates for L. U. office, or candidates to conventions." And see Art. 17, § 1 (b), Constitution of the Sheet Metal Workers' International Association; Art. XXIV, § 2, Constitution of the International Association of Machinists.

C. A number of the constitutions of appellant unions provide for the use of compulsory dues and assessments to finance union insurance and death benefit plans. See, *e. g.*, Constitution of the International Brotherhood of Firemen and Oilers, Art. I, § 22; Constitution of the Railroad Yardmasters of America, Art. VII, § 4; Constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, Art. VII, § 2.

[9] See Summers, Disciplinary Powers of Unions (1950), 3 Ind. & Lab. Rel. Rev. 483; Summers, Disciplinary Procedures of Unions

On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, and assessments." If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

The provision of law now challenged is the latest exercise by Congress of its power under the Commerce Clause to promote peaceful industrial relations in the

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(1950), 4 Ind. & Lab. Rel. Rev. 15; Summers, Legal Limitations on Union Discipline (1951), 64 Harv. L. Rev. 1049; Aaron & Komaroff, Statutory Regulation of Internal Union Affairs (1949), 44 Ill. L. Rev. 425, 631; Wirtz, Government by Private Groups (1953), 13 La. L. Rev. 440; Williams, The Political Liberties of Labor Union Members (1954), 32 Tex. L. Rev. 826.

functioning of interstate railroads and thereby to further the national well-being. A mere recital of the course of history in this important field goes a long way to indicate that the main point of attack against the Act of January 10, 1951, 64 Stat. 1238, raises questions not of constitutional validity but of policy in a domain of legislation peculiarly open to conflicting views of policy. These efforts constitute a body of empiric responses by Congress to new problems or new insight for dealing with old problems.

The course of legislation affecting industrial controversies on railroads flows through these statutes: the Act of October 1, 1888, 25 Stat. 501; the Erdman Act of June 1, 1898, 30 Stat. 424, growing out of the Pullman strike of 1894, see *In re Debs,* 158 U. S. 564; the Newlands Act of July 15, 1913, 38 Stat. 103; the Adamson Law of September 3, 1916, 39 Stat. 721; Title III of the Transportation Act of 1920, 41 Stat. 456, 469; the Railway Labor Act of May 20, 1926, 44 Stat. 577; the Act of June 21, 1934, 48 Stat. 1185, amending the Railway Labor Act.

Nearly fifty years ago, the railroads successfully attacked the constitutionality of a vital feature of the Act of June 1, 1898, whereby Congress made it a criminal offense to bar employment in interstate railroads merely because of labor union membership. *Adair* v. *United States,* 208 U. S. 161 (1908). It is fair to say that this decision marks the nadir of denial to Congress of the power to regulate the conditions for assuring the Nation's dependence on the peaceful and effective operation of its railroads. The criticisms that the case aroused, see, *e. g.,* Richard Olney, Discrimination Against Union Labor—Legal?, 42 Amer. L. Rev. 161 (1908), and Roscoe Pound, Liberty of Contract, 18 Yale L. J. 454 (1909), were reflected in later decisions of the Court. Neither the Commerce Clause nor the Due Process Clause was thereafter conceived, at least so far as they restrain railroad labor

regulation, to be confined within such doctrinaire and frozen bounds as were confined the assumptions which underlay the decision in the *Adair* case. Thus, the Court sustained the Adamson Law, which was enacted to avert the threatened nation-wide railroad strike of 1916, *Wilson* v. *New,* 243 U. S. 332 (1917); Title III of the Transportation Act of 1920, *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U. S. 72 (1923); and the Railway Labor Act of 1926, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548 (1930); but see *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330 (1935).

The change in the Court's understanding of industrial problems, certainly as they affect railroads, in their bearing upon the country's commerce and all that thereby hangs, to no small degree reflected the changed attitude of the railroads towards the rôle of railroad labor unions in the discharge of the functions of railroads. As striking evidence as any of this important shift in opinion is the fact that the Railway Labor Act of 1926 came on the statute books through agreement between the railroads and the railroad unions on the need for such legislation. It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement. I doubt whether there is another instance in the history of important legislation in which acknowledgment was so candidly made by a President of the United States that agreement reached between industrial disputants regarding legislation appropriate for securing their peaceful relations should become law. "I am informed," the President reported to Congress in his annual message of December 8, 1925, "that the railroad managers and their employees have reached a substantial agreement as to what legislation is necessary to regulate and improve their relationship. Whenever they bring for-

ward such proposals, which seem sufficient also to protect the interests of the public, they should be enacted into law." H. R. Doc. No. 2, 69th Cong., 1st Sess., p. 18. The President was Calvin Coolidge.

We have come full circle from the point of view in the *Adair* case. There the railroads, to repeat, successfully resisted an Act of Congress which outlawed what colloquially became known as the "yellow-dog contract." We are now asked to declare it beyond the power of Congress to authorize railroads to enter into voluntary agreements with the unions to which the overwhelming proportion of railway employees belong whereby all their workers are required to belong to such unions, provided, of course, that the unions be open unions, *i. e.,* that membership in the unions be available on ordinary, appropriate terms. It seems to me that the constitutional objections to this legislation were conclusively and compendiously answered by Mr. Justice Holmes in his dissent in *Adair* v. *United States, supra:*

> "Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may

> differ,—I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large." 208 U. S., at 191–192.

The Court has put to one side situations not now before us for which the protection of the First Amendment was earnestly urged at the bar. I, too, leave them to one side.

Syllabus.

COMMISSIONER OF INTERNAL REVENUE *v.* LoBUE.

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

No. 373. Argued March 6, 1956.—Decided May 28, 1956.

In recognition of his "contribution and efforts in making the operation of the Company successful," a corporation gave an employee options to purchase stock in the corporation. The options were nontransferable and were contingent upon continued employment. After some time had elapsed and the value of the shares had increased, the employee exercised the options and purchased the stock at less than the then current market price. For some of the shares, he gave the employer a promissory note for the option price; but the shares were not delivered until the notes were paid in cash, when the value of the shares had increased. *Held:* Under the Internal Revenue Code of 1939, as amended, the resulting gain to the employee was taxable as income received at the time he exercised the option and purchased the stock, and his taxable gain should be measured as of the time when the options were exercised and not as of the time when they were granted. Pp. 244–250.

(a) In defining "gross income" as broadly as it did in § 22 (a) of the Internal Revenue Code of 1939, as amended, Congress intended to tax all gains except those specifically exempted. P. 246.

(b) The only exemption that could possibly apply to these transactions is the gift exemption of § 22 (b) (3), and these transactions were not "gifts" in the statutory sense. Pp. 246–247.

(c) There is no statutory basis for excluding such transactions from "gross income" on the ground that one purpose of the employer was to confer on the employee a "proprietary interest" in the business. P. 247.

(d) The employee received a substantial economic and financial benefit from his employer, prompted by the employer's desire to get better work from the employee, and this is "compensation for personal service" within the meaning of § 22 (a). P. 247.

(e) In these circumstances, the employee "realized" a taxable gain when he purchased the stock. P. 248.

(f) The employee's taxable gain should be measured by the difference between the option price and the market value of the

shares as of the time when the options were exercised and not as of the time when the options were granted. Pp. 248–249.

(g) On remand, the Tax Court may consider the question, not previously passed on, whether delivery of a promissory note for the purchase price marked the completion of the stock purchase and whether the gain should be measured as of that date or as of the date the note was paid. P. 250.

223 F. 2d 367, reversed and remanded.

Philip Elman argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Acting Assistant Attorney General Rice, Hilbert P. Zarky* and *Joseph F. Goetten.*

Richard F. Barrett argued the cause for respondent. With him on the brief was *Melville F. Weston.*

Mr. Justice Black delivered the opinion of the Court.

This case involves the federal income tax liability of respondent LoBue for the years 1946 and 1947. From 1941 to 1947 LoBue was manager of the New York Sales Division of the Michigan Chemical Corporation, a producer and distributor of chemical supplies. In 1944 the company adopted a stock option plan making 10,000 shares of its common stock available for distribution to key employees at $5 per share over a 3-year period. LoBue and a number of other employees were notified that they had been tentatively chosen to be recipients of nontransferable stock options contingent upon their continued employment. LoBue's notice told him: "You may be assigned a greater or less amount of stock based entirely upon your individual results and that of the entire organization." About 6 months later he was notified that he had been definitely awarded an option to buy 150 shares of stock in recognition of his "contribution and efforts in making the operation of the Company successful." As to future allotments he was told "It is up to you to justify your participation in the plan during the next two years."

LoBue's work was so satisfactory that the company in the course of 3 years delivered to him 3 stock options covering 340 shares. He exercised all these $5 per share options in 1946 and in 1947,[1] paying the company only $1,700 for stock having a market value when delivered of $9,930. Thus, at the end of these transactions, LoBue's employer was worth $8,230 less to its stockholders and LoBue was worth $8,230 more than before.[2] The company deducted this sum as an expense in its 1946 and 1947 tax returns but LoBue did not report any part of it as income. Viewing the gain to LoBue as compensation for personal services the Commissioner levied a deficiency assessment against him, relying on § 22 (a) of the Internal Revenue Code of 1939, 53 Stat. 9, as amended, 53 Stat. 574, which defines gross income as including "gains, profits, and income derived from . . . compensation for personal service . . . of whatever kind and in whatever form paid . . . ."

LoBue petitioned the Tax Court to redetermine the deficiency, urging that "The said options were not intended by the Corporation or the petitioner to constitute additional compensation but were granted to permit the petitioner to acquire a proprietary interest in the Corporation and to provide him with the interest in the successful operation of the Corporation deriving from an ownership interest." The Tax Court held that LoBue had a taxable gain if the options were intended as compensation but not if the options were designed to provide him with "a proprietary interest in the business." Finding after hearings

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[1] There may be some question as to whether the first option was exercised in 1945 or 1946. See the discussion, *infra*, as to when the transactions were completed.

[2] The Commissioner assessed a deficiency on the basis of $8,680 although the record figures show a difference between option price and market value of $8,230. No explanation for the discrepancy appears in the record.

that the options were granted to give LoBue "a proprietary interest in the corporation, and not as compensation for services" the Tax Court held for LoBue. 22 T. C. 440, 443. Relying on this finding the Court of Appeals affirmed, saying: "This was a factual issue which it was the peculiar responsibility of the Tax Court to resolve. From our examination of the evidence we cannot say that its finding was clearly erroneous." 223 F. 2d 367, 371. Disputes over the taxability of stock option transactions such as this are longstanding.[3] We granted certiorari to consider whether the Tax Court and the Court of Appeals had given § 22 (a) too narrow an interpretation. 350 U. S. 893.

We have repeatedly held that in defining "gross income" as broadly as it did in § 22 (a) Congress intended to "tax all gains except those specifically exempted." See, *e. g.*, *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 429–430. The only exemption Congress provided from this very comprehensive definition of taxable income that could possibly have application here is the gift exemption of § 22 (b)(3). But there was not the slightest indication of the kind of detached and disinterested generosity which might evidence a "gift" in the statutory sense. These transfers of stock bore none of the earmarks of a gift. They were made by a company engaged in operating a business for profit, and the Tax Court found that the stock option plan was designed to achieve more profitable operations by providing the employees "with an incentive to promote the growth of the company by permitting them to participate in its success." 22 T. C., at 445.

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[3] See, *e. g.*, *Durkee* v. *Welch*, 49 F. 2d 339; *Erskine* v. *Commissioner*, 26 B. T. A. 147; *Geeseman* v. *Commissioner*, 38 B. T. A. 258; *Evans* v. *Commissioner*, 38 B. T. A. 1406. See also Miller, The Treasury's Proposal to Tax Employee's Bargain Purchases, 56 Yale L. J. 706; Note, 64 Yale L. J. 269; 93 Cong. Rec. A4060–A4066; Surrey and Warren, Federal Income Taxation (1955 ed.), 653–674.

Under these circumstances the Tax Court and the Court of Appeals properly refrained from treating this transfer as a gift. The company was not giving something away for nothing.[4]

Since the employer's transfer of stock to its employee LoBue for much less than the stock's value was not a gift, it seems impossible to say that it was not compensation. The Tax Court held there was no taxable income, however, on the ground that one purpose of the employer was to confer a "proprietary interest." [5] But there is not a word in § 22 (a) which indicates that its broad coverage should be narrowed because of an employer's intention to enlist more efficient service from his employees by making them part proprietors of his business. In our view there is no statutory basis for the test established by the courts below. When assets are transferred by an employer to an employee to secure better services they are plainly compensation. It makes no difference that the compensation is paid in stock rather than in money. Section 22 (a) taxes income derived from compensation "in whatever form paid." And in another stock option case we said that § 22 (a) "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." *Commissioner* v. *Smith,* 324 U. S. 177, 181. LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is "compensation for personal service" within the meaning of § 22 (a).

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[4] *Robertson* v. *United States,* 343 U. S. 711, 713–714; *Bogardus* v. *Commissioner,* 302 U. S. 34.

[5] The Tax Court noted "that in practically all such cases as the one before us, both the element of additional compensation and the granting of a proprietary interest are present." 22 T. C., at 445. See also *Geeseman* v. *Commissioner,* 38 B. T. A. 258, 263.

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LoBue nonetheless argues that we should treat this transaction as a mere purchase of a proprietary interest on which no taxable gain was "realized" in the year of purchase. It is true that our taxing system has ordinarily treated an arm's length purchase of property even at a bargain price as giving rise to no taxable gain in the year of purchase. See *Palmer* v. *Commissioner,* 302 U. S. 63, 69. But that is not to say that when a transfer which is in reality compensation is given the form of a purchase the Government cannot tax the gain under § 22 (a). The transaction here was unlike a mere purchase. It was not an arm's length transaction between strangers. Instead it was an arrangement by which an employer transferred valuable property to his employees in recognition of their services. We hold that LoBue realized taxable gain when he purchased the stock.[6]

A question remains as to the time when the gain on the shares should be measured. LoBue gave his employer promissory notes for the option price of the first 300 shares but the shares were not delivered until the notes were paid in cash.[7] The market value of the shares was lower when the notes were given than when the cash was paid. The Commissioner measured the taxable gain by the market value of the shares when the cash was paid. LoBue contends that this was wrong, and that the gain

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[6] Since our view of the statute requires taxation of gain here it is unnecessary for us to rely on the Treasury Regulations to reach that conclusion. Apparently the present regulations were not applicable to all of the options. See 26 CFR, Rev. 1953, § 39.22 (a)–1 (c); 1939–1 Cum. Bull. 159; 1946–1 Cum. Bull. 15–18. And since the transactions in question here occurred prior to 1950 the 1950 statute establishing special tax treatment for "restricted stock option plans" has no relevance. See § 130A, Internal Revenue Code of 1939, as amended, 64 Stat. 942. And see § 421, Internal Revenue Code of 1954, 68A Stat. 142.

[7] LoBue paid cash for the last 40 shares.

should be measured either when the options were granted or when the notes were given.

It is of course possible for the recipient of a stock option to realize an immediate taxable gain. See *Commissioner* v. *Smith,* 324 U. S. 177, 181–182. The option might have a readily ascertainable market value and the recipient might be free to sell his option. But this is not such a case. These three options were not transferable [8] and LoBue's right to buy stock under them was contingent upon his remaining an employee of the company until they were exercised. Moreover, the uniform Treasury practice since 1923 has been to measure the compensation to employees given stock options subject to contingencies of this sort by the difference between the option price and the market value of the shares at the time the option is exercised.[9] We relied in part upon this practice in *Commissioner* v. *Smith,* 324 U. S. 177, 324 U. S. 695. And in its 1950 Act affording limited tax benefits for "restricted stock option plans" Congress adopted the same kind of standard for measurement of gains. § 130A, Internal Revenue Code of 1939, as amended, 64 Stat. 942. And see § 421, Internal Revenue Code of 1954, 68A Stat. 142. Under these circumstances there is no reason for departing from the Treasury practice. The taxable gain to LoBue should be measured as of the time the options were exercised and not the time they were granted.

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[8] Cf. *McNamara* v. *Commissioner,* 210 F. 2d 505.

[9] See 1923 II–1 Cum. Bull. 50; 1939–1 Cum. Bull. 159; 1946–1 Cum. Bull. 15–18; Dillavou, Employee Stock Options, 20 Accounting Review 320; Miller, The Treasury's Proposal to Tax Employee's Bargain Purchases, 56 Yale L. J. 706, 713–715. See also Note, The Valuation of Option Stock Subject to Repurchase Options and Restraints on Sale, 62 Yale L. J. 832; Note, Tax Effects of Absence of Market Value on Employee Bargain Purchases, 21 U. of Chi. L. Rev. 464.

It is possible that a bona fide delivery of a binding promissory note could mark the completion of the stock purchase and that gain should be measured as of that date. Since neither the Tax Court nor the Court of Appeals passed on this question the judgment is reversed and the case is remanded to the Court of Appeals with instructions to remand the case to the Tax Court for further proceedings.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE CLARK, concurring.

We join in the judgment of the Court and in its opinion on the main issue. However, the time when LoBue acquired the interest on which he is taxed was not in issue either before the Tax Court or the Court of Appeals. In the circumstances of this case, there certainly is no reason for departing from the general rule whereby this Court abstains from passing on such an issue in a tax case when raised here for the first time. See *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380; *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498.

MR. JUSTICE HARLAN, whom MR. JUSTICE BURTON joins, concurring in part and dissenting in part.

In my view, the taxable event was the grant of each option, not its exercise. When the respondent received an unconditional option to buy stock at less than the market price, he received an asset of substantial and immediately realizable value, at least equal to the then-existing spread between the option price and the market price. It was at that time that the corporation conferred a benefit upon him. At the exercise of the option, the corporation "gave" the respondent nothing; it simply satisfied a previously-created legal obligation. That trans-

action, by which the respondent merely converted his asset from an option into stock, should be of no consequence for tax purposes. The option should be taxable as income when given, and any subsequent gain through appreciation of the stock, whether realized by sale of the option, if transferable, or by sale of the stock acquired by its exercise, is attributable to the sale of a capital asset and, if the other requirements are satisfied, should be taxed as a capital gain.[1] Any other result makes the division of the total gains between ordinary income (compensation) and capital gain (sale of an asset) dependent solely upon the fortuitous circumstance of when the employee exercises his option.[2]

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[1] *Commissioner* v. *Smith*, 324 U. S. 177, 324 U. S. 695, does not require an opposite result. In that case Smith's employer, Western, had undertaken the management of a reorganized corporation, Hawley, under a contract by which Western was to receive as compensation for its managerial services a specified amount of stock in Hawley if it was successful in reducing Hawley's indebtedness by a stated amount. Western, in turn, gave Smith, who was active in the Hawley reorganization, an option to buy, at the then-existing market price, a fixed share of any Hawley stock received under the management contract. The management contract was successfully performed, and a part of the Hawley stock received by Western—the value of which was of course substantially enhanced by the performance of the contract—was sold to Smith at the option price. Under the peculiar facts of that case—more analogous to an assignment to an employee of a share in the anticipated proceeds of a contract than to the usual employee stock option plan—the Tax Court's finding that the gain that would accrue to Smith upon the successful performance of the management contract was intended as "compensation" to him for his services was no doubt amply justified. But as the Court expressly stated in upholding that finding: "It of course does not follow that in other circumstances not here present the option itself, rather than the proceeds of its exercise, could not be found to be the only intended compensation." *Id.*, at p. 182.

[2] Suppose two employees are given unconditional options to buy stock at $5, the current market value. The first exercises the option immediately and sells the stock a year later at $15. The second

The last two options granted to respondent were unconditional and immediately exercisable, and thus present no further problems. The first option, however, was granted under somewhat different circumstances. Respondent was notified in January 1945 that 150 shares had been "allotted" to him, but he was given no right to purchase them until June 30, 1945, and his right to do so then was expressly made contingent upon his still being employed at that date. His right to purchase the first allotment of stock was thus not vested until he satisfied the stated condition, and it was not until then that he could be said to have received income, the measure of which should be the value of the option on that date.

Accordingly, while I concur in the reversal of the judgment below and in the remand to the Tax Court, I would hold the granting of the options to be the taxable events and would measure the income by the value of the options when granted.

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holds the option for a year, exercises it, and sells the stock immediately at $15. Admittedly the $10 gain would be taxed to the first as capital gain; under the Court's view, it would be taxed to the second as ordinary income because it is "compensation" for services. I fail to see how the gain can be any more "compensation" to one than it is to the other.

Syllabus.

OFFUTT HOUSING CO. *v.* COUNTY OF SARPY ET AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 404. Argued April 26, 30, 1956.—Decided May 28, 1956.

Petitioner entered into a contract with the Secretary of the Air Force, under which petitioner leased from the Government land on an Air Force base in Nebraska and built thereon housing accommodations to be rented by petitioner to military and civilian personnel of the base under strict governmental control. The lease was for a term of 75 years at nominal rental and provided that the buildings and improvements erected by petitioner should become part of the real estate and that, upon expiration or termination of the lease, all improvements made upon the leased premises should remain the property of the Government without compensation. The estimated useful life of the buildings and improvements was only 35 years. The Nebraska county in which the base was located assessed against petitioner "personal property" taxes on the buildings, improvements, appliances and furniture erected or provided by petitioner on the premises. *Held:*

1. By the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949, Congress consented to state taxation of petitioner's interest as lessee, though the area involved is subject to the federal power of "exclusive Legislation." Pp. 257–261.

2. In the circumstances of this case, the full value of the buildings and improvements is attributable to the lessee's interest. Pp. 261–262.

3. Petitioner's interest in the appliances is subject to the state tax in like manner as its interest in the buildings. P. 262.

160 Neb. 320, 70 N. W. 2d 382, affirmed.

Robert L. Stern argued the cause for petitioner. With him on the brief was *Charles S. Reed.*

Dixon G. Adams and *Orville Entenman* argued the cause for respondents. With them on the brief was *Clarence S. Beck,* Attorney General of Nebraska.

Solicitor General Sobeloff, Acting Assistant Attorney General Rice, Hilbert P. Zarky and *Edwin A. Goldstein* filed a brief for the United States, as *amicus curiae,* urging reversal.

Jennings P. Felix filed a brief for Grant County, Washington, as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This suit was brought by petitioner against respondent county and its treasurer for a declaratory judgment that petitioner was not required to pay certain state and county "personal property" taxes and for an injunction against the levy of such taxes on that property. The controlling facts are not in dispute. Petitioner is a Nebraska corporation organized primarily to provide housing for rent or sale. On January 18, 1951, petitioner entered into a contract with the Secretary of the Air Force to lease 63 acres of land and to build a housing project on Offutt Air Force Base in respondent county in accordance with specifications submitted to the Department of the Air Force and to be approved by the Federal Housing Commissioner.

The lease was for 75 years at a rental price of $100 per year. It provided that the "buildings and improvements erected by the Lessee, constituting the aforesaid housing project, shall be and become, as completed, real estate and part of the leased land, and public buildings of the United States, leased to Lessee . . ." and further provided that "upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall remain the property of the Government without compensation . . . ." Petitioner was to lease all the units of the project to such military and civilian personnel at the Base as were designated by the Commanding Officer,

on terms specified in the contract and at a maximum rent approved by the Federal Housing Administration and the Air Force. The Government was to provide fire and police protection to the project on a reimbursable basis. Petitioner had the right to permit public utilities to extend water, gas, sewer, telephone, and electric power lines onto the leased land in order to provide those services. Petitioner agreed to insure the buildings at its own expense, to permit Government inspection of the premises, and to comply with regulations prescribed by the Commanding Officer for military requirements for safety and security purposes, consistent with the use of the leased land for housing. Petitioner could not assign the lease without the written approval of the Secretary of the Air Force.

The preferred stock of petitioner was held by the Commissioner of the Federal Housing Administration which, acting under Title VIII of the National Housing Act (the Wherry Military Housing Act), 63 Stat. 570, insured a mortgage on the project after receiving a certificate from the Department of the Air Force that a housing project was necessary to provide adequate housing for civilian or military personnel. After the signing of the contract and the insurance of the mortgage, construction proceeded forthwith. Petitioner filed no county tax return, although the Attorney General of Nebraska had ruled that its interest in the project, including all of the "personal property" used therein, was taxable as "personal property." On June 23, 1952, the county assessor of Sarpy County filed a schedule on behalf of petitioner, listing a taxable total of $825,685, itemized as "Furniture & Fixtures—Tools & Equipment"; "Household Appliances"; and "Improvements on Leased Land." Petitioner never paid the resulting county and state taxes, and after the county treasurer threatened to issue the usual distress warrant to collect the taxes, petitioner brought this suit.

The District Court of Sarpy County held that, since title to the buildings and improvements was in the United States, Nebraska and Sarpy County could not tax them. The Supreme Court of Nebraska reversed, holding that Congress had given Nebraska the right to tax petitioner's interest in the property and that for tax purposes, under Neb. Rev. Stat., Reissue 1950, § 77–1209, petitioner was in fact and as a matter of law the owner of the property sought to be taxed. 160 Neb. 320, 70 N. W. 2d 382. Petitioner's attack on the Nebraska judgment raises serious questions of state-federal relations with respect to taxation of private housing developments on Government-owned land, and therefore we granted certiorari. 350 U. S. 893.

This is another in a long series of cases in this Court dealing with the power of the States to tax property in private hands against a claim of exempt status deriving from an immunity of the Federal Government from state taxation. Offutt Air Force Base falls within the scope of Article I, § 8, cl. 17 of the United States Constitution, providing that the Congress shall have power

> "To exercise exclusive Legislation in all Cases whatsoever, over such District [of Columbia] . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

The course of construction of this provision cannot be said to have run smooth. The power of "exclusive Legislation" has been held to prohibit a state tax on private property located on a military base acquired pursuant to Art. I, § 8, cl. 17. *Surplus Trading Co.* v. *Cook,* 281 U. S. 647. On the other hand, the State may acquire the right to tax private interests within such a location

by permission of Congress, see, *e. g.,* the Buck Act, 54 Stat. 1059 (permitting state sales, use, and income taxes), and we have also held that the State may tax when the United States divests itself of proprietary interest over the area on which the tax is sought to be levied. *S. R. A., Inc.* v. *Minnesota,* 327 U. S 558; see also *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375.

The line of least resistance in analysis of our immediate problem is to ascertain whether Congress has given consent to the type of state taxation here asserted. The applicable congressional statutes are the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949 (adding Title VIII to the National Housing Act). The Military Leasing Act provides:

> "That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. . . . Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Sec-

retary of the Department concerned during a national emergency declared by the President. . . . The authority herein granted shall not apply to oil, mineral, or phosphate lands. . . .

. . . . . .

"SEC. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated." 61 Stat. 774–776.

Two years later, the Wherry Act provided:

"Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. . . ." 63 Stat. 570, 576.

These two Acts interlock and must be read together. The reasonable relationship between them has been thus delineated by the Court of Appeals for the Third Circuit:

"In our view this provision of the National Housing Act [the 1949 Act] merely permits leasing for

military housing purposes, already covered by the general authorization of the 1947 Act, to be accomplished without regard to specified restrictions of the 1947 Act, when the elimination of these restrictions would serve the purposes of the Housing Act. Other provisions of the 1947 Act, including the language of Section 6 subjecting the lessee's interest to local taxation, apply to leases made under the authority of both Acts.

"We have not overlooked the argument for a narrower view of the scope of the 1947 Act based upon legislative history indicating that the primary purpose of that Act was to provide for the leasing of stand-by defense plants. But the language of the Act extends the leasing authority to all non-surplus property under the control of the Defense Department except oil, mineral, or phosphate lands (an exception which would be unnecessary if the Act applied only to defense plants). An additional indication that the 1947 Act encompasses the leasing of property generally is found in Section 2 which repeals the prior authority for the leasing of War Department property generally, 27 Stat. 321. The Senate Report expresses the reporting committee's understanding that this prior leasing statute was being 'entirely superseded'. Sen. Rep. No. 626, 1947, 80th Cong. 1st Sess. [p. 3]." *Fort Dix Apartments Corp.* v. *Borough of Wrightstown,* 225 F. 2d 473, 475–476.

We agree with this. To be sure, the 1947 Act does not refer specifically to property in an area subject to the power of "exclusive Legislation" by Congress. It does, however, govern the leasing of Government property generally and its permission to tax extends generally to all lessees' interests created by virtue of the Act. The legis-

lative history indicates a concern about loss of revenue to the States and a desire to prevent unfairness toward competitors of the private interests that might otherwise escape taxation. While the latter consideration is not necessarily applicable where military housing is involved, the former is equally relevant to leases for military housing as for any other purpose.

We do not say that this is the only admissible construction of these Acts. We could regard Art. I, § 8, cl. 17 as of such overriding and comprehensive scope that consent by Congress to state taxation of obviously valuable private interests located in an area subject to the power of "exclusive Legislation" is to be found only in explicit and unambiguous legislative enactment. We have not heretofore so regarded it, see *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, nor are we constrained by reason to treat this exercise by Congress of the "exclusive Legislation" power and the manner of construing it any differently from any other exercise by Congress of that power. This is one of those cases in which Congress has seen fit not to express itself unequivocally. It has preferred to use general language and thereby requires the judiciary to apply this general language to a specific problem. To that end we must resort to whatever aids to interpretation the legislation in its entirety and its history provide. Charged as we are with this function, we have concluded that the more persuasive construction of the statute, however flickering and feeble the light afforded for extracting its meaning, is that the States were to be permitted to tax private interests, like those of this petitioner, in housing projects located on areas subject to the federal power of "exclusive Legislation." We do not hold that Congress has relinquished this power over these areas. We hold only that Congress, in the exercise of this power, has per-

mitted such state taxation as is involved in the present case.

Petitioner also argues that the state tax, measured by the full value of the buildings and improvements, is not on the "lessee's interest" but is on the full value of property owned by the Government. Labeling the Government as the "owner" does not foreclose us from ascertaining the nature of the real interests created and so does not solve the problem. See *Millinery Center Building Corp.* v. *Commissioner,* 350 U. S. 456. The lease is for 75 years; the buildings and improvements have an estimated useful life of 35 years. The enjoyment of the entire worth of the buildings and improvements will therefore be petitioner's.

Petitioner argues, however, that the Government has a substantial interest in the buildings and improvements, since the Government prescribed the maximum rents and determined the occupants, had voting interests in petitioner, provided services, and took the financial risks by insuring the project. Petitioner compares its own position to that of a "managing agent." This characterization is an attempt by use of a phrase to make these facts fit an abstract legal category. This contention would certainly surprise a Congress which was interested in having private enterprise and not the Government conduct these housing projects. The Government may have "title," but only a paper title, and, while it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of unbridled economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it. If an ordinary private housing venture were being assessed for tax purposes, the value would not be allocated between an owner and the mortgage company which does his financing or between the owner and the State, which may fix rents and provide

services. In the circumstances of this case, then, the full value of the buildings and improvements is attributable to the lessee's interest.[1]

Petitioner further argues that the tax on the appliances and furniture is invalid because petitioner owns those items, never bought them from the Government, and that therefore its interest was not "made or created pursuant to the provisions of this Act [the Military Leasing Act of 1947]." Here again using a label, that of "owner," as descriptive of petitioner does not answer the question. It appears from the record that petitioner was required to supply the appliances for the housing project. Petitioner and its tenants will have full use of them for the lease period and they or their replacements must be left on the property at the end of the lease. Petitioner's interest in the appliances, just like its interest in the buildings, is determined by its agreement with the Government and, keeping in mind the purpose of § 6, we interpret that section as treating these items alike.[2]

For these reasons the judgment of the Supreme Court of Nebraska must be

Affirmed.

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[1] The record before us is unclear whether the estimated useful life of all the appliances and furniture is less than the lease period. To the extent that the estimated useful life of any of these items extends beyond the term of the lease, the value attributable to such period must be excluded from the tax, since it represents the Government's ownership interest. In the present state of the record, however, petitioner's remedy, if any, is in the Nebraska courts, not here.

[2] The record does not indicate clearly the relationship of the parties with respect to the furniture—valued at $205 in the total 1952 valuation of the taxable property at $825,685. This is a minor matter and we leave petitioner to seek redress in the Nebraska courts should the interests of the Government and petitioner in the furniture be significantly different from their interests in the appliances or buildings.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN concur, dissenting.

There are two reasons why I dissent in this case.

First. The legislative history of the Wherry Act makes clear that the purpose of the legislation was to encourage military personnel to remain in the Armed Forces by providing clean, adequate, and inexpensive housing for them. H. R. Rep. No. 854, 81st Cong., 1st Sess., pp. 2, 4; S. Rep. No. 410, 81st Cong., 1st Sess., pp. 2, 4–5. There is nothing to indicate that Congress departed from the established practice (*Surplus Trading Co.* v. *Cook,* 281 U. S. 647) and consented to local taxation on the federal enclaves. Taxation by local authorities of a housing project is one sure way of increasing its cost and hampering the federal program. If that had been intended, I would expect plain language revealing the purpose. The Court finds no plain language but relies only on adumbration and reasoning from elaborate implication. Yet the "doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate." *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 122.

To be sure, the Wherry Act and the Military Leasing Act are intertwined and § 6 of the Leasing Act makes the "lessee's interest" subject to local taxation. But the intertwining of the two Acts is very limited. Section 805 of the Wherry Act authorizes the Secretaries of the Armed Forces to make leases under the authority of the Leasing Act, without regard to the limitations imposed by it as respects the term or duration of the lease. But the authority to lease and the limitations imposed on leases are contained in § 1 of the Leasing Act. Nothing in the language of § 805 requires the balance of the Act to be

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incorporated. We strain beyond the normal demands of language to pull § 6 of the Leasing Act into the Wherry Act. Section 807 of the Wherry Act deals with taxation. It allows local taxation of real property acquired by the Federal Housing Commissioner. I would suppose that if local taxation is specifically allowed in one instance, the waiver of immunity is limited, not general. We usurp the function of the lawmakers when we hold to the contrary.

Second. Even if the Wherry Act be read as including § 6 of the Leasing Act, we should rebel at the application now given it. Section 6 of the Leasing Act, if applicable, only subjects the "lessee's interest" to local taxation. Yet the Court allows the local tax to be placed on the entire value of the property. Its justification apparently is the low annual rental charged by the United States to the lessee, the length of the lease, and the useful life of the buildings and improvements. The "enjoyment of the entire worth" of the property will be the lessee's, says the Court. The interest of the Federal Government is therefore nominal. For these reasons the "lessee's interest" is held to include the entire value of the property.[1]

This formalism misses the entire point. The Government's stake here cannot be measured by bare legal title. It has vast and important interests in these projects. It owns the controlling stock in the lessee. It prescribes the maximum rentals. It determines what persons may occupy the living quarters. It assumes most of the financial risks of these housing projects by insuring the mortgagees. It provides police and fire protection, sewerage and water service, and access roads. The United

[1] It is of interest that an effort was made in the Senate Committee on Armed Services to provide in the Leasing Act that when property was leased by the Government the entire value be subject to local taxation. See Hearings, Senate Committee on Armed Services on S. 1198, 80th Cong., 1st Sess., pp. 27–32. But that proposal was rejected by the Senate Committee.

States is not a mere lessor who, having leased the property, allows it to be managed by the lessee. The great decisions as to management are made by the Government. The lessee is, indeed, a managing agent.

The lease makes the buildings and improvements property of the United States. That reservation of title may not be challenged here as colorable. See *Kern-Limerick, Inc.* v. *Scurlock, supra,* 116–123. It was made to protect the large interests of the United States in low-cost housing on federal enclaves—a purpose now partially defeated by what we do today. For, once the local taxes are imposed, the rentals to the servicemen rise, unless the United States pays the bill. Ironically, the rents rise without the servicemen receiving more benefits of local government than even transients receive. The tax is a windfall to the local Nebraska authorities as the Federal Government provides the governmental services protective of the property taxed.[2]

[2] Under the Buck Act, 54 Stat. 1059, as amended, 4 U. S. C. §§ 104–110, residents of military reservations pay state sales, use, income, and gasoline taxes.

UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 530. Argued April 24–25, 1956.—Decided June 4, 1956.

An employer which was subject to the National Labor Relations Act filed a complaint with the Wisconsin Employment Relations Board charging appellant union and others with committing unfair labor practices within the meaning of the Wisconsin Employment Peace Act, which practices were also unfair labor practices under the National Labor Relations Act, as amended. The employer alleged that, during a strike, members of the union had engaged in mass picketing, thereby obstructing ingress to and egress from the employer's plant; interfered with the free and uninterrupted use of public highways; prevented persons who desired to be employed from entering the plant; coerced employees who desired to work, and threatened them and their families with physical injury. The State Board found the allegations to be true and issued an order directing the union and certain of its members to cease all such activities. This order was enforced by a Wisconsin State Court. *Held:* The order of the State Board is valid and the judgment of the State Court enforcing it is affirmed. Pp. 267–275.

(a) Section 8 (b) (1) of the National Labor Relations Act, as amended, is not the exclusive method of controlling violence even against employees, much less violence interfering with others approaching an area where a strike is in progress; and the Federal Act does not so occupy the field as to prevent a State from enjoining such violence. Pp. 271–273.

(b) The fact that a union commits a federal unfair labor practice while engaging in violent conduct does not prevent a State from taking steps to stop the violence. P. 274.

(c) A different result is not required by the fact that the State acted under a state labor-relations statute, rather than under a general state law against violence and coercion, nor by the fact that the State has chosen to entrust its power to a labor board. Pp. 273–275.

269 Wis. 578, 70 N. W. 2d 191, affirmed.

Kurt L. Hanslowe argued the cause for appellant. With him on the brief were *Harold A. Cranefield, Max Raskin* and *Redmond H. Roche, Jr.*

Beatrice Lampert, Assistant Attorney General of Wisconsin, argued the cause for the Wisconsin Employment Relations Board, appellee. With her on the brief were *Vernon W. Thomson,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General.

Jerome Powell argued the cause for the Kohler Company, appellee. With him on the brief were *John C. Gall, John F. Lane, William F. Howe* and *Lyman C. Conger.*

Briefs of *amici curiae* urging affirmance were filed by *John Ben Shepperd,* Attorney General, and *Burnell Waldrep, Philip Sanders* and *John Atchison,* Assistant Attorneys General, for the State of Texas, and *E. R. Callister,* Attorney General, and *Raymond W. Gee,* Assistant Attorney General, for the State of Utah, and *Eugene Cook,* Attorney General, for the State of Georgia.

Mr. Justice Reed delivered the opinion of the Court.

This case, as stated in the brief for the United Automobile, Aircraft and Agricultural Implement Workers of America, presents the question whether or not a State may enjoin through its labor statute, the Wisconsin Employment Peace Act, union conduct of a kind which may be an unfair labor practice under the National Labor Relations Act, as amended.[1]

[1] The question presented is narrowed by appellant in another paragraph to apply only to instances, as here, where the National Board has asserted jurisdiction over certain other labor practices arising from the same employer-union relationship. These proceedings include a plea by the employer that the state-enjoined union conduct constitutes a defense to a union charge filed with the Board. Appellant also asserted that the State should act only after the Board

Appellant concedes that a State may punish violence arising in labor relation controversies under its generally applicable criminal statutes. It does not admit or deny the charged violence. The union considers the coercion immaterial in this case. Its position is that a State may not exercise this police power through an agency that is concerned only with labor relations. The argument is that a State Board will use this power to stop force and violence in order to further state labor policy, thus creating a conflict with the federal policy as developed by the National Labor Relations Board. The union argues that Wisconsin has no jurisdiction to enjoin the alleged conduct under its labor act because such conduct would be an unfair labor practice under the National Labor Relations Act.

This controversy arose out of the failure of appellant and the Kohler Company to reach an accord concerning a new collective-bargaining agreement. As the parties were unable to agree, Kohler's production workers struck and picketed the premises of the company. Ten days later Kohler filed a complaint with the Wisconsin Employment Relations Board charging appellant and others with committing unfair labor practices within the meaning of the Wisconsin Employment Peace Act.[2] It was alleged that appellant's members had engaged in mass picketing, thereby obstructing ingress to and egress from the Kohler plant; interfered with the free and uninter-

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has passed upon the pending union complaint. In view of our disposition of this appeal, we do not consider these narrower issues material.

[2] Wisconsin Statutes, 1953, c. 111, p. 1903.

§ 111.04, p. 1905:

"111.04 *Rights of employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such

rupted use of public ways; prevented persons desiring to be employed by Kohler from entering the plant; and coerced employees who desired to work, and threatened them and their families with physical injury. The State Board found the allegations to be true and issued an order that directed the union and certain of its members to cease all such activities. The order appears below.[3]

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employes shall also have the right to refrain from any or all of such activities."

§ 111.06 (2), p. 1907:

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

. . . . . .

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

§ 111.07, p. 1908:

"111.07 *Prevention of unfair labor practices.* (1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

[3] "It is ordered that the Respondent Unions, their officers, members and agents immediately cease and desist from

"1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.

"2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.

"3. Obstructing or interfering in any way with entrance to and

Without change of substance it was enforced by a Wisconsin Circuit Court, and the State Supreme Court affirmed that judgment. 269 Wis. 578, 70 N. W. 2d 191. As the appeal raised an important question of federalism, we noted probable jurisdiction. 350 U. S. 957.[4]

The Kohler Company is subject to the National Labor Relations Act. It seems agreed, and we think correctly in view of the findings of fact, that the alleged conduct of the union in coercing employees in the exercise of their rights is a violation of § 8 (b)(1) of that Act.[5] Since

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egress from the premises of the Kohler Company.

"4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

"It is further ordered that the Respondent Unions, their officers, members and agents take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space of at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

[4] The legal problems have received considerable attention in recent years. A collection of available articles appears in Note, 53 Mich. L. Rev. 602. See also Further Comments on Federalism, 54 Mich. L. Rev. 540; Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A. B. A. J. 415.

[5] "SEC. 8. . . .

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

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ." 61 Stat. 136, 141, 29 U. S. C. § 158 (b)(1).

"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 . . . ." 61 Stat. 140, 29 U. S. C. § 157.

there is power under the Act to protect employees against violence from labor organizations by assuring their right to refrain from concerted labor activities, the National Labor Board might have issued an order similar to that of the State Board.[6] The provisions of the National Labor Relations Act, as amended, cover the labor relations of the Kohler Company. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31. These provisions may be assumed to include the coercion not only of strikers but also of other persons seeking employment with the plant.[7]

By virtue of the Commerce Clause, Congress has power to regulate all labor controversies in or affecting interstate commerce, such as are here involved. If the congressional enactment occupies the field, its control by the Supremacy Clause supersedes or, in the current phrase, pre-empts state power. *Kelly* v. *Washington,* 302 U. S. 1, 9. In the 1935 Act, § 10 (a), the Board was empowered to prevent unfair labor practices. By § 10 (a) this power was made "exclusive." 49 Stat. 449, 453, 29 U. S. C. § 160. In the Taft-Hartley amendments of 1947, the word "exclusive" was omitted but the phrase, "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise," was re-enacted without significant change. The omission was explained in the Conference Report.[8]

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[6] Cf. *In the Matter of Local #1150, United Electrical, Radio & Machine Workers,* 84 N. L. R. B. 972; *In the Matter of Perry Norvell Co.*, 80 N. L. R. B. 225; *United Mine Workers of America, District 2,* 96 N. L. R. B. 1389.

[7] See *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 182, *First.* Cf. *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 120, I.

[8] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 52:

"(1) The House bill omitted from section 10 (a) of the existing law the language providing that the Board's power to deal with unfair labor practices should not be affected by other means of

Yet under the 1935 Wagner Act this Court ruled that Wisconsin, under its same Labor Peace Act, could enjoin union conduct of the kind here involved. *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740. At that time, however, the federal Act made no provision for enjoining union activities. With the passage of the Taft-Hartley Act in 1947, the Congress recognized that labor unions also might commit unfair labor practices to the detriment of employees, and prohibited, among other practices, coercion of employees who wish to refrain from striking. See n. 5, *supra.* Appellant urges that this amendment eliminated the State's power to control the activities now under consideration through state labor statutes.

It seems obvious that § 8 (b) (1) was not to be the exclusive method of controlling violence even against employees, much less violence interfering with others approaching an area where a strike was in progress.[9] No one suggests that such violence is beyond state criminal power. The Act does not have such regulatory pervasiveness. The state interest in law and order precludes such interpretation. Senator Taft explained that the federal

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adjustment or prevention, but it retained the language of the present act which makes the Board's jurisdiction exclusive. The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

[9] *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U. S. 656, 666–669, a state case that allowed tort recovery, makes this clear.

prohibition against union violence would allow state action.[10]

Appellant is of the view that such references were "to the general state criminal law against violence and coercion, not to state labor relations statutes." But this cannot be correct since *Allen-Bradley Local* v. *Wisconsin Board,* the leading case dealing with violence under this same Wisconsin statute, was well known to Congress.[11]

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[10] 93 Cong. Rec. 4437:

"The Senator from Oregon a while ago said that the enactment of this proposed legislation will result in duplication of some of the State laws. It will duplicate some of the State laws only to the extent, as I see it, that actual violence is involved in the threat or in the operation.

. . . . . .

"Mr. President, I may say further that one of the arguments has suggested that in case this provision covered violence it duplicated State law. I wish to point out that the provisions agreed to by the committee covering unfair labor practices on the part of labor unions also might duplicate to some extent that State law. Secondary boycotts, jurisdictional strikes, and so forth, may involve some violation of State law respecting violence which may be criminal, and so to some extent the measure may be duplicating the remedy existing under State law. But that, in my opinion, is no valid argument."

See also 93 Cong. Rec. 4024; S. Rep. No. 105, 80th Cong., 1st Sess. 50.

[11] There it was said:

"The only employee or union conduct and activity forbidden by the state Board in this case was mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. So far as the fourteen individuals are concerned, their status as employees of the company was not affected.

"We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that authority of the several States may be exerted to control

The fact that the Labor Management Relations Act covered union unfair practices for the first time does not make the *Allen-Bradley* case obsolete. Orders which originate in state boards and become effective through the state judiciary should give more careful protection to the rights of labor than the purely judicial orders of a court.

There is no reason to re-examine the opinions in which this Court has dealt with problems involving federal-state jurisdiction over industrial controversies. They have been adequately summarized in *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474–477. As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct "which has been made an 'unfair labor practice' under the federal statutes." *Id.*, at 475, and cases cited. But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence.[12] The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion has been explicit in the opinions cited in note 12.

The States are the natural guardians of the public against violence. It is the local communities that suffer

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such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' . . . Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board." 315 U. S. 740, 748–749.

[12] See *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 477, 482; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 666–669; *Garner* v. *Teamsters Union*, 346 U. S. 485, 488; *International Union* v. *O'Brien*, 339 U. S. 454, 459; *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 253.

most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect.

We hold that Wisconsin may enjoin the violent union conduct here involved. The fact that Wisconsin has chosen to entrust its power to a labor board is of no concern to this Court.[13]

Affirmed.

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

There are instances where we have sustained identical regulations of the same act by both a State and the Federal Government. *California* v. *Zook,* 336 U. S. 725, is an example. But the instances are few and far between.

Of course, where the States and the Federal Government regulate the same act, but each with a different sanction, both often survive. *United Workers* v. *Laburnum Corp.,* 347 U. S. 656, is a recent example. We there allowed a common-law tort action for damages to be enforced in a state court for the same acts that could have been the basis for administrative relief under the federal Act. But the present case is not that case. Here the State has prescribed an administrative remedy that duplicates the administrative remedy prescribed by Congress. Each reaches the same identical conduct. We disallowed that duplication of remedy in *Garner* v. *Teamsters Union,* 346 U. S. 485. In that case we held that a state court could not enjoin action which was subject to an unfair labor proceeding under the federal Act. And see *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468. Today we depart from *Garner* and allow a state board to enjoin action

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[13] Cf. *Hughes* v. *Superior Court,* 339 U. S. 460, 467; *International Brotherhood of Teamsters* v. *Hanke,* 339 U. S. 470, 479.

which is subject to an unfair labor proceeding before the federal board. We sanction a precise duplication of remedies which is pregnant with potentialities of clashes and conflicts.*

Of course the States may control violence. They may make arrests and invoke their criminal law to the hilt. They transgress only when they allow their administrative agencies or their courts to enjoin the conduct that Congress has authorized the federal agency to enjoin. We retreat from *Garner* and open the door to unseemly conflicts between state and federal agencies when we sustain what Wisconsin has done here.

**Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, is not in point because the federal Act at that time made no provision for enjoining union activities.

DURLEY *v.* MAYO, CUSTODIAN, FLORIDA STATE PRISON.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 489. Argued April 2, 1956.—Decided June 4, 1956.

Upon reviewing the decision of the Supreme Court of Florida denying, without opinion, petitioner's petition for a writ of habeas corpus, in which he claimed, *inter alia,* that his state conviction and imprisonment for stealing cattle violated the Federal Constitution, it appeared that the judgment of that Court might have rested on one or both of two adequate state grounds. *Held:* The case is dismissed for lack of jurisdiction. Pp. 278–285.

(a) Where the highest court of a State delivers no opinion and it appears that its judgment might have rested on a nonfederal ground, this Court will not take jurisdiction to review the judgment. *Stembridge* v. *Georgia,* 343 U. S. 541. Pp. 281–282.

(b) The Supreme Court of Florida might have rested its denial of the petition here involved on either or both of the following grounds: (1) that the several federal issues presented by it had been raised previously within the meaning of Fla. Stat. Ann., 1943, § 79.10, and therefore could not be raised again under state practice; (2) that they could have been raised in the prior proceedings and, accordingly, were not available as a matter of state law under Florida decisions. Pp. 282–284.

(c) There is nothing in the order of the Supreme Court of Florida to show that that Court must have decided the case on federal grounds rather than on the readily available and substantial state grounds. Pp. 284–285.

Case dismissed.

Neal P. Rutledge, acting under appointment by the Court, 350 U. S. 900, argued the cause and filed a brief for petitioner.

Reeves Bowen, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Richard W. Ervin,* Attorney General.

MR. JUSTICE BURTON delivered the opinion of the Court.

In this case our jurisdiction is questioned by the State of Florida because the judgment of the Supreme Court of that State, which we are asked to review and which was rendered without opinion, may have rested upon an adequate state ground. For the reasons hereafter stated, we find that to be true with the result that we have no jurisdiction to entertain this petition or to consider the merits of the federal questions suggested by petitioner. While we thus deem petitioner's allegations of fact as to the merits of this case to be irrelevant here, we imply nothing as to their truth or falsity, and we refrain from any discussion that depends upon or assumes their truth.

In 1945, petitioner Durley was convicted by a jury in the Criminal Court of Record for Polk County, Florida, on two informations. In each he was charged, in three counts, with stealing cattle.[1] In the first count of the first information it was charged that, on July 7, 1945, petitioner, with two others, stole two steers from a Mrs. Bronson; in the second count, two cows; and in the third count, one heifer. The three counts of the other information charged that the same men on July 29, 1945, stole from a Mr. Zipperer a cow and two heifers, each of the animals allegedly stolen being the subject of a separate count. Petitioner was sentenced to serve five years' imprisonment on each count, the terms to be served consecutively, thus making a total of 30 years.

Petitioner did not appeal from his conviction but, in 1949, labeling his petition a writ of error *coram nobis,* he,

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[1] "811.11 Horse or cattle stealing

"Whoever commits larceny by stealing any horse, mule, mare, filly, colt, cow, bull, ox, steer, heifer or calf, the property of another, shall be punished by imprisonment in the state prison not less than two years nor more than five years." Fla. Stat. Ann., 1944.

pro se, unsuccessfully sought relief. In the same year, also *pro se,* he filed a petition for a writ of habeas corpus in the Supreme Court of Florida claiming that he was confined in violation of the Fifth Amendment to the Federal Constitution because he had been tried on informations rather than on indictments, that the verdict rested on perjured testimony,[2] and that he had been denied a hearing on his petition for a writ of error *coram nobis.* This petition for habeas corpus was denied by the Supreme Court of Florida, without opinion, on the ground that petitioner failed to show probable cause that he was held without lawful authority.

In 1952, with the aid of court-appointed counsel, petitioner filed a petition for a writ of habeas corpus in a Florida Circuit Court. There he claimed that the informations upon which he had been convicted charged the commission of only two, rather than six, offenses and that he already had served sufficient time to satisfy a ten-year sentence which would have been the maximum sentence permissible for two such offenses. Petitioner also charged that his imprisonment was in violation of his rights under the Constitution of the United States. A writ was issued, a return was filed, and the court heard argument of counsel for each side. The writ was quashed. Petitioner appealed to the Supreme Court of Florida, where his appeal was dismissed without opinion.

In 1955, petitioner, again *pro se,* instituted the present proceeding by filing in the Supreme Court of Florida another petition for a writ of habeas corpus. In it he claimed, *inter alia,* that his detention was an "abuse of the Due Process Clause of the 14th Amendment to the Constitution of the United States . . ." and that his con-

[2] There was *no* allegation in this or the subsequent petition that the prosecution *knowingly* used perjured testimony as in *Mooney* v. *Holohan,* 294 U. S. 103.

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secutive sentences not only violated the Federal and State Constitutions, but were contrary to a recent decision of the Supreme Court of Florida, citing *Hearn* v. *Florida,* 55 So. 2d 559. That petition was argued in the Supreme Court of Florida by counsel for the State, although neither petitioner nor his counsel was present. The petition was denied, without opinion, again on the ground that petitioner failed to show probable cause that he was held without lawful authority.

A rehearing was denied but petitioner's application for a writ of certiorari was granted by this Court, 350 U. S. 872, and counsel was appointed by this Court to represent him here, 350 U. S. 900. The case was fully briefed and argued on the jurisdictional issue as well as on the merits.

The State of Florida has objected consistently to our entertaining jurisdiction of this proceeding. Its reason is that the Florida Supreme Court's denial of the 1955 petition for a writ of habeas corpus may have rested upon one or both of two adequate state grounds. Those grounds are (1) that, under Florida law, the issues presented in 1955 already had been rendered *res judicata* by the 1952 litigation, and (2) that, in any event, petitioner was precluded from raising the federal issues presented in 1955 because he had failed to raise them in comparable prior proceedings where he had a fair and adequate opportunity to do so.

The State's claim as to *res judicata* rests primarily upon Fla. Stat. Ann., 1943, § 79.10, which provides that, while a judgment denying a petition for a writ of habeas corpus remains in force, no person "shall be at liberty to obtain another habeas corpus for the same cause, or by any other proceeding to bring the same matter again in question except by a writ of error or by action of false imprisonment . . . ."

Florida's other state ground is based upon its Supreme Court decisions, and particularly upon *Washington* v. *Mayo,* 77 So. 2d 620, 621. It is there stated that "The rule is clear that a convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues that were previously raised and determined, or that the prisoner had a fair and adequate opportunity to raise and have determined in earlier proceedings."

In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge* v. *Georgia,* 343 U. S. 541, 547.

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman* v. *Hanan,* 300 U. S. 14, 18; *Lynch* v. *New York,* 293 U. S. 52. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Klinger* v. *Missouri,* 13 Wall. 257, 263; *Wood Mowing & Reaping Machine Co.* v. *Skinner,* 139 U. S. 293, 297; *Allen* v. *Arguimbau,* 198 U. S. 149, 154–155; *Lynch* v. *New York, supra.* . . . But it is likewise well settled that if the independent [state] ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law

raising the Federal question, and this court will then take jurisdiction.' *Klinger* v. *Missouri, supra,* p. 263; *Johnson* v. *Risk,* 137 U. S. 300, 307; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282–283." *Williams* v. *Kaiser,* 323 U. S. 471, 477–478.

While the federal questions relied upon by petitioner in 1955 are not set forth by him as clearly as they might be, we do not rely upon that inadequacy.[3]

Petitioner argues that § 79.10 does not embody the traditionally broad doctrine of *res judicata.* He suggests that the statute bars only the relitigation of questions and matters that have been specifically presented and decided. By thus construing § 79.10, he argues that none of the precise federal issues raised in the 1955 petition were sufficiently raised and considered under his previous petitions. However, the Supreme Court of Florida has treated § 79.10 as applying the general rule of *res judicata.* See *Florida ex rel. Cacciatore* v. *Drumbright,* 116 Fla. 496, 156 So. 721; *Florida ex rel. Williams* v. *Prescott,* 110 Fla. 261, 148 So. 533; *D'Alessandro* v. *Tippins,* 102 Fla. 10, 137 So. 231. It even has applied that doctrine without reference to § 79.10. See *Florida ex rel. Davis* v. *Hardie,* 108 Fla. 133, 146 So. 97. On the other hand, it has, at times, treated habeas corpus petitions as barred by § 79.10 only where the issues have been raised and decided in a prior proceeding. See *Moat* v. *Mayo,* 82 So. 2d 591; *Lee* v. *Tucker,* 42 So. 2d 49; *Pope* v. *Mayo,* 39 So. 2d 286; and

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[3] The 1955 petition for habeas corpus and the petition for certiorari to this Court were drafted by petitioner. In similar circumstances, this Court has held that "where the substance of the claim is clear, we should not insist upon more refined allegations than [such a person] could be expected to supply." *Tomkins* v. *Missouri,* 323 U. S. 485, 487; *Rice* v. *Olson,* 324 U. S. 786, 791–792; *Holiday* v. *Johnston,* 313 U. S. 342, 350. Florida follows the same practice. *Ex parte Amos,* 93 Fla. 5, 12, 112 So. 289, 292; *Chase* v. *Florida ex rel. Burch,* 93 Fla. 963, 968, 113 So. 103, 106.

compare *Florida ex rel. Williams* v. *Prescott, supra; Florida ex rel. Davis* v. *Hardie, supra.*

In its more recent cases, the Supreme Court of Florida has held that, on an original application for habeas corpus, the petitioner may not raise issues that have been raised in prior proceedings whatever those may have been. Also, that unless he can show good reason for his failure to do so, he is precluded from raising issues which he *could* have raised in any such prior proceedings. *Washington* v. *Mayo,* 77 So. 2d 620; *Irvin* v. *Chapman,* 75 So. 2d 591; *Florida ex rel. Johnson* v. *Mayo,* 69 So. 2d 307.[4] In arguing before us that the issues now raised were or were not raised in prior proceedings, the parties have relied somewhat upon cases from this Court to support their arguments. Those decisions are not squarely in point because

[4] While it is true that in the *Johnson* and *Irvin* cases the issues sought to be raised in the habeas corpus proceeding could have been raised on direct appeal, the court held that the writ was not available because the petitioners had failed to raise those issues in "prior proceedings." These included a writ of error *coram nobis* in *Johnson* and a previous trial on the merits in *Irvin.*

It is suggested that the *Washington* case does not preclude this Court from taking jurisdiction because in that case the court, while stating the rule that would preclude jurisdiction, did consider on its merits a nonfederal contention which had not been previously raised. But assuming that the contention so considered had involved a substantial federal question, this Court would have lacked jurisdiction to review the judgment for the reason that it might have rested upon the adequate state ground. For our purposes, therefore, the discussion of the merits in that case may be treated as dicta.

Furthermore, the contention considered on its merits in the *Washington* case "apparently was not raised upon the earlier proceeding . . . ." 77 So. 2d, at 622. In the instant case, the perjury issue was presented in the 1949 petition, although not in terms of a federal constitutional issue. The *Washington* case, therefore, is certainly no authority for a conclusion in the instant case that any issues growing out of the previously raised issue, that the conviction rested upon perjured testimony, could be raised in the proceeding which is before us.

the issue before us is not one of federal law. The issue before us on *res judicata* is whether, under Florida law, petitioner was or was not free to raise in the Supreme Court of Florida in 1955 the questions he attempted to raise there. We conclude that the Supreme Court of Florida *might* have rested its denial of the 1955 petition on the grounds that the several federal issues presented to it in 1955 had been previously raised within the meaning of § 79.10 and, therefore, could not be raised again under the state practice, or at least could have been raised in the prior proceedings and, accordingly, under the above decisions they likewise were not available as a matter of state law.[5]

Petitioner further suggests that, under Florida law, the doctrine of *res judicata* will "not be so rigidly applied as to defeat the ends of justice." *Universal Construction Co.* v. *Fort Lauderdale,* 68 So. 2d 366, 369. Relying on that case, petitioner argues that the application of *res judicata* is within the discretion of the court, but that case does not provide the necessary authority for that conclusion. In that case, the Supreme Court of Florida, exercising traditional common-law and equitable powers, created an exception to the common-law doctrine of *res judicata* because of an "unusual situation" confronting it. *Id.,* at 370. The question before us is whether, under the facts of this case, the Supreme Court of Florida must necessarily read a similar exception into an Act of the legislature. We find no authoritative basis for doing so.

Finally, it is suggested that the order of the Florida court denying the 1955 petition shows affirmatively that the court decided the petition on the merits of the federal questions raised. We do not so read it. At most it is

[5] Our discussion of the Florida law is solely for the purpose of determining whether the test for our jurisdiction is met. We do not intimate that, under that law, petitioner is foreclosed from seeking any further remedial process that may be open to him.

inconclusive and leaves room for a decision on the state grounds indicated in § 79.10 or by *Washington* v. *Mayo, supra.* The language of the order is that petitioner "failed to show . . . probable cause to believe that he is detained in custody without lawful authority . . . ." That is stated in the standard form used in habeas corpus proceedings. We find nothing on its face showing that the court must have decided the case on federal grounds rather than on the readily available and substantial state grounds.

Inasmuch as the Supreme Court of Florida's denial of the 1955 petition *might* have rested on either of the state grounds now suggested by the State, petitioner has failed to establish our jurisdiction to decide the federal issues that he urges upon us. He has not shown that they have been passed upon by the highest court of his State.

For lack of jurisdiction, the case, therefore, must be

Dismissed.

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

Petitioner is a prisoner in the Florida State Prison, serving a total sentence of 30 years for cattle stealing. In February 1955 he filed a petition for a writ of habeas corpus in the Supreme Court of Florida. That court denied the petition without affording petitioner a hearing and without requiring a response from respondent, the custodian of the prison. A timely motion for rehearing was also denied. We granted certiorari. 350 U. S. 872.

In these circumstances, the allegations of the petition must be accepted as true for purposes of review. See *Hawk* v. *Olson,* 326 U. S. 271, 273; *Williams* v. *Kaiser,* 323 U. S. 471, 473–474. If they are taken as true, we have a shocking case of miscarriage of justice.

In 1945 the County Solicitor for Polk County, Florida, filed two informations charging petitioner and two codefendants, R. B. Massey, Jr., and Charles Bath, with six offenses of stealing cattle, each information containing three separate counts. The first count of the first information charged that the three defendants on July 7, 1945, stole two steers belonging to Mrs. Edna P. Bronson; the second count charged that the three defendants on July 7, 1945, stole two cows belonging to Mrs. Bronson; and the third count charged that on July 7, 1945, they stole one heifer belonging to Mrs. Bronson. In the second information, the first count charged that the three defendants on July 29, 1945, stole one cow belonging to William C. Zipperer; the second count charged that the three defendants on July 29, 1945, stole one heifer belonging to Mr. Zipperer; and the third count charged that, on the same day, the defendants stole one heifer belonging to Mr. Zipperer. The second and third counts of the second information are virtually identical.

At the trial petitioner asserted his innocence. His two codefendants, however, admitted their guilt and implicated petitioner. Their testimony was the only evidence linking petitioner with the crimes charged. All three were convicted. Bath apparently received a sentence of two years' imprisonment and Massey, 26 years. Petitioner, 53 years old at the time and never before accused of dishonesty, was sentenced to five years' imprisonment on each of the 6 counts, each sentence to be served consecutively, making a total sentence of 30 years. Petitioner, now 63 years old, has served more than 10 years of his sentence.

In May 1949 petitioner, without the assistance of counsel, prepared a petition for writ of habeas corpus and filed it in the Supreme Court of Florida. The petition was inartistically drawn. Petitioner contended that his trial on a bill of information rather than on a grand-

jury indictment violated the Fifth Amendment of the United States Constitution. Secondly, he contended that "he is innocent of said offense and is falsely imprisoned by reason that verdict of guilt was wholly supported by *prejudge* [*sic*] and perjured testimony." Accompanying the petition was an affidavit by one J. E. Croft relating a prison conversation he had with Bath, the codefendant who received the relatively light sentence of two years' imprisonment. According to this affidavit, Bath told Croft that petitioner was completely innocent. Bath described an agreement which he and codefendant Massey had made before they embarked on their cattle-stealing ventures. They agreed that, if they were caught, they would say they were working for petitioner, for whom they had worked as laborers on other occasions. Bath explained that by naming petitioner they had hoped to be "passed up" and given a chance to get out of the country.

In addition to the Croft affidavit, the habeas corpus petition was accompanied by an affidavit signed and sworn to by Massey. He recanted his trial testimony, clearing petitioner of all responsibility for the stolen cattle. Massey stated that his story implicating petitioner "was a falsehood and that I gave such testimony, hoping that it would aid me when my case came up." The affidavit concluded, "Before God is my judge Dan Durley, never had anything to do with any cattle stealing that I testified to at the trial."

The Supreme Court of Florida denied the 1949 petition for a writ of habeas corpus on the ground that petitioner had failed to show probable cause that his detention was unlawful. It should be noted that the 1949 petition did not assert that the use of perjured testimony deprived petitioner of a federal constitutional right.

In January 1952 petitioner filed a second habeas corpus petition in the Circuit Court of Union County, Florida,

this time assisted by court-appointed counsel. He contended that the six 5-year sentences amounted to double jeopardy because the two informations upon which he was convicted charged him in substance with no more than two offenses, each of which carried a maximum penalty of 5 years, and that petitioner had already served sufficient time to satisfy a 10-year sentence. He made a general claim that his imprisonment was "in direct violation of his rights as set out in the Constitution of the United States." There was no mention of the perjured testimony issue. After argument the Circuit Court of Union County quashed the writ. An appeal to the Supreme Court of Florida was dismissed.

The basis of the present litigation is the habeas corpus petition filed in the Florida Supreme Court in February 1955. Petitioner prepared it without the aid of counsel. The petition repeats the double-jeopardy contention as well as the charge that he was convicted solely on the basis of perjured testimony, coupling these allegations with a claim that his imprisonment deprives him of liberty "in violation of his Constitutional Rights afforded him by the State of Florida and the Constitution of the United States of America." His federal constitutional arguments were elaborated in the motion for rehearing. Petitioner's claim that it violates due process to let his conviction stand solely on perjured testimony was raised for the first time in the 1955 habeas corpus petition—the one now under consideration.[1]

The Court dismisses the case on the ground that the Florida Supreme Court order denying habeas corpus might have rested on an adequate state ground—*res judicata*. I disagree.

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[1] In the 1949 petition, petitioner argued that the testimony was perjured, but he did not present this as a federal question. The 1952 petition did not mention the perjured testimony issue.

The Court concludes that under Florida law petitioner is barred from raising federal issues in the 1955 habeas corpus proceeding because he had raised them or at least had a fair and adequate opportunity to raise them in prior habeas corpus proceedings. The Court strangely relies on *Washington* v. *Mayo,* 77 So. 2d 620. That case involved a habeas corpus petition in which two contentions were raised. The first contention had been expressly raised and decided in a previous habeas corpus proceeding. The second contention, however, had not been raised previously. This contention was decided on the merits by the Florida Supreme Court even though the petitioner "has not shown that he did not have a fair and adequate opportunity to raise and have it determined." *Id.,* at 622.

Johnson v. *Mayo,* 69 So. 2d 307, and *Irvin* v. *Chapman,* 75 So. 2d 591, also relied on by the Court, are not in point. In both cases, the Florida Supreme Court held that an issue that could have been raised *on direct appeal from the conviction* could not be litigated in subsequent habeas corpus proceedings.[2] Those cases did not involve the question now before us—whether prior habeas corpus proceedings bar the litigation of issues which could not have been raised on direct appeal from the conviction.[3]

The Florida Supreme Court has expressly dismissed a number of habeas corpus proceedings on the ground that former habeas corpus adjudications were *res judicata.*

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[2] The Florida Supreme Court stated the rationale of these decisions as follows: "It is elementary that a writ of habeas corpus cannot be used as a substitute for appeal, motion to quash or a motion in arrest of judgment." *Johnson* v. *Mayo,* 69 So. 2d, at 308.

[3] Petitioner's claim of a denial of federal rights because his conviction is based solely on perjured testimony obviously could not have been raised on direct appeal. He did not obtain the affidavits showing that the witnesses had lied until long after the time to appeal his conviction had expired.

But in those cases the habeas corpus petitions attempted to relitigate issues which had been expressly presented and decided in the previous habeas corpus proceedings. See *Moat* v. *Mayo,* 82 So. 2d 591; *Pope* v. *Mayo,* 39 So. 2d 286; *Florida ex rel. Williams* v. *Prescott,* 110 Fla. 261, 148 So. 533.

Res judicata is not a rigid doctrine in Florida. The Supreme Court recently refused to apply it where to do so would "defeat the ends of justice." *Universal Const. Co.* v. *City of Ft. Lauderdale,* 68 So. 2d 366, 369.[4] Once the facts alleged by petitioner are conceded, as they must be on the present record, it defeats the ends of justice to deny relief here.

The language of the Florida Supreme Court's order in the present case indicates that petitioner's federal constitutional claims were rejected not on grounds of *res judicata* but on their merits. The petition was denied because of failure to show "probable cause to believe that [petitioner] is detained in custody without lawful authority." Faced with a similar state court order in *Williams* v. *Kaiser,* 323 U. S., at 478, we said: "The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right." We should hold the same in the present case.

Once we reach the merits the answer seems clear. It is well settled that to obtain a conviction by the use of

[4] "The basic principle upon which the doctrine of res judicata rests is that there should be an end to litigation and that *'in the interest of the State* every justiciable controversy should be settled in one action in order that the courts and the parties will not be bothered for the same cause by interminable litigation.' 59 So. 2d at page 44; italics supplied. Nevertheless, when a choice must be made we apprehend that the State, as well as the courts, is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation." 68 So. 2d, at 369.

testimony known by the prosecution to be perjured offends due process. *Mooney* v. *Holohan,* 294 U. S. 103; *Pyle* v. *Kansas,* 317 U. S. 213. While the petition did not allege that the prosecution knew that petitioner's codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to a denial of due process of law.

Perhaps a hearing on the charges would dispel them. But on the present record, we have a grave miscarriage of justice involving an invasion of federal rights guaranteed by the Fourteenth Amendment.

BLACK ET AL. *v.* CUTTER LABORATORIES.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 92. Argued April 26, 1956.—Decided June 4, 1956.

A corporation manufacturing pharmaceutical and biological products in California discharged an employee on the grounds that she was an active member of the Communist Party and had falsified her application for employment. Her union sought her reinstatement before an arbitration board pursuant to a valid collective-bargaining agreement which authorized discharge for "just cause" only. Finding that she was an active member of the Communist Party and had falsified her application for employment, but that these grounds for discharge had been waived by the employer and that she actually was discharged for union activities, the board ordered her reinstatement. The lower California courts affirmed this order; but the Supreme Court of California reversed. Certiorari was granted by this Court on a petition contending that the decision and opinion violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Upon an analysis of the record, however, it appeared that the Supreme Court of California construed the term "just cause" to embrace membership in the Communist Party and refused to apply a doctrine of waiver. *Held:* The decision involves only California's construction of a local contract under local law; no substantial federal question is presented; and the writ of certiorari is dismissed. Pp. 293–300.

(a) This Court reviews judgments, not statements in opinions; and it will not pass on federal questions discussed in the opinion of a state court where it appears that the judgment rests on adequate state grounds. Pp. 297–298.

(b) The scope of review of the findings of the arbitration board under the California Arbitration Act is a matter exclusively for the courts of that State. P. 298.

(c) The Supreme Court of California construed the term "just cause" to embrace membership in the Communist Party and refused to apply a doctrine of waiver. Pp. 298–299.

(d) Such a decision involves only California's construction of a local contract under local law, and no substantial federal question is presented. P. 299.

Writ of certiorari dismissed.

Joseph Forer argued the cause for petitioners. On the brief were *Bertram Edises, A. L. Wirin* and *Abraham Glasser.*

Gardiner Johnson and *Thomas E. Stanton, Jr.* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *Edward J. Ennis* for the American Civil Liberties Union, and *Charles R. Garry* for the National Lawyers Guild, San Francisco Chapter.

Lambert H. Miller filed a brief for the National Association of Manufacturers of the United States, as *amicus curiae,* urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

In 1949 Mrs. Doris Walker was discharged from her job at Cutter Laboratories, a manufacturer of pharmaceutical and biological products, on the claimed grounds that she was an active member of the Communist Party and had falsified her application for employment there.[1]

[1] At the time of discharge a written notice was read to Mrs. Walker by a company official in the presence of another company official, an assistant shop steward of the union and a company stenographer. The notice read as follows:

"Mrs. Walker:

"As you are aware, the company has known for some time that when you applied for work with Cutter Laboratories on October 4, 1946, you made a number of false representations on your 'Application for Employment.'

"As we know now, you falsified the statement of your education so as to conceal the fact that you had completed a law school course at the University of California's School of Jurisprudence at Berkeley in May, 1942. You concealed the facts that you received the degree of Bachelor of Laws in May, 1942, and that you were admitted to the State Bar of California on December 8, 1942. You concealed that since that date you have at all times been admitted and entitled to practice as an attorney before all of the Courts of California.

"We know now that by falsification of the name of a previous

Petitioner, Bio-Lab Union of Local 225, United Office & Professional Workers of America, sought reinstatement for Mrs. Walker before an Arbitration Board pursuant to a valid collective-bargaining agreement which author-

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employer, you concealed the fact that from June, 1942 to February, 1944 you were employed by the Federal Government's Office of Price Administration, including employment as an Enforcement Attorney at a salary of about $3,200.00 a year.

"We know now that you deliberately concealed from us that from February 1944 to December, 1945 you were employed as an attorney by Gladstein, Grossman, Sawyer and Edises, a well-known firm of lawyers specializing in labor cases.

"You know that a few weeks ago the 'Labor Herald,' the official CIO newspaper, stated that the National Labor Relations Board had sustained a cannery firm that had discharged you for refusing to answer whether or not you were a Communist.

"We have checked the records. We know now that you deliberately concealed that in 1946, just before you applied for work here, you were employed by a series of canneries and had been discharged by them.

"Ordinarily, an employee of the Company would be discharged immediately for falsifying material facts on an 'Application for Employment.' Because you were an officer of the Union we kept you on the pay roll rather than open ourselves to a charge of persecuting a union officer. We have given your case careful consideration because we know very well that no matter how strong the case against you there will be a claim of discrimination because of union activities.

"Because no employer wants to become involved in a dispute of that kind we have been patient and deliberate in our consideration of your misconduct.

"On October 1, 1948, when you testified under oath before a Trial Examiner of the National Labor Relations Board, you refused to answer the question as to whether or not you were a member of the Communist Party.

"You refused to answer under oath the question as to whether or not you were or had been a member of the Federal Workers' Branch No. 3 of the Communist Party.

"You refused to testify under oath whether or not you were or had been a member of the South Side Professional Club of the Communist Party.

"We are convinced now, that you were and still are a member of

ized discharge for "just cause" only. The Board determined that she had been discharged for union activity and, by a vote of 2 to 1, ordered her reinstatement. The Superior Court of San Francisco County confirmed the award and ordered it enforced. On appeal, the District Court of Appeal affirmed. The Supreme Court of California, however, reversed. 43 Cal. 2d 788, 278 P. 2d 905. Petitioners contend that the decision and opinion below violate constitutional principles embraced in the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We granted certiorari, 350 U. S. 816.

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the Communist Party, that you were a member of the Federal Workers' Branch No. 3 of the Communist Party, and that you were a member of the South Side Professional Club of the Communist Party.

"Our recent investigation of your past record has uncovered previously unknown conduct that goes far beyond a mere concealment of material facts. We have just completed a thorough investigation and have a full report upon your past activities. We realize now the importance of the facts that you concealed from us. We realize the full implications of your falsification and misrepresentations. A follow-up and investigation of the 'Labor Heralds' recent revelations has uncovered a situation far more grave than we expected.

"We are convinced now that for a number of years, you have been and still are a member of the Communist Party. We are convinced beyond any question that for a number of years you have participated actively in the Communist Party's activities.

"The nature of our company's business requires more than the usual precaution against sabotage and subversion. Upon a disclosure that any employee is a member of the Communist Party, or has participated in other subversive or revolutionary activity, we conceive it to be the responsibility of management to take action.

"Confronted with such a situation, any inclination to be lenient or to grant a union official special consideration is out. In the face of your record there is no alternative open to us except to terminate your services at once. Accordingly, you are notified now that you are discharged for the causes mentioned. You will be paid the full amount due to you promptly."

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Before Mrs. Walker applied for a job at the Cutter plant, she had graduated from law school, worked for three years as an attorney for the Office of Price Administration and in private practice, and had been discharged for union activity from jobs in three different canneries. All of these facts, she readily admitted to the Board, were concealed or misrepresented by her in the Cutter employment application in 1946. In addition, she admitted that she had falsely stated that she had been employed as a file clerk in 1939 by one John Trippe, attorney. She told the Board that no such person or employment had existed. The character references she listed had been warned by her of the omissions and falsifications in her application and at her request they did not disclose her true background to Cutter. These falsifications and omissions were not discovered until after she had been employed as a label clerk by the Cutter plant and the "probationary period" had expired.

The Arbitration Board found that Mrs. Walker had played an active role in union activities at the Cutter plant. In 1947 she became a shop chairman and a member of the executive board of the Local. The following year she was elected chief shop steward, and her activities were extended to all manufacturing departments of the Laboratory. She became president of the Local in the spring of 1949, and was holding that office at the time of her discharge. The Board also found that Mrs. Walker was a member of the Communist Party during the period of her employment. Cutter had investigated her in 1947 and 1949 and had discovered evidence of Communist Party membership and also that she had falsified her employment application. The Board's finding of Communist Party membership was based on evidence uncovered in the Cutter investigations plus Mrs. Walker's

refusal to answer questions relating to membership and the Union's offer to stipulate that the company could reasonably have concluded that she was a Communist.[2]

The Board took the "view of the record" that Cutter honestly believed that Mrs. Walker had falsified her application and was a member of the Party. But it held that, "while an employer may have sufficient grounds for a discharge," he "should not be entitled to carry mutually known grounds for discharge in his hip pocket indefinitely for future convenient use." It found Cutter's grounds to be "stale" and concluded that Mrs. Walker was unjustly discharged and that this action of Cutter "interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation."

The majority opinion of the Supreme Court of California contains broad statements to the effect that specific performance of the arbitration award would violate the public policy of the State. Petitioner's constitutional arguments are based on the belief that these statements establish the ground on which the judgment below was based, and that therefore the decision below not only establishes a conclusive presumption of advocacy of violence from the mere fact of membership in the Communist Party, but renders unenforceable substantially all contracts entered into by members of the Party.

This Court, however, reviews judgments, not statements in opinions. *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126; *Morrison* v. *Watson,* 154 U. S. 111, 115. See also

[2] Since the Board was authorized to inquire into the reasons for her discharge and the questions were, as it ruled, relevant to the issue, it could draw such inferences as were warranted. In this respect the case is unlike *Slochower* v. *Board of Education,* 350 U. S. 551.

Williams v. *Norris,* 12 Wheat. 117, 118, 120. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Herb* v. *Pitcairn, supra; Williams* v. *Kaiser,* 323 U. S. 471, 477.

It is significant that the Supreme Court of California did not limit itself to a discussion of the application of the California public policy. It also subjected the findings of the Arbitration Board to a scrutinizing review. Of course, the scope of review of such findings under the California Arbitration Act is a matter exclusively for the courts of that State, and is not our concern. *Allen-Bradley Local* v. *Labor Board,* 315 U. S. 740, 747.

First, the court determined that, since Mrs. Walker was a continuing member of the Communist Party, the doctrine of waiver could not be applied to this ground for discharge. The court noted that Mrs. Walker had remained a member of the Party "on an active and devoted basis even at the time of the board hearings." [3] 43 Cal. 2d, at 807, 278 P. 2d, at 916.

Second, it is clear that the individual parties might have agreed that the circumstance of Communist Party membership would constitute "just cause" under the contract, and no federal question would thereby be raised. It is implicit in the Arbitration Board's opinion that this

[3] While the court also spoke of its public policy in reaching this conclusion, its reasoning outlined above amply supports its conclusion.

was a reasonable construction of the contract, but since it applied a doctrine of waiver, no explicit findings on this point were made. But, as we read the opinion of the Supreme Court of California, after concluding that waiver could not be applied to the facts of this case, it decided that the "just cause" provision of the contract permitted discharge on the ground of Communist Party membership, and that Mrs. Walker was discharged on that ground. The court stated, "The contract between Cutter Laboratories and the Bio-Lab Union cannot be construed, and will not be enforced, to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise." 43 Cal. 2d, at 809, 278 P. 2d, at 917. At another point, the court noted that "an entirely adequate ground [Party membership] for refusing to employ her (whether by original refusal to hire or by discharge) was a continuing one which was available to the employer at any time during its existence." 43 Cal. 2d, at 807, 278 P. 2d, at 916. In this connection, it might also be noted that the court below discussed the history of the clause in the contract which prohibited discrimination "because of race, color, creed, national origin, religious belief, or Union affiliation." At one time the word "political" as well as "religious belief" was included in the provision, but, by negotiation, it was deleted.

We believe that the Supreme Court of California construed the term "just cause" to embrace membership in the Communist Party, and refused to apply a doctrine of waiver. As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question. See

Stembridge v. *Georgia,* 343 U. S. 541, 547, and cases cited. Cf. *United States* v. *Rumely,* 345 U. S. 41. It follows that the writ must be

Dismissed.

MR. JUSTICE REED would affirm the judgment below.

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

I believe, with all deference, that the decision of the Court abuses the rule that we will not undertake to review a decision of a state court that rests on an independent state ground. No independent state ground is present in this case. Rather, it is easily demonstrated, I think, that the decision of the Supreme Court of California squarely and directly raises an important question under the First and Fourteenth Amendments.

At times we have ambiguous opinions that make us unsure of the precise grounds of the decision of the state court. In this case, however, we are left in no doubt. The arbitrators found that the employer discharged this worker because of her labor union activities, using the charge of Communism as a mere pretext. The Supreme Court of California went on no such ground. It is clear from a reading of its opinion (43 Cal. 2d 788, 278 P. 2d 905), that it approved the employer's discharge of this worker because she was a Communist. The tactics of Communists and the dangers of Communism make up a total of 11 pages of the 21-page majority opinion of the Supreme Court. Among other things, the Supreme Court of California said:

"From the array of congressional and legislative findings which have been quoted above, if not from the common knowledge of mankind, it must be accepted as conclusively established that a member of the Communist Party cannot be loyal to his private employer as against

any directive of his Communist master." 43 Cal. 2d, at 806, 278 P. 2d, at 916. It went on to hold that "acts of sabotage by Communists are reasonably to be expected at any time such acts may be directed by the party leader" (43 Cal. 2d, at 807, 278 P. 2d, at 916) and that an employer has the "right to discharge employees who upon the established facts are dedicated to be disloyal to him, to be likewise disloyal to the American labor union they may purport to serve, and who constitute a continuing risk to both the employing company and the public depending upon the company's products." 43 Cal. 2d, at 807, 278 P. 2d, at 917.

The arbitrators found that any grievance against Doris Walker was a stale one, the employer having known all her Communist activities for two years. The Superior Court upheld that finding. The District Court of Appeal ruled that the employer "sat back for two and a half years" and then used her Communist activities as an excuse for injuring the union in its lawful labor activity. 266 P. 2d 92, 100. But the Supreme Court held that she was discharged not for her "labor union activities" but for her "Communist Party activities." 43 Cal. 2d, at 808, 278 P. 2d, at 917. It said that the fact that the employer, knowing all the facts, did nothing for two years was irrelevant, since it was against the "public policy" of California to conclude that there was a waiver by the failure to discharge a Communist. 43 Cal. 2d, at 806, 278 P. 2d, at 916. It is plain, therefore, that the judgment of the Supreme Court of California sustains a discharge of this worker because she was a Communist.

The Court says that the parties to a collective-bargaining agreement may make Communist Party membership "just cause" for discharge of an employee, that discharge for that reason is merely a matter of contract between the union on the one hand and the employer on the other, and that when the contract is enforced no federal right is

infringed. I disagree with that doctrine. It is a dangerous innovation to meet the exigencies of the present case. It violates First Amendment guarantees of citizens who are workers in our industrial plants.

I can better illustrate my difficulty by a hypothetical case. A union enters into a collective-bargaining agreement with an employer that allows any employee who is a Republican to be discharged for "just cause." Employers can, of course, hire whom they choose, arranging for an all-Democratic labor force if they desire.* But the courts may not be implicated in such a discriminatory scheme. Once the courts put their imprimatur on such a contract, government, speaking through the judicial branch, acts. *Shelley* v. *Kraemer,* 334 U. S. 1; *Barrows* v. *Jackson,* 346 U. S. 249. And it is governmental action that the Constitution controls. Certainly neither a State nor the Federal Government could adopt a political test for workers in defense plants or other factories. It is elementary that freedom of political thought is protected by the Fourteenth Amendment against interference by the States (*De Jonge* v. *Oregon,* 299 U. S. 353, 364–365) and against federal regimentation by the First Amendment.

Government may not favor one political group over another. Government may not disqualify one political group from employment. And if the courts lend their support to any such discriminatory program, *Shelley* v. *Kraemer, supra,* teaches that the Government has thrown

*A union has no such liberty if it operates with the sanction of the State or the Federal Government behind it. It is then the agency by which governmental policy is expressed and may not make discriminations that the Government may not make. See *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood,* 323 U. S. 210; *Railroad Trainmen* v. *Howard,* 343 U. S. 768; *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 337; *Syres* v. *Oil Workers Union,* 350 U. S. 892, reversing 223 F. 2d 739; *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225.

its weight behind an unconstitutional scheme to discriminate against citizens by reason of their political ideology. That cannot be done in America, unless we forsake our Bill of Rights.

It has hitherto been assumed that Communists, except and unless they violate laws, are entitled to the same civil rights as other citizens. In 1937, Chief Justice Hughes wrote to that effect for a unanimous Court in *De Jonge* v. *Oregon, supra.* That decision held that a State could not punish Communists for having a public meeting to discuss a matter of public concern. Chief Justice Hughes said that First Amendment rights might be abused "to incite to violence and crime." 299 U. S., at 364. But he went on to say, "The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *Id.,* at 364–365.

Cutter Laboratories is an important pharmaceutical factory. It may need special protection. It may need to establish safeguards against sabotage and adulteration. It may need special screening of its employees. But there is not a word in the present record indicating that it needs protection against Doris Walker. She has no criminal record. She is guilty of no adulteration, no

act of sabotage. The factory in question has not been plagued with any such problem. It is only the fear that Doris Walker might at a future time engage in sabotage that is made the excuse for her discharge. I do not think we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear.

The blunt truth is that Doris Walker is not discharged for misconduct but either because of her legitimate labor union activities or because of her political ideology or belief. Belief cannot be penalized consistently with the First Amendment. As Mr. Justice Roberts wrote for a unanimous Court in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304, the First Amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." The Court today allows belief, not conduct, to be regulated. We sanction a flagrant violation of the First Amendment when we allow California, acting through her highest court, to sustain Mrs. Walker's discharge because of her belief.

UNITED STATES *v.* McKESSON & ROBBINS, INC.

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

No. 448. Argued April 30, 1956.—Decided June 11, 1956.

Appellee is the largest drug wholesaler in the United States and sells to retailers in many states. It also manufactures its own line of brand-name drugs, which it sells to retailers and to independent wholesalers in many states. It refused to sell its brand products to independent wholesalers which had not entered into agreements that, in wholesaling appellee's products, they would adhere to the wholesale prices fixed by appellee. As a result, many independent wholesalers which were in direct competition with appellee's wholesaling operations signed such agreements. *Held:* Such price-fixing agreements were not exempted from the prohibitions of § 1 of the Sherman Act by the "fair-trade" provisions of the Miller-Tydings Act or the McGuire Act. Pp. 306–316.

(a) Such price-fixing agreements are illegal *per se* under § 1 of the Sherman Act, unless they are within the exemptions of the Miller-Tydings Act or the McGuire Act. Pp. 308–311.

(b) The exemptions of the Miller-Tydings Act and the McGuire Act are expressly made inapplicable to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other," and these words must be taken in their normal and customary meaning. Pp. 311–312.

(c) Appellee is admittedly a "wholesaler" with resale price maintenance contracts with many other "wholesalers" who are in competition with it, and it cannot be brought within the exemptions of the Miller-Tydings Act or the McGuire Act by resort to a fiction that it acts only as a manufacturer when it concludes such agreements with competing wholesalers. P. 312.

(d) Even if appellee were not properly considered a "wholesaler," it would not be within the exemptions of the Miller-Tydings Act or the McGuire Act, because the price-fixing agreements here involved are "between persons, firms, or corporations in competition with each other" within the meaning of those Acts. Pp. 312–313.

(e) This restrictive language is unambiguous, and a different result is not required by the legislative history of the McGuire Act. Pp. 313–315.

(f) These limitations must be construed strictly, since resale price maintenance is a privilege restrictive of a free economy. Pp. 315–316.

Reversed and remanded.

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff* and *Assistant Attorney General Barnes.*

John P. McGrath argued the cause for appellee. With him on the brief were *Laurence C. Ehrhardt* and *Marland Gale.*

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

This is a direct appeal by the Government under the Expediting Act, 32 Stat. 823, 15 U. S. C. § 29, as amended by 62 Stat. 869, from a decision of the District Court for the Southern District of New York, interpreting the scope of the exemption from the antitrust laws provided by "fair trade" legislation.

Appellee, a Maryland corporation with its home office in New York, is the largest drug wholesaler in the United States. Operating through 74 wholesale divisions located in 35 States, it sells drugstore merchandise of various brands to retailers, principally drugstores, substantially throughout the nation. For the fiscal year ended March 31, 1954, its sales of all drug products amounted to $338,000,000.

Appellee is also a manufacturer of its own line of drug products, the total sales of which amounted to $11,000,000 for the year ended March 31, 1954. Its manufacturing operation is conducted through a single manufacturing division, McKesson Laboratories, located at Bridgeport, Connecticut. This division, like each of appellee's wholesale divisions, has a separate headquarters and a separate staff of employees, but none of the 75 divisions is

separately incorporated. All are component parts of the same corporation and are responsible to the corporation's president and board of directors.

Appellee distributes its own brand products to retailers through two channels: (1) directly to retailers, and (2) through independent wholesalers. The major portion of its brand products is distributed to retailers through its own wholesale divisions. Appellee also makes direct sales to important retailers through its manufacturing division. Most of appellee's sales to independent wholesalers are made by its manufacturing division, but its wholesale divisions sold approximately $200,000 of McKesson brand products to other wholesalers during the fiscal year ended June 30, 1952.

To the extent possible under state law, appellee requires all retailers of its brand products to sell them at "fair trade" retail prices fixed by appellee. These prices are set forth in published schedules of wholesale and retail prices.

Appellee also has "fair trade" agreements with 21 independent wholesalers who buy from its manufacturing division. Sixteen of these independents compete with appellee's wholesale divisions. The other 5 compete with the manufacturing division for sales to chain drugstores located in their trading areas. On June 6, 1951, in accordance with appellee's "fair trade" policy, a vice president in charge of merchandising notified appellee's wholesale divisions that—

> "None of our wholesale divisions will sell any McKesson labeled products to any wholesaler who has not entered into a fair trade contract with McKesson Laboratories."

As a result, 73 of the independent wholesalers who had been dealing with McKesson wholesale divisions entered

into "fair trade" agreements with McKesson by which they bound themselves in reselling its brand products to adhere to the wholesale prices fixed by it. Each of these independent wholesalers is in direct competition with the McKesson wholesale division from which it buys.

The Government, under Section 4 of the Sherman Act,[1] brought this civil action for injunctive relief against appellee in the District Court. The complaint charged that appellee's "fair trade" agreements with independent wholesalers with whom it was in competition constituted illegal price fixing in violation of Section 1 of the Act. Appellee admitted the contracts, but claimed that they were exempted from the Sherman Act by the Miller-Tydings Act[2] and the McGuire Act.[3]

The Government moved for summary judgment on the ground that these Acts do not immunize McKesson's agreements with other wholesalers, since they expressly exclude from their exemption from the antitrust laws contracts "between wholesalers" or "between persons, firms, or corporations in competition with each other." The district judge denied the motion.[4] He recognized that price fixing is illegal *per se* under the Sherman Act, but announced that in "fair trade" cases "No inflexible standard should be laid down to govern in advance." He was "unwilling, at this stage of case law development of legislatively sanctioned resale price fixing" to apply the *per se* rule "in fair trade situations absent a factual showing of illegality." Such a showing, he said, could not be made "simply by pointing to *some* restraint of competition." The "true test of legality" of "fair trade" agreements between a producer-wholesaler and independent

[1] 26 Stat. 209.

[2] 50 Stat. 693.

[3] 66 Stat. 632.

[4] 122 F. Supp. 333.

wholesalers, the court held, "is whether some additional restraint destructive of competition is occasioned." [5]

The case then proceeded to trial before another district judge, who concurred in the "ruling that fair trade price fixing by a producer-wholesaler was not per se illegal under the Sherman Act," and held that the Government's evidence did not establish an "additional restraint" within the meaning of the test previously enunciated in the case.[6] He ordered the complaint dismissed, and the Government took a direct appeal under the Expediting Act. We noted probable jurisdiction.[7]

The issue presented is a narrow one of statutory interpretation. The Government does not question the so-called vertical "fair trade" agreements between McKesson and retailers of McKesson brand products. It challenges only appellee's price-fixing agreements with independent wholesalers with whom it is in competition.

Section 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." [8]

It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does

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[5] 122 F. Supp., at 337–339. The district judge provided an illustration of the kind of conduct which might satisfy his test:
"If, for example, it could be established that a producer became a wholesaler, though not in competition with an independent wholesaler, and stipulated prices for his own and the independent wholesaler as a first step toward and with intent to gouge consumers, that might suffice *prima facie* as violation of the Sherman Act outside the privilege of the fair trade statutes."

[6] R. 180.

[7] 350 U. S. 922.

[8] 26 Stat. 209.

not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable.[9] It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.[10]

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, in holding price-fixing agreements to be illegal *per se*, this Court said:

> "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . . the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." [11]

And it has been said by this Court:

> "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act." [12]

The question before us is whether the price-fixing agreements challenged herein move along that route. If they do not, they are illegal *per se*. There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional

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[9] *E. g., United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458. See also *Standard Oil Co.* v. *United States*, 221 U. S. 1, 65.

[10] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–224.

[11] 310 U. S., at 221–222.

[12] *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721.

per se doctrine. The District Court was plainly in error in attempting to create a category of agreements which are outside the exemption of those Acts but which should nevertheless be spared from application of the *per se* rule.

In the Miller-Tydings Act, passed as a rider to a District of Columbia revenue bill, Congress was careful to state that its exemption of certain resale price maintenance contracts from the prohibitions of the antitrust laws "shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or *between wholesalers,* or between brokers, or between factors, or between retailers, or *between persons, firms, or corporations in competition with each other.*" [13] (Emphasis supplied.)

Fifteen years later, Congress attached an almost identical proviso to the McGuire Act.[14] We are to take the

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[13] 50 Stat. 693. This proviso qualified the proviso immediately preceding it, which amended § 1 of the Sherman Act so as to make lawful resale price maintenance contracts entered into by manufacturers of branded or trade-marked goods if such contracts are authorized by state law as to intrastate transactions and if the commodity affected is in "free and open competition with commodities of the same general class produced or distributed by others . . . ."

[14] 66 Stat. 632. The McGuire Act amended § 5 (a) of the Federal Trade Commission Act by adding, *inter alia,* § 5 (a)(2). This specifically exempts from the antitrust laws price fixing under "fair trade" agreements which bind not only retailers who are parties to the agreement but also retailers who refuse to sign the agreement. As in the Miller-Tydings Act, the statutory exemption was qualified by an important proviso. This stated:

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or *between wholesalers,* or

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words of these statutes "in their normal and customary meaning." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 388.

Appellee is admittedly a wholesaler with resale price maintenance contracts with 94 other wholesalers who are in competition with it. Thus, even if we read the proviso so that the words "in competition with each other" modify "between wholesalers," the agreements in question would seem clearly to be outside the statutory exemption. Appellee concedes that the proviso does not exempt a contract between two competing independent wholesalers fixing the price of a brand product produced by neither of them.[15] Yet it urges that what would be illegal if done between competing independent wholesalers becomes legal if done between an independent wholesaler and a competing wholesaler who is also the manufacturer of the brand product. This is so, appellee maintains, because in contracting with independent wholesalers it acted solely as a manufacturer selling to buyers rather than as a competitor of these buyers. But the statutes provide no basis for sanctioning the fiction of McKesson, the country's largest drug wholesaler, acting only as a manufacturer when it concludes "fair trade" agreements with competing wholesalers. These were agreements "between wholesalers."

Any doubts which might otherwise be raised as to the propriety of considering a manufacturer-wholesaler as a

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between brokers, or between factors, or between retailers, or *between persons, firms, or corporations in competition with each other.*" (Emphasis supplied.)

[15] Appellee's brief, p. 6. In the District Court and in its motion to affirm filed in this Court, however, appellee claimed that the proviso applies only to agreements "between manufacturers of competing products, or between wholesalers of competing products, or retailers of such products, fixing the prices at which *two or more* competitive products are to be sold." (Appellee's emphasis.) Motion to affirm, pp. 5–6.

"wholesaler" are dispelled by the last phrase of the proviso in question, which continues the proscription against price-fixing agreements "between persons, firms, or corporations in competition with each other." Congress thus made as plain as words can make it that, without regard to categories or labels, the crucial inquiry is whether the contracting parties compete with each other. If they do, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices. The Court stated in *Schwegmann Bros.* v. *Calvert Corp.,* 341 U. S. 384, 389, that this proviso "expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." [16] Since appellee competes "at the same functional level" with each of the 94 wholesalers with whom it has price-fixing agreements, the proviso prevents these agreements from falling within the statutory exemption.

Appellee argues that a brief colloquy on the Senate floor between a supporter of the McGuire Act and an inquiring Senator shortly before the Act was passed should dictate a meaning contrary to that revealed by the Act's plain language. But, at best, the statement was inconclusive.[17] And the Senator whose statement is relied on was not in charge of the bill, nor was he a member of

[16] Previous phrases of the proviso appear in state "fair trade" laws, upon which the proviso seems to have been modeled. FTC Report on "Resale Price Maintenance," pp. 80–81 (1945). The last phrase, however, has apparently never been included in any state statute. Thus, meticulous inclusion of this phrase in the federal acts is not without significance.

[17] 98 Cong. Rec. 8870. Senator Humphrey, in answer to an inquiry by Senator Sparkman, said:

". . . If, for example, when a producer, who sells to distributors, wholesalers, retailers, and consumers, makes a resale price-maintenance agreement relative to a commodity made by him and bearing a trade-mark or brand, with a distributor, wholesaler, or retailer who resells such commodity at either the wholesale, or retail level, there

any committee that had considered it. Moreover, the McGuire Act was not a Senate bill, having been passed by the House of Representatives prior to this Senate discussion. There is nothing in the proceedings of the

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exists a vertical resale price-maintenance contract which would be lawful under the bill if the requirements of paragraph (2) are met.

"On the other hand, *if one wholesaler enters into a resale price-maintenance agreement with another wholesaler prescribing the price at which they both sell a trade-marked or branded commodity which they both buy from the producer, that agreement would be horizontal and would not be made lawful.*

"In other words, wholesalers getting together on a price are acting illegally. For a manufacturer to get together with other manufacturers to maintain prices is illegal, but for a manufacturer to say that a certain product will sell at a certain price from the manufacturer down to the retailer is legal under the limitations prescribed in paragraph (2) of section 5 (a) of the Federal Trade Commission Act.

"In general, the test of whether a resale price-maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price-maintenance contract is horizontal as if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

"It is important to keep this distinction in mind, because *many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.*

"*Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers.* While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers." (Emphasis added.)

It should be noted that these remarks appear to be confined to the "between wholesalers" and "between retailers" phrases and do not deal with the "corporations in competition" phrase. And, even as to the former, it is not at all clear that Senator Humphrey was discussing the situation where actual competition exists between the manufac-

House to indicate that the meaning for which appellee contends should be given to the Act. Similarly, except to show congressional concern that the prohibition against "horizontal" price fixing be continued, the Senate and House debates on the proviso in the Miller-Tydings Act are of little assistance with respect to the problem before us.

The court below did not rely on the legislative history, finding it to be "unedifying and unilluminating." [18] We agree with this appraisal, but are not troubled by it since the language of the proviso in question is unambiguous.[19] It excludes from the exemption from the *per se* rule of illegality resale price maintenance contracts between firms competing on the same functional level.

Both the Government and appellee press upon us economic arguments which could reasonably have caused Congress to support their respective positions.[20] We need

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turer-wholesaler and independent wholesalers. As indicated in note 15, *supra,* until we noted probable jurisdiction, appellee flatly disagreed with an important part of this statement.

[18] 122 F. Supp., at 336.

[19] Cf. *Greenwood* v. *United States,* 350 U. S. 366, 374.

[20] The Government maintains that a resale price maintenance agreement between a manufacturer-wholesaler and competing independent wholesalers, in addition to eliminating competition between the parties, enables the former, because of its leverage as a manufacturer of branded products, to dictate the latter's prices on these products. Such an agreement, the Government claims, also leaves the manufacturer-wholesaler free to undersell the independent wholesalers when dealing with large retailers directly through its manufacturing division. And if the manufacturer's own wholesale outlets are inefficient, resale price maintenance permits it to insulate those outlets from the inroads of more efficient operators by setting its "fair trade" price higher than otherwise. According to the Government, none of these effects is present where price fixing exists between independent wholesalers and a nonintegrated manufacturer.

Appellee contends that the economic effects of "fair trading" are the same whether or not the manufacturer has its own wholesale out-

not concern ourselves with such speculation. Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy. Cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, 280.

The judgment of the District Court dismissing the complaint must, therefore, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON join, dissenting.

Lack of sympathy with an Act of Congress does not justify giving to it a construction that cannot be rationalized in terms of any policy reasonably attributable to Congress. Rather our duty, as always, is to seek out the policy underlying the Act and, if possible, give effect

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lets, since the protection which resale price maintenance provides to the manufacturer's good will "necessarily involves elimination of price competition among different outlets for the manufacturer's own branded merchandise." In both situations, appellee claims, the manufacturer makes "at the source, as a manufacturer, . . . downstream price fixing arrangements with its outlets."

The court below indicated an awareness of the economic arguments on both sides but refused to follow "either of alternate horns . . . in the dilemma of fair trade agreements with independent wholesalers by a manufacturer who is also a wholesaler . . . ." 122 F. Supp., at 337. Instead, the district judge advocated a case-by-case examination of the economic setting in which the question arises, with the burden on the Government to show "some *additional* restraint destructive of competition." 122 F. Supp., at 339.

For discussion of these economic contentions and the conclusions which they are designed to support, see Weston, Resale Price Maintenance and Market Integration: Fair Trade or Foul Play? 22 Geo. Wash. L. Rev. 658; Note, 64 Yale L. J. 426; 54 Col. L. Rev. 282.

to it. In this instance, I think the Court has departed from that rule by giving the Miller-Tydings and McGuire Acts an artificial construction which produces results that could hardly have been intended by Congress.

The purpose of the state fair-trade laws is to allow the manufacturer of a brand-named product to protect the goodwill his name enjoys by controlling the prices at which his branded products are resold. *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 193–194. The necessary result—indeed, the very object—is to permit the elimination of price competition in the branded product among those who sell it. Congress has sanctioned those laws in the Miller-Tydings and McGuire Acts, considering them not to be offensive to federal antitrust policy.[1] Sufficient protection to the public interest was deemed to be afforded by the competition among different brands, a safeguard made express by the provision of the Miller-Tydings and McGuire Acts denying fair-trade contracts exemption from the antitrust laws unless the fair-traded product is "in free and open competition with commodities of the same general class." In short, the very purpose of the Acts is to permit a manufacturer to set the resale price for his own products while preserving competition between brands—that is, between the fair-traded item and similar items produced by other manufacturers.

If we accept the legislative judgment implicit in the Acts that resale price maintenance is necessary and desirable to protect the goodwill attached to a brand name,

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[1] The Court refers to the Miller-Tydings Act as having been "passed as a rider to a District of Columbia revenue bill." It is pertinent to note that, in passing the later McGuire Act, Congress not only reaffirmed the policy of the Miller-Tydings Act but also eliminated the restrictive effect of this Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, as regards "non-signers" of fair-trade contracts.

there is no meaningful distinction between the fair-trade contracts of integrated and non-integrated manufacturers. Certainly the integrated manufacturer has as strong a claim to protection of his goodwill as a non-integrated manufacturer, and the economic effect of the contracts is the same. In both cases price competition in the resale of the branded product is eliminated, and in neither case does the price fixing extend beyond the manufacturer's own product. While the Government concedes the right of a non-integrated manufacturer to eliminate price competition in his products between wholesalers, it finds a vice not contemplated by the Acts when one of the "wholesalers" is also the manufacturer, for then the contracts eliminate competition between the very parties to the contracts. But, in either case, all price competition is eliminated, and I am unable to see what difference it makes between whom the eliminated competition would have existed had it not been eliminated. The other bases of distinction suggested by the Government are equally tenuous and reflect a subtlety of analysis for which there is no support in either the Acts or their history.

So unsatisfactory, indeed, are the Government's attempts to rationalize the result contended for, that the Court chooses not to rely upon them, finding the language of the provisos so clear as to make it unnecessary even to hypothesize a consistent rationale attributable to Congress that might justify the discrimination against integrated producers. Indeed, not even the fact that the only legislative history directly in point is squarely opposed to the Court's reading of the statute (see note 17 of the Court's opinion, pp. 313–315) prompts enough doubt in the Court to require an inquiry into the purpose of the Acts. The Court's reasoning is this: the provisos except from the Acts contracts "between wholesalers" or "between persons, firms, or corporations in competition with each other"; McKesson is a "wholesaler"

as well as a manufacturer and is also "in competition with" independent wholesalers; its contracts with independent wholesalers are therefore forbidden contracts "between wholesalers" and between "corporations in competition with each other." This verbalistic argument can be answered by the equally verbalistic one that the fair-trade contracts, being made in connection with the sale of its own branded products, were made by McKesson in its capacity as a "manufacturer" rather than as a competing "wholesaler." Neither argument being more conclusive than the other, the answer to the problem can be found only by looking to the purpose of the provisos and its relation to the basic policy of permitting resale price maintenance of branded goods.

As noted above, the Acts necessarily contemplate the elimination of price competition in the resale of a particular branded product and rely for protection of the public interest upon competition between brands. Viewed in the light of this purpose, the provisos become readily understandable. The vice of price-fixing agreements between those in competition with each other, whether at the manufacturing, wholesaling, or retailing level, is that they can be utilized to eliminate competition *between brands.* Thus manufacturers might agree to fix the resale prices of their competing brands in relation to each other; the same result, on an even broader scale, could be achieved by agreements between wholesalers or retailers. Further, agreements initiated by anyone other than the owner of the brand name are unnecessary to the protection of goodwill, the very justification for permitting fair-trade contracts. Thus an agreement between wholesalers to fix the price of a product bearing the trade name of neither would serve no purpose other than the elimination of competition. Interpreting the provisos in the light of these considerations, I conclude that an integrated manufacturer selling

its products under fair-trade contracts to independent wholesalers should be deemed to be acting as a "manufacturer" rather than as a "wholesaler." This interpretation of the provisos fits with their terms and produces, rather than an arbitrary discrimination hardly intended by Congress, a result fully in harmony with the policy of the Acts to permit manufacturers to maintain the resale prices of their branded products while preserving competition between brands.[2]

For these reasons, therefore, I would hold McKesson's contracts to be within the Miller-Tydings and McGuire Acts and would affirm the judgment below.

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[2] The Federal Trade Commission, the administrative agency specially charged with administering the McGuire Act, has reached like conclusions. See *Eastman Kodak Co.*, 3 CCH Trade Reg. Rep. (10th ed.), par. 25, 291.

DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* UNION PACIFIC RAILROAD CO. ET AL.

NO. 117. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.*

Argued April 23–24, 1956.—Decided June 11, 1956.

1. After hearings upon complaint of the Rio Grande Railroad, the Interstate Commerce Commission ordered the Union Pacific to establish through routes with the Rio Grande for certain commodities such as fruits, perishable foods, and livestock in a limited geographical area, and to establish joint rates the same as applied on its own and other connecting lines. The Rio Grande, considering itself aggrieved both because of the geographical limitations of the order and because joint rates were not established for all commodities, challenged the order in the Federal District Court in Colorado. The court set aside the order on the ground that there was no substantial evidence to support the Commission's finding that through routes were not in existence. *Held:* The Commission's conclusion that the through routes claimed were not in existence was supported by substantial evidence, and it was error for the Colorado District Court to set aside the Commission's finding and to remand the case to the Commission. Pp. 323–330.
2. The Union Pacific, considering itself aggrieved because the Commission's order required establishment of some through routes and joint rates, challenged the order in the Federal District Court in Nebraska. That court sustained the order of the Commission with reference to shipments which required certain transit services on the Rio Grande, but refused to sustain the order with reference to shipments not requiring such transit services. *Held:* The judgment of the Nebraska District Court is affirmed insofar as it

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*Together with 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.*, on appeals from the same court; and No. 332, *Washington Public Service Commission et al.* v. *Denver & R. G. W. R. Co.*, No. 333, *Union Pacific Railroad Co. et al.* v. *Denver & R. G. W. R. Co.*, and No. 334, *United States et al.* v. *Denver & R. G. W. R. Co.*, on appeals from the United States District Court for the District of Colorado.

affirmed the order of the Commission, and is reversed insofar as it refused to enforce the Commission's order. Pp. 330–335.

(a) The Commission cannot be deemed to have acted in excess of its authority in concluding, on the evidence before it, that through routes and joint rates on the specified commodities were needed to provide adequate and more economic transportation and were necessary in the public interest. Pp. 330–333.

(b) The Nebraska District Court erred in cutting down the scope of the Commission's order insofar as it established through routes and joint rates on shipments that did not require certain transit services on the Rio Grande. Pp. 333–334.

(c) A shipper's privilege to have his goods reconsigned at joint rates should be considered on the same basis as transit services in determining the adequacy and economy of existing transportation. P. 334.

(d) The Commission's order was justified under §§ 15 (1), 15 (3) and 15 (4) of the Interstate Commerce Act, and the Nebraska District Court should have sustained the order in full. Pp. 334–335.

131 F. Supp. 372, reversed.

132 F. Supp. 72, affirmed in part and reversed in part.

Frank E. Holman argued the causes for the Denver & Rio Grande Western Railroad Co. With him on the brief were *Robert E. Quirk* and *Dennis McCarthy.*

Elmer B. Collins argued the causes for the Union Pacific Railroad Co. et al. With him on the brief were *L. E. Torinus, Roland J. Lehman, Eugene S. Davis, James C. Wilson, W. R. Rouse, Lowell Hastings, Edwin C. Matthias, M. L. Countryman, Jr., J. C. Gibson* and *John L. Davidson, Jr.*

Robert W. Ginnane argued the causes for the United States et al., appellants in Nos. 119 and 334 and appellees in No. 118. With him on the brief were *Solicitor General Sobeloff, Ralph S. Spritzer, Samuel R. Howell, Robert L. Farrington* and *Neil Brooks.*

Robert L. Simpson, Assistant Attorney General, argued the causes for the Washington Public Service Commission

et al., and *Bert L. Overcash* argued the causes for the State of Nebraska et al., appellants in Nos. 118 and 332 and appellees in Nos. 117 and 119. On the brief were *Don Eastvold,* Attorney General, and *Mr. Simpson* for the Washington Public Service Commission, *Clarence S. Beck,* Attorney General, and *Mr. Overcash* for the State of Nebraska et al., *George F. Guy,* Attorney General, for the State Board of Equalization and Public Service Commission of Wyoming, and *C. W. Ferguson* for the Public Utilities Commissioner of Oregon.

The causes were submitted on briefs by *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, 333 and 334.

Mr. Justice Black delivered the opinion of the Court.

These cases all involve the validity of a single order of the Interstate Commerce Commission establishing through railroad routes and prescribing joint through rates for carriage of certain goods over the routes. The Commission's order was made after lengthy hearings upon complaint of the Denver & Rio Grande Western Railroad Company. The Rio Grande's main line runs from Ogden, Salt Lake City, and Provo, Utah, across much of Colorado to Denver, Pueblo, and Trinidad. The chief controversy involved in this case is between the Rio Grande and the Union Pacific Railroad Company. The Union Pacific lines which are relevant here run from points in Washington and Oregon through Idaho, Utah, Wyoming, Colorado, Kansas, and Nebraska, going as far east as Omaha and Kansas City. The Union Pacific and Rio Grande connect at Ogden, Salt Lake City, and Provo, Utah, and at Denver, Colorado. The connection at Ogden is known

as the Ogden Gateway, meaning the gateway between the northwestern states served by the Union Pacific and states to the south and east served by the Rio Grande. The Union Pacific has used its strategic position in the northwest territory in such a way that practically all traffic between the Northwest, Denver and points east and south of Denver goes over its lines. For this reason the Northwest is often referred to as "closed door" territory. This situation caused the Rio Grande to file its complaint with the Commission. It charged that the Union Pacific had agreements with other connecting railroads named defendants under which goods could be carried to and from the Northwest at joint through rates, but that the only way the Rio Grande could carry goods to and from this area was by exacting higher "combination rates," which are the sum of local rates. These high rates practically bar the Rio Grande as a connecting carrier for through shipments to and from the Northwest. The Rio Grande asked the Commission to order the Union Pacific to establish and maintain for the future "just, reasonable and non-discriminatory competitive joint through rates" with the Rio Grande. It charged that the Union Pacific's failure to establish and maintain such rates violated §§ 1 (4), 3, 15 (1), and 15 (3) of the Interstate Commerce Act.[1] Section 15 (1) authorizes the Commission to proscribe individual or joint rates or practices that are "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial" and to prescribe rates and practices that are "just, fair, and reasonable." Section 15 (3) empowers the Commission to establish

[1] 24 Stat. 379, 380, 384, as amended, 49 U. S. C. §§ 1 (4), 3, 15 (1), 15 (3). Section 1 (4) makes it the duty of common carriers "to establish reasonable through routes with other such carriers, and just and reasonable rates . . . ." And § 3 (4) enjoins carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic" without discrimination or undue prejudice.

through routes and joint rates whenever deemed by the Commission "to be necessary or desirable in the public interest." Section 15 (4), which is very important in this controversy, places restrictive conditions upon the Commission's power to establish through routes under § 15 (3) when the establishment of a through route would require a railroad "without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route . . . ." [2] This provision is generally referred to as a prohibition against making a railroad "short-haul" itself. Among other findings the Commission must make under § 15 (4) before establishing a through route which requires a railroad to short-haul itself is that the new route "is needed in order to provide adequate, and more efficient or more economic, transportation . . . ."

The Rio Grande's petition before the Commission alleged that through routes with the Union Pacific already existed through the Ogden Gateway. It contended that they had been created and used by the Union Pacific. On this basis Rio Grande claimed that the restrictive conditions of § 15 (4) did not apply and that the Commission need not concern itself with those conditions but should proceed to establish reasonable joint rates under § 15 (3). After hearing much evidence the Commission rejected this contention and found that the through routes claimed by Rio Grande did not exist.[3] The Commission went on to find, however, that through routes should be established with reference to certain commodities such as fruits,

[2] 24 Stat. 384, as amended, 49 U. S. C. § 15 (4).

[3] Five Commissioners thought that through routes were in existence; five were of the opinion that they were not. Under ICC practice this meant that the Rio Grande had failed to prove its allegation that through routes existed.

perishable foods, and livestock in a limited geographical area. The Commission found in accordance with § 15 (4) that these new routes were needed "to provide adequate and more economic transportation . . . ." It also found as required by § 15 (3) that through routes and joint rates for the specified commodities were "necessary and desirable in the public interest." 287 I. C. C. 611, 659.

On the basis of its findings the Commission ordered the Union Pacific to establish through routes for the specified commodities and to establish joint rates the same as applied on its own and other connecting lines. The Union Pacific considered itself aggrieved because the order required establishment of some through routes and joint rates. The Rio Grande considered itself aggrieved both because of the geographical limitations of the Commission's order and because joint rates were not established for all commodities. The Union Pacific challenged the ICC order in a three-judge United States District Court in Nebraska and the Rio Grande challenged it in a three-judge United States District Court in Colorado. See 28 U. S. C. §§ 1336, 2284, 2321–2325. The Colorado court upset the order on a single ground. It held that there was no substantial evidence to support the finding that through routes were not in existence. Had the Commission found there were established through routes, the Colorado court reasoned, much broader relief for the Rio Grande might have been ordered, since the restrictions of § 15 (4) would not have been applicable. Consequently the Colorado court remanded the case to the Commission for further consideration. 131 F. Supp. 372. The Nebraska court accepted the Commission's finding that no through routes were in existence. It then held that there was evidence before the Commission sufficient to support the finding under § 15 (4) that through routes were needed "in order to provide adequate and more economic transportation" for specified commodities shipped from

the Northwest to initial destination points on the Rio Grande for "in-transit privileges incident to reshipment to points east of Denver . . . ." 132 F. Supp. 72, 82. The Nebraska court declined, however, to sustain the Commission's action with reference to shipments not requiring such transit services. Both District Court decrees are now before us on direct appeal under 28 U. S. C. §§ 1253 and 2101 (b). They were consolidated for oral argument and we treat them together here. It is convenient to take up first the Colorado court's holding.

In considering the question of through routes under § 15 (4) we begin with our recent holdings and opinions in *Thompson* v. *United States,* 343 U. S. 549; *United States* v. *Great Northern R. Co.,* 343 U. S. 562. We there emphasized the purpose of § 15 (4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline "short-hauls" without faithful observance of restrictive conditions imposed by that section. At the same time we recognized that Commission action is not necessary to the creation of through routes. We pointed out that a through route is ordinarily a voluntary arrangement, express or implied, between connecting carriers, and that the existence of such an arrangement depends on the circumstances of particular cases. We said in *Thompson* v. *United States, supra,* at 557, that "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." Findings of through routes can therefore be made on the basis of express agreements between carriers or on the basis of inferences drawn from continuous practices sufficient to show that through routes exist even though not provided for in formal contracts or tariffs. The question in each case is one of fact. Cf. *Through Routes and Through Rates,* 12 I. C. C. 163, 166–167. The Colorado court viewed the evidence here as showing beyond dispute the

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existence of through routes both by formal tariffs and by long railroad practices. Whether the evidence could have justified the Commission in finding the existence of through routes we need not determine. We are satisfied, however, that the evidence before the Commission did not compel it to make such a finding and that its conclusion that the through routes claimed were not in existence is supported by substantial evidence.

There was evidence that as early as 1897 the Union Pacific and lines it controlled did establish through routes to and from points in the "closed" northwest territory through the Ogden Gateway, and did establish joint through rates with the Rio Grande on the same basis as the joint through rates on Union Pacific's own lines. But these joint rates were canceled by Union Pacific in amended tariffs published between 1906 and 1912. Apparently there was no language in the published amended tariffs expressly and formally declaring that the through routes by way of the Ogden Gateway were also to be deemed closed. The amended tariffs, however, resulted in very high combination rates for northwest traffic transported by the Rio Grande. The effect of these high rates has been greatly to handicap if not actually to close the Rio Grande as an artery for through traffic between the Northwest, Denver and points south and east. Of course the effect of such rates might not be enough standing alone to show a voluntary abandonment of the through routes. See *Virginian R. Co.* v. *United States,* 272 U. S. 658, 666; *Thompson* v. *United States, supra,* at 556–558. At the same time it cannot be said that the Union Pacific's failure formally to declare the through routes abandoned in 1906 (when it canceled joint rates) automatically left the through routes in existence for § 15 (4) purposes in 1949 when this litigation started. Cancellation of the rates in 1906 without formal cancel-

lation of the routes is only a circumstance to be considered along with other circumstances in determining whether through routes now exist. The Colorado court relied on railroad practices as other circumstances which, considered with the failure expressly to abandon through routes, were sufficient to compel the Commission to hold that through routes did exist. We turn to that.

At best for the Rio Grande the evidence of railroad practices with reference to the continued existence of through routes showed the following. Despite the high combination rates a small number of shipments continue to trickle through the Ogden Gateway to and from the closed northwest territory. In 1948, which the Commission considered a representative year, a number of carload shipments moved on through bills of lading along the alleged through routes. But none of them coming from the Northwest went further than points on the Rio Grande in Colorado also served by the Union Pacific and connecting lines. There were a few shipments of various commodities from east and south of Denver which went by way of the Rio Grande through the Ogden Gateway. The total shipments over the alleged through routes, however, were no more than a fractional part of one percent of the traffic carried to and from the Northwest by way of the Union Pacific routes. It is also undisputed that through routes and joint rates exist for eastbound shipments of sheep and goats. During World War II some Army troop and supply trains moved over the Rio Grande on through bills of lading. In addition to the foregoing some traffic moved over the Rio Grande in 1949 when snow storms blocked the Union Pacific route through Wyoming. These movements were made under service orders of the Commission, which did not exercise its authority under § 15 (4) to establish emergency through routes.

The Union Pacific produced evidence tending to show that there were no through routes. It quite plainly appears from the record that there has been a long-standing struggle between the Union Pacific and the Rio Grande over the efforts of the Union Pacific to keep the Ogden Gateway closed. We think the record supports the finding of the Commission that:

> "There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic." 287 I. C. C., at 618.

We adhere to the "holding out" test of the *Thompson* case. The evidence before the Commission was not such as to compel it to find that the Union Pacific held itself out as offering through service over the Rio Grande lines. It was error for the Colorado District Court to set aside the Commission's finding and to remand the case to the Commission. This brings us to a consideration of the Nebraska District Court's action.

The Commission required the Union Pacific to establish through routes and joint rates with the Rio Grande for the carriage of certain commodities including livestock, fresh fruits and vegetables, frozen foods, butter, and

eggs.[4] The order rested on the Commission's conclusion that such through routes and joint rates were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation . . . ." 287 I. C. C., at 659. This conclusion was based on findings from a vast amount of evidence both oral and written. The pertinent language of § 15 (4) allows the Commission to establish through routes where "needed in order to provide adequate, and more efficient or more economic, transportation." The dispute in the Nebraska court and here relates principally to the adequacy of the existing transportation services. The efficiency of Union Pacific services was established beyond dispute.

Section 15 (4) empowers the Commission to consider the interests of shippers and the kind of services they get and need as well as the interests of carriers in determining whether additional routes should be established to provide "adequate" and "more economic" transportation service.

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[4] The Commission ordered the railroads:
"to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming."

We have held that in determining this question the Commission should look beyond the mere adequacy of the carrier's physical operations "to the broader public interest which embraces service to shippers and the rates they pay." *Pennsylvania R. Co.* v. *United States,* 323 U. S. 588, 591–593. The duty of the Commission, as we there stated, is to try to strike a fair balance in satisfying the needs of shippers, railroads, and the public. This of course calls for the Commission to exercise its informed judgment, having in mind its statutory obligation to develop, coordinate and preserve an adequate national transportation system.[5] This it did. Relying on our interpretation of § 15 (4) in the *Pennsylvania Railroad* case, the Commission considered the various interests here. It found that: "Because of their generally perishable nature, food articles . . . must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." 287 I. C. C., at 656. There are facilities along the Rio Grande route for feeding and grazing livestock in transit, and for partial unloading, storing or processing other shipments in transit. As a result shippers in the northwest territory were found to be "debarred from effective participation in the widespread system developed for the marketing of such commodities" and processors, shippers and dealers along the Rio Grande were found to be at a disadvantage in

[5] 54 Stat. 899. See also *New England Divisions Case,* 261 U. S. 184; *United States* v. *Great Northern R. Co.,* 343 U. S. 562, 575–576.

competing with those on the Union Pacific. For the specified commodities the Commission found the Union Pacific routes to be "inadequate and less economical than are the Rio Grande routes." [6] The Nebraska District Court sustained the Commission's order with reference to shipments which required transit services on the Rio Grande. We agree with this portion of the holding. We cannot say that the Commission acted in excess of its authority in concluding, on the mass of evidence before it, that through routes and joint rates on the specified commodities were needed to provide adequate and more economic transportation and were necessary in the public interest.

But the scope of the Commission's order was cut down by the Nebraska court insofar as it established through routes and joint rates on shipments that did not require transit services such as we have mentioned. We disagree with the Nebraska District Court in this respect. The evidence showed and the Commission found that in marketing food and other perishable products it is a general practice among railroads to allow diversion of carloads in transit as markets are found and sales are made. The successful operation of this practice requires the existence of joint through rates to the final market, since diversion or reconsignment would often, as a practical matter, be unavailable to a shipper who is compelled to reconsign his goods at high combination rates. The Commission found that "If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called

[6] Because of the inability of most granite and marble monument retailers to purchase entire carload lots the Commission found "an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande." 287 I. C. C., at 638.

closed or pocket markets." 287 I. C. C., at 642. To illustrate its conclusion that combination rates result in inadequate transportation service in situations where shippers are compelled to reconsign, the Commission noted that: "Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there." 287 I. C. C., at 643. Pocket markets, of course, exist because reconsignment is possible only at high combination rates. We see no reason why a shipper's privilege to have his goods reconsigned at joint rates should not be considered on the same basis as transit services in determining the adequacy and economy of existing transportation. We think it was error for the Nebraska court to narrow the scope of the Commission's order by excluding shipments of commodities which so urgently need the advantage of reconsignment privileges at joint rates.

Many other arguments are made against the Commission's order. It is pointed out, for example, that the Rio Grande road has more curves than the Union Pacific. Its grades are steeper. Consequently its traffic is sometimes slower. It is contended that the evidence as a whole is insufficient to justify the holding that the establishment of through routes will be of such great advantage to shippers and the public that the Union Pacific should be compelled to short-haul itself. We are not unmindful of the force of the arguments made by the Union Pacific and by those who have intervened on its side. It is entirely possible that the Commission could have made findings contrary to those it did make. But on the whole we are unable to say that the Commission did not strike a fair balance in finding that the evidence required the establishment of these through routes and joint rates.

After consideration of all the contentions made, we hold that the Nebraska court should have sustained the Commission's order in full.[7] Since the Commission's order is justified under §§ 15 (1), 15 (3) and 15 (4) we have no occasion to consider contentions raised under §§ 3 (1) and 3 (4).

The judgment of the District Court of Colorado is reversed with directions to dismiss the bill. The judgment of the Nebraska District Court is affirmed insofar as it affirmed the order of the Commission, and is reversed insofar as the court refused to enforce the Commission's order.

It is so ordered.

MR. JUSTICE FRANKFURTER, dissenting.

I agree with the Court that through routes were not in existence and that joint rates are therefore not empowered under § 15 (3) of the Interstate Commerce Act, unqualified by § 15 (4). 54 Stat. 898, 911–912, 49 U. S. C. § 15 (3), (4). The controversy thus turns on the enforcement of congressional policy expressed as follows in § 15 (4):

> "In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless

[7] In reaching our conclusion we have not overlooked attacks on the breadth of the order with respect to marble, granite, and livestock shipments, nor challenges to that part of the order correcting discrimination in favor of the Bamberger Railroad.

> such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. . . ."

As is true so often in applying regulatory legislation, the general approach—that is, the starting point—may be determinative of the result. It makes a vital difference whether § 15 (4) is deemed a restriction on the power of the Interstate Commerce Commission which is to be closely confined and sharply construed or whether it is deemed to express a legislative command which ought to be heeded and not slightingly enforced. The fact of the matter is that we are dealing with a provision of the law which the Commission has long considered undesirable from the point of view of a national railroad policy and whose repeal it has consistently urged upon Congress. (See the history set forth in *Thompson* v. *United States,* 343 U. S. 549, 554–556.) Although Congress has, from the time of the Commission's creation and especially in recent years, relied on the Commission as its expert adviser on policy, and legislation has largely reflected the Commission's recommendations, the latter's persistence in recommending repeal of § 15 (4) has been matched and overborne by the persistence of Congress in retaining it. Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled. Encouragement should not

be given to disregard of that policy, even if such disregard occurs through inadequate observance attributable to an unconscious desire to restrict the scope of the statute. In short, when an order of the Commission is brought under judicial scrutiny, and challenge is made that the safeguards of § 15 (4) have not been observed, it is the duty of this Court to apply the policy expressed by that section. If the requisite findings or conclusions are ambiguous or unclear, or the policy of the section is slighted, our duty demands remand to the Commission to dispel ambiguity or to secure clarity and obedience to the policy.

It is my view that, even though evidence may be found in the record to support a portion of the order, the Commission did not support the portion on that basis but, on the contrary, appears to have justified the whole order on considerations that collide with congressional policy. The proceedings should therefore be returned to the Commission and the order ought not to be sustained in whole or in part. I will summarize the reasons for this conclusion.

The Commission ordered the establishment of through routes and joint rates by the Union Pacific with the Rio Grande for shipments of livestock and certain perishable agricultural products originating in the northwest (excluded) territory and destined for that part of the United States which the Nebraska District Court roughly described as "east of Denver." * 132 F. Supp. 72, 75, n. 1.

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*It used the phrase to designate the points included in the order with respect to which through routes and joint rates were ordered established for livestock and certain agricultural commodities by the Union Pacific with the Rio Grande. The Commission in its order defined these points as:

"destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha,

Apparently, through routes and joint rates were already in existence for shipments via the Ogden Gateway between the northwest territory and intermediate points on the Rio Grande, originating or terminating at those intermediate points. Joint through rates, however, were not generally in effect over the Rio Grande to or from the Colorado or Utah common point territory (*e. g.*, Denver, Colorado Springs, and Pueblo; Ogden, Salt Lake City, and Provo) of the Rio Grande and the Union Pacific and other defendants, or for transcontinental traffic between the northwest territory and points east of the Colorado common points. The Commission did not order through routes and joint rates to the Utah or Colorado common points or to a large area which is in fact east of Denver. (See description in footnote *.) Through routes and joint rates over the Rio Grande also were not ordered for westbound traffic to the northwest territory originating east of the Colorado common points, except for granite and marble monuments from origins in Vermont and Georgia. The Commission found that it was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation," 287 I. C. C. 611, 659, to establish the specified through routes and joint rates. The Commission gave this justification for its finding:

> ". . . The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. . . . Movements of transcontinental proportions are involved in important instances. . . . A complex but efficient marketing system has been evolved to provide as

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Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas . . . ."

> orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, [the enumerated] food articles . . . must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." 287 I. C. C., at 655–656.

The Commission also found support for its conclusion that shippers of these products are debarred from participation in the widespread marketing system in the fact that "in-transit" privileges on the Rio Grande, such as stop-off for partial unloading or processing, or for grazing of cattle, are not available to shippers of these commodities from the northwest territory, except at the higher combination rates.

The Commission considered through routes and joint rates to points "east of Denver" as a unitary problem and saw no difference between shipments destined initially to intermediate points on the Rio Grande and shipments destined initially to points "east of Denver." The Nebraska District Court, however, found nothing in the evidence to support a finding that the transportation service furnished by Union Pacific on through service between the northwest territory and points "east of Denver" was inadequate, and as to livestock this restriction was not contested by the Commission on this appeal. The Nebraska District Court, therefore, narrowed the order to

require through routes and joint rates only for those carloads originating in the northwest territory and consigned to initial destination points on the Rio Grande west of Denver, Pueblo, and Trinidad, Colorado, which require "in-transit" privileges incident to reshipment to points east of those places.

The Court, rejecting the narrowed construction by the Nebraska District Court, affirms the Commission's order as written. In doing so, however, it does not rely on the reasons given by the Commission in support of its conclusion, but rather it affirms on a different basis. How can we know whether, and to what extent, the Court's reasons influenced the Commission, or would influence it, in making its decision? The report certainly indicates that the Commission thought its own reasoning sufficient to support the whole order. Once the Commission's reasoning for a conclusion is found wanting, the conclusion is necessarily impaired. While the judgment of a lower court may be sustained by this Court on a ground other than that on which it was rested below, see *Langnes* v. *Green,* 282 U. S. 531, 534–539; *Helvering* v. *Gowran,* 302 U. S. 238, 245–247, the legal relation between the Commission and the courts is of a very different order from that of a lower court and a reviewing court. A Commission having defined and limited delegated power must justify the exercise of that power by findings that support it and by evidence that supports the findings. When regard is had for the complicated technical nature of the problems and the voluminousness of the records in the important cases that come before the Commission, a fair discharge of its functions precludes casting upon a reviewing court the task of quarrying though a record to find for itself adequate evidence to permit the effectuation of orders of the Commission.

The precise function of findings is to make practicable scrutiny by the courts in order to determine whether the

Commission has kept within the bounds legislatively defined. To be sure, the Commission's findings are not binding in the sense that attack cannot be made on them for lack of evidence. *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91–94. The Commission cannot—it has not purported to do so here—pass on to the Court an unanalyzed summary of a long proceeding and call it findings. While findings need not be formulated in an enumerated sequence, helpful as that would be, they must at least appear in a Commission's decision with unambiguous clarity, and they must be logically related to its conclusion. The justification the Commission has given cannot be rejected and a new justification found by the Court to satisfy the requirement of a foundation for judicial review. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92–95. After all, it is the Commission which Congress has established as the expert in this field.

The Commission treated the whole problem of joint rates alike, whether the shipment was initially destined for intermediate points on the Rio Grande or whether it was a through shipment. The Court now finds one justification, the inability to use available "in-transit" privileges of the Rio Grande, to support the order in the former situation, and another justification, elimination of "pocket markets," to support the order in the latter situation. It does not rely on what appears to have been the principal, if not the only, reason which the Commission thought justified its whole order, the necessity for the specified products to be able to move to market "over as many routes as possible." Indeed, that viewpoint of the Commission is directly contrary to the congressional policy expressed in § 15 (4). The theory of that section is that products are not to be able to move to markets "over as many routes as possible" when that would involve short-hauling a carrier without its consent on the proposed through route, unless, among other things, the

transportation already in existence is inadequate. To make available to shippers as many routes to market as possible is a policy which the Commission has long urged but which the Congress has resolutely rejected. To find inadequacy of service on a short-hauled carrier in that other routes are not made available would virtually nullify § 15 (4).

It may well be that what are somewhat misleadingly called "in-transit" privileges justify joint through rates to shipments stopped at intermediate points on the Rio Grande for those privileges, and on similar reasoning joint through rates might be justified for shipments initially consigned to intermediate points on the Rio Grande and thereafter reconsigned to points "east of Denver" if the sale is lost, subject to findings being made concerning reconsignment privileges on the Rio Grande. In both situations it is a fiction to speak of a single shipment on which the Union Pacific would be short-hauled should the proposed through route go into effect. The situation involves two separate shipments for which, under normal railroad practice, only the rate of a single continuous shipment over the whole route is charged. On neither of these shipments is Union Pacific being short-hauled because it is capable of performing neither. In this sense, Union Pacific service is of course not "adequate"; it is non-existent. But the Commission did not found its order on such an analysis, and I cannot confidently surmise that it would have ordered the establishment of through routes and joint rates on this basis. Such a determination should be left for the Commission.

The Court also affirms that part of the Commission's order establishing through routes and joint rates for shipments destined initially to points "east of Denver." It does so both with respect to the specified agricultural products and with respect to livestock, even though the Commission did not before us contest the Nebraska Dis-

trict Court's elimination of through routes and joint rates for livestock to points "east of Denver" for want of evidence to support a finding of inadequacy of service. This Court relies for support of this very important portion of the Commission's order on a few paragraphs of the Commission's report under the heading "Proponents' Testimony" where some testimony concerning "pocket markets" is set forth. The Commission in its "General Discussion and Ultimate Fact Findings" makes no reference to the "pocket market" problem as supporting its order. Indeed, the discussion of "pocket markets" seems related only to the refusal of the Union Pacific to establish joint through rates on shipments going through certain points even over its own lines (because the points involved are off the main line and substantial back hauls or out-of-line hauls are required), and has nothing at all to do with the Rio Grande. Moreover, the order requiring the Union Pacific to establish through routes with the Rio Grande prescribes that there be maintained over such routes only joint rates "the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming." From all that appears on the record before us, this could not affect the "pocket markets" complained of because at those points there are no joint through rates over the Union Pacific. Since the establishment of through routes and joint rates for shipments destined initially to points "east of Denver" appears to have no effect on "pocket markets," it is difficult to understand how the "pocket market" situation can be used to justify the establishment of such routes and rates.

The upshot of all this is that after the Nebraska three-judge District Court disagreed about the justification for the order and the majority thought it could be saved by narrowing it, this Court reinstates the whole order, but on

a different basis from that of the Commission, and with respect to a major portion of the order, it does so on a ground which appears to have no support in the Commission's findings. I do not say that no through routes or joint rates can be established through the Ogden Gateway. But I do believe that it is neither for the District Court nor for this Court to speculate what the Commission would have done if it were required to disregard some of its important views on policy, as this Court has disregarded them. I also believe that it is not our duty to find reasons to support the Commission's order which the Commission on full consideration did not summon to its support. This is a striking instance of a case requiring remand to the Commission for clarification and reconsideration of the basis for decision. See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511.

MR. JUSTICE HARLAN, dissenting.

I agree with the opinion of MR. JUSTICE FRANKFURTER, except that I would consider an order of the Commission limited to establishing through routes and joint rates on shipments destined initially to intermediate points on the Rio Grande to be supported by the present findings. Accordingly, I would affirm the judgment of the Nebraska District Court, which remanded the case to the Commission to allow it to determine whether such a limited order would be in the public interest and for any further proceedings not inconsistent with its opinion.

JAY *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE.

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

No. 503. Argued May 3, 1956.—Decided June 11, 1956.

An alien, whose deportation had been ordered because admittedly, after entry, he had been a member of the Communist Party from 1935 through 1940, applied for suspension of his deportation under § 244 of the Immigration and Nationality Act of 1952, which authorizes the Attorney General, "in his discretion," to suspend deportation of any deportable alien who meets certain statutory requirements relating to moral character, hardship and period of residence in the United States. After administrative hearings not expressly required by statute but authorized by regulations of the Attorney General, a special inquiry officer found that the alien met the statutory prerequisites for the favorable exercise of discretionary relief but denied relief because of confidential information not disclosed to the alien. The use of such confidential information without disclosure thereof to the applicant was expressly authorized by the regulations if "the disclosure of such information would be prejudicial to the public interest, safety, or security." *Held:* The Attorney General has properly exercised his discretionary powers under the statute in this case, and denial of the application is sustained. Pp. 347–361.

(a) Under his rulemaking authority and as a matter of administrative convenience, the Attorney General validly delegated his authority to special inquiry officers with review by the Board of Immigration Appeals. P. 351, n. 8.

(b) The regulation permitting consideration of confidential information not disclosed to the applicant is not inconsistent with § 244 (a). Pp. 352–356.

(c) Suspension of deportation is not a matter of right but a matter of grace, like probation, parole or suspension of sentence, and the applicant is not entitled to the kind of a hearing which contemplates full disclosure of the considerations entering into an exercise of the Attorney General's discretion. Pp. 354–356.

(d) Section 244 (c), which requires the Attorney General to file with Congress "a complete and detailed statement of the facts"

regarding cases in which suspension is *granted*, with "the reasons for such suspension," is inapplicable to cases in which suspension is *denied*, and it affords no basis for a conclusion that an applicant must be apprised of reasons for a denial of his request for suspension. P. 356.

(e) Section 235 (c), which specifically authorizes the Attorney General to determine, in some circumstances, that an alien is excludable "on the basis of information of a confidential nature," does not, by implication, prevent the use of confidential information in rulings upon applications for suspension of deportation. Pp. 356–357.

(f) Though it is contended that, in construing the statute, all doubts should be resolved in the applicant's favor, because the use of such confidential information is inconsistent with the "tradition and principles of free government" and denial of suspension may lead to severe results, this Court must adopt the plain meaning of this statute. Pp. 357–358.

(g) As here construed, § 244 is constitutional. P. 357, n. 21.

(h) The regulation permits the use of undisclosed confidential information only when disclosure "would be prejudicial to the public interest, safety, or security," and this is a reasonable class of cases in which to exercise that power. P. 358.

(i) Since the Board of Immigration Appeals, the District Court and the Court of Appeals concluded, in effect, that the special inquiry officer found that disclosure of the confidential information in this case would have been contrary to the public interest, safety or security, this Court accepts that finding, and nothing more is required by the regulation. P. 358, n. 22.

(j) In view of the gratuitous nature of the relief, the use of confidential information in a suspension of deportation proceeding is more clearly within statutory authority than the regulations sustained in *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *Shaughnessy* v. *Mezei*, 345 U. S. 206. Pp. 358–359.

(k) The use of undisclosed confidential information as a basis for denying suspension of deportation did not transgress any of the related regulations governing suspension of deportation proceedings. Pp. 359–361.

222 F. 2d 820, 224 F. 2d 957, affirmed.

Will Maslow and *John Caughlan* argued the cause for petitioner. On the brief were *Mr. Caughlan* and *Norman Leonard.*

John V. Lindsay argued the cause for respondent. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Gray Thoron, Beatrice Rosenberg, J. F. Bishop* and *L. Paul Winings.*

Mr. Maslow and *Shad Polier* filed a brief for the American Jewish Congress, as *amicus curiae,* urging reversal.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner brought this habeas corpus proceeding to test the validity of the denial of his application under §§ 244 (a)(5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 215, 216, 8 U. S. C. §§ 1254 (a)(5) and 1254 (c), for discretionary suspension of deportation. He contends that the denial of his application was unlawful because based on confidential, undisclosed information. The District Court denied the writ, holding, so far as pertinent here, that, "after complying with all the essentials of due process of law in the deportation hearing and in the hearing to determine eligibility for suspension of deportation, [the Attorney General may] consider confidential information outside the record in formulating his discretionary decision."[1] The Court of Appeals affirmed, concluding, *inter alia,* that petitioner was not "denied due process of law in the consideration of his application for suspension of deportation because of the use of this confidential information." 222 F. 2d 820, 820–821; rehearing denied, 224 F. 2d 957. We granted certiorari, 350 U. S. 931, to consider the validity of 8 CFR, Rev. 1952, § 244.3, the Attorney General's regulation which provides:

> "§ 244.3 *Use of confidential information.* In the case of an alien qualified for . . . suspension of deportation under section . . . 244 of the Immigra-

[1] The District Judge wrote no opinion. The quote is taken from the Findings of Fact and Conclusions of Law, Record 15, 17–18.

> tion and Nationality Act the determination as to whether the application for . . . suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security."

Following a hearing, the fairness of which is unchallenged, petitioner was ordered deported in 1952 pursuant to 8 U. S. C. (1946 ed., Supp. V) § 137–3. That section provided for the deportation of any alien "who was at the time of entering the United States, or has been at any time thereafter," a member of the Communist Party of the United States.[2] Petitioner, a citizen of Great Britain, last entered the United States in 1921. At the deportation hearing he admitted having been a voluntary member of the Communist Party from 1935 through 1940. He attacked the validity of the deportation order in the courts below on the ground that there is "no lawful power . . . under the Constitution or laws of the United States" to deport one who has "at no time violated any condition imposed at the time of his entry." But that point has been abandoned, and in this Court petitioner in effect concedes that he is deportable. See *Galvan* v. *Press,* 347 U. S. 522; *Harisiades* v. *Shaughnessy,* 342 U. S. 580.

In 1953, upon motion of petitioner, the deportation order was withdrawn for the purpose of allowing petitioner to seek discretionary relief from the Attorney General under § 244 (a)(5) of the Act. The application for

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[2] A similar provision is now contained in 8 U. S. C. § 1251 (a)(6)(C).

suspension of deportation was filed and a hearing thereon was held before a special inquiry officer of the Immigration and Naturalization Service.[3] The special inquiry officer found petitioner to be qualified for suspension of deportation [4]—that is, found that petitioner met the statutory prerequisites to the favorable exercise of the discretionary relief.[5] But the special inquiry officer decided the case for suspension did not "warrant favorable

[3] "In determining cases submitted for hearing, special inquiry officers shall exercise . . . the authority contained in section 244 of the Immigration and Nationality Act to suspend deportation." 8 CFR, Rev. 1952, § 242.6.

[4] The finding was:

"As the respondent has not been found to have been a Communist Party member later than 1940, it follows that more than ten years has elapsed since the assumption of the status which constitutes the ground for his deportation. Evidence of record, consisting of affidavits of persons well acquainted with the respondent, together with employment records, as well as a report of an investigation by this Service, satisfactorily establishes that he has been physically present in the United States for a continuous period of not less than ten years last past. A check of the local and Federal records reveals no criminal record. An independent character investigation, as well as the above related affidavits tend to establish that for the ten years immediately preceding his application for relief, he has been a person of good moral character.

". . . He has stated that if he were deported he would suffer extreme and unusual hardship in that he would be separated from relatives and friends, and in effect that he would find it almost impossible to maintain himself because of lack of funds. On the record, respondent appears to be qualified for suspension of deportation."

[5] Section 244 (a)(5) of the Act provides in pertinent part that "the Attorney General may, in his discretion, suspend deportation" in the case of a deportable alien who (1) has been present in the United States for at least ten years since the ground for his deportation arose; (2) "proves that during all of such period he was and is a person of good moral character"; and (3) is one "whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship."

action" in view of certain "confidential information."[6] The Board of Immigration Appeals dismissed an appeal, basing its decision "Upon a full consideration of the evidence of record and in light of the confidential information available."[7] Thus, the Board in considering the appeal reviewed the undisclosed information as well as the evidence on the open record. Petitioner then commenced the present habeas corpus action.

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[6] In his petition for a writ of habeas corpus petitioner alleged, "Upon information and belief," that the "confidential information" considered by the special inquiry officer, and later by the Board of Immigration Appeals, was nothing more than the fact that petitioner's name had appeared on a list circulated by the American Committee for the Protection of the Foreign Born, an organization which had been designated subversive by the Attorney General, ex parte. Petitioner claimed that "Solely by reason of [his] name appearing on said list, his case for discretionary relief was prejudged and no fair or impartial consideration of his case was given . . . ." In its Return to the Order to Show Cause, the Government denied that the confidential information relied upon was as alleged by petitioner, and denied that the case had been prejudged. The District Court made no specific finding with respect to the character or substance of the confidential information, but it did determine that the special inquiry officer and the Board of Immigration Appeals "exercised their independent judgment in denying discretionary relief." See *Accardi* v. *Shaughnessy,* 347 U. S. 260, 349 U. S. 280; *Marcello* v. *Bonds,* 349 U. S. 302.

Petitioner apparently abandoned this allegation and argument in the Court of Appeals. In his petition for a writ of certiorari in this Court, he indirectly raises the point again by claiming to be "entitled to a judicial hearing upon . . . his allegation of fact in habeas corpus proceedings that the undisclosed and so-called confidential matter . . . was of such a character that its consideration was not authorized by applicable regulations established by the Attorney General." However, petitioner made no direct assertion in this Court with respect to prejudgment. In this state of the record we conclude that there is no claim of prejudgment before this Court. See n. 22, *infra.*

[7] No further administrative appeal was then available to petitioner. See 8 CFR, Rev. 1952, §§ 242.61 (e), 6.1 (b)(2), 6.1 (h)(1).

As previously noted, § 244 (a)(5) of the Act provides that the Attorney General "may, in his discretion" suspend deportation of any deportable alien who meets certain statutory requirements relating to moral character, hardship and period of residence within the United States. If the Attorney General does suspend deportation under that provision, he must file, pursuant to § 244 (c), "a complete and detailed statement of the facts and pertinent provisions of law in the case" with Congress, giving "the reasons for such suspension." So far as pertinent here, deportation finally cancels only if Congress affirmatively approves the suspension by a favorable concurrent resolution within a specified period of time. There is no express statutory grant of any right to a hearing on an application to the Attorney General for discretionary suspension of deportation. For purposes of effectuating these statutory provisions, the Attorney General adopted regulations delegating his authority under § 244 of the Act to special inquiry officers; [8] giving the alien the right to apply for suspension during a deportation hearing; [9] putting the burden on the applicant to establish the statutory requirements for eligibility for suspension; [10] allowing the alien-applicant to submit any evidence in support of his application; [11] requiring the special inquiry officer to present

[8] 8 CFR, Rev. 1952, § 242.6 quoted in part at note 3, *supra*. Petitioner does not suggest, nor can we conclude, that Congress expected the Attorney General to exercise his discretion in suspension cases personally. There is no doubt but that the discretion was conferred upon him as an administrator in his capacity as such, and that under his rulemaking authority, as a matter of administrative convenience, he could delegate his authority to special inquiry officers with review by the Board of Immigration Appeals. 66 Stat. 173, 8 U. S. C. § 1103.

[9] 8 CFR, Rev. 1952, § 242.54 (d).

[10] *Ibid.*

[11] *Ibid.*

evidence bearing on the applicant's eligibility for relief; [12] and requiring a "written decision" with "a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application." [13] The Attorney General also promulgated the regulation under attack here, 8 CFR, Rev. 1952, § 244.3, see pp. 347–348, *supra,* providing for the use by special inquiry officers and the Board of Immigration Appeals of confidential information in ruling upon suspension applications if disclosure of the information would be prejudicial to the public interest, safety or security.

We note that petitioner does not suggest that he did not receive a full and fair hearing on evidence of record with respect to his statutory eligibility for suspension of deportation. In fact, petitioner recognizes that the special inquiry officer found in his favor on all issues relating to eligibility for the discretionary relief and that those findings were adopted by the Board of Immigration Appeals.[14] This favorably disposed of petitioner's eligibility for consideration for suspension of deportation—the first step in the suspension procedure. Thus, we have here the case of an admittedly deportable alien who has been ordered deported following an unchallenged hearing, and who has been accorded another full and fair hearing on the issues respecting his statutory qualifications for discretionary suspension of deportation.

It is urged upon the Court that the confidential information regulation is invalid because inconsistent with § 244 of the Act. In support of this claim, petitioner argues that § 244 implicitly requires the Attorney General to give a hearing on applications for suspension of deportation. It is then said that this statutory right is nullified and rendered illusory by the challenged regula-

[12] 8 CFR, Rev. 1952, § 242.53 (c).

[13] 8 CFR, Rev. 1952, § 242.61 (a).

[14] See notes 4 and 5, *supra,* and accompanying text.

tion, and that therefore the regulation is invalid. But there is nothing in the language of § 244 of the Act upon which to base a belief that the Attorney General is required to give a hearing with all the evidence spread upon an open record with respect to the considerations which may bear upon his grant or denial of an application for suspension to an alien eligible for that relief. Assuming that the statute implicitly requires a hearing on an open record as to the specified statutory prerequisites to favorable action, there is no claim here of a denial of such a hearing on those issues. Moreover, though we assume a statutory right to a full hearing on those issues, it does not follow that such a right exists on the ultimate decision—the exercise of discretion to suspend deportation.

Eligibility for the relief here involved is governed by specific statutory standards which provide a right to a ruling on an applicant's eligibility. However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute says that, as to qualified deportable aliens, the Attorney General "may, in his discretion" suspend deportation.[15]

[15] Congress first provided for suspension of deportation in 1940 by adding a new provision to the Immigration Act of 1917. 54 Stat. 672, as amended, 62 Stat. 1206, 8 U. S. C. (1946 ed., Supp. V) § 155 (c). That new provision provided that "the Attorney General may . . . suspend deportation" under certain circumstances. In enacting the Immigration and Nationality Act of 1952, Congress added the phrase "in his discretion" after the words "the Attorney General may." In an analysis of draft legislation leading up to the 1952 Act, prepared by the Immigration and Naturalization Service for the assistance of the congressional committees, it was stated that the new words were suggested "in order to indicate clearly that the grant of suspension is entirely discretionary . . . ." That analysis was considered by the congressional committees. See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 3; H. R. Rep. No. 1365, 82d Cong., 2d Sess., p. 28.

It does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi* v. *Shaughnessy*, 347 U. S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst*, 295 U. S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States*, 302 U. S. 211, 213.[16] And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole.[17] Even if we assume that Congress has given to qualified applicants for suspension of deportation a right to offer evidence to the Attorney General in support of their applications, the similarity between the discretionary powers vested in the

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[16] As stated by Judge Learned Hand, "The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491. See also S. Rep. No. 1137, 82d Cong., 2d Sess., p. 25, for an indication that suspension of deportation is a matter of grace to cover cases of unusual hardship. And see 81 Cong. Rec. 5546, 5553, 5554, 5561, 5569–5570, and 5572, where early proposed legislation for administrative suspension of deportation was variously described as a procedure for "clemency" and "amnesty," and was compared with presidential discretion. And see S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600, emphasizing that suspension of deportation is an entirely discretionary action which does not follow automatically from compliance with the formal eligibility requirements.

[17] ". . . if in the opinion of the Board [of Parole] such release is not incompatible with the welfare of society, the Board *may in its discretion* authorize the release of such prisoner on parole." (Emphasis supplied.) 18 U. S. C. § 4203. See *United States* v. *Anderson*, 76 F. 2d 375, 376; *Losieau* v. *Hunter*, 90 U. S. App. D. C. 85, 193 F. 2d 41.

Attorney General by § 244 (a) of the Act on the one hand, and judicial probation power and executive parole power on the other hand, leads to a conclusion that § 244 gives no right to the kind of a hearing on a suspension application which contemplates full disclosure of the considerations entering into a decision. Clearly there is no statutory right to that kind of a hearing on a request for a grant of probation after criminal conviction in the federal courts.[18] Nor is there such a right with respect to an application for parole.[19] Since, as we hold, the Attorney

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[18] A sentencing court "may suspend . . . sentence and place the defendant on probation" if it is "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." 18 U. S. C. § 3651.

"The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation . . . ." Rule 32 (c)(1), Fed. Rules Crim. Proc. "The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court." Rule 32 (c)(2), Fed. Rules Crim. Proc. "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." Rule 32 (a), Fed. Rules Crim. Proc.

Cf. *Williams* v. *New York,* 337 U. S. 241, where this Court held that there is no constitutional bar to setting a state criminal sentence on the basis of "out-of-court information."

[19] "If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole." 18 U. S. C. § 4203 (a).

Note also that only certain prisoners are eligible for this discretionary relief. 18 U. S. C. § 4202.

General's discretion is not limited by the suggested hearing requirement, the challenged regulation cannot be said to be inconsistent with § 244 (a) of the Act.

Petitioner says that a hearing requirement, with a consequent disclosure of all considerations going into a decision, is made implicit by § 244 (c) if not by § 244 (a). Section 244 (c), it will be recalled, requires the Attorney General to file with Congress "a complete and detailed statement of the facts" as to cases in which suspension is granted, "with reasons for such suspension." This statutory mandate does not, however, order such a report on cases in which suspension is denied. Section 244 (c) actually emphasizes the fact that suspension is not a matter of right. Congress was interested in limiting grants of this relief to the minimum. It evidenced an interest only in the reasons relied upon by the Attorney General for granting an application so that it could have an opportunity to accept or reject favorable administrative decisions. This in no way suggests that the applicant is to be apprised of the reasons for a denial of his request for suspension.

Petitioner also points to § 235 (c) of the Act, 8 U. S. C. § 1225 (c), which specifically authorizes the Attorney General to determine under some circumstances that an alien is excludable "on the basis of information of a confidential nature." [20] It is argued from this that had Congress intended to permit the use of confidential information in rulings upon applications for suspension of deportation, it would have expressly so provided in language as specific as that used in § 235 (c). The difficulty with this argument is that § 235 (c) is an exception to an express statutory mandate under § 236 (a) of the Act, 8 U. S. C. § 1226 (a), that determinations of admissibility

[20] See *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *Shaughnessy* v. *Mezei*, 345 U. S. 206, upholding a regulation of the Attorney General to a similar effect which had been promulgated prior to the existence of § 235 (c) or any other such specific statutory authority.

be "based only on the evidence produced at the inquiry." No such express mandate exists with respect to suspension of deportation, and, therefore, no specific provision for the use of confidential information was needed if normally contemplated by the broad grant of discretionary power to the Attorney General.

It is next argued that, even if the confidential information regulation is not inconsistent with § 244 (a), it nevertheless should be held invalid. Emphasizing that Congress did not in terms authorize such a procedure, petitioner contends that the Act should be construed to provide a right to a hearing because only such a construction would be consistent with the "tradition and principles of free government." [21] On its face this is an attractive argument. Petitioner urges that, in view of the severity of the result flowing from a denial of suspension of deportation, we should interpret the statute by resolving all doubts in the applicant's favor. Cf. *United States* v. *Minker,* 350 U. S. 179, 187–188. But we must adopt the plain meaning of a statute, however severe the consequences. Cf. *Galvan* v. *Press,* 347 U. S. 522, 528. As we have already stated, suspension of deportation is not given to deportable aliens as a right, but, by congressional direction, it is dispensed according to the unfettered

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[21] It is not claimed that a contrary construction would render the statute and regulation unconstitutional, or even that a substantial constitutional question would thereby arise. The thrust of the argument is rather that the statute should be construed liberally in favor of the alien as a matter of statutory interpretation. In any event, in this case we have not violated our normal rule of statutory interpretation that, where possible, constructions giving rise to doubtful constitutional validity should be avoided. That rule does not authorize a departure from clear meaning. *E. g., United States* v. *Sullivan,* 332 U. S. 689, 693; *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315, 334–335. Moreover, the constitutionality of § 244 as herein interpreted gives us no difficulty. Cf. *Williams* v. *New York,* 337 U. S. 241.

discretion of the Attorney General. In the face of such a combination of factors we are constrained to construe the statute as permitting decisions based upon matters outside the administrative record, at least when such action would be reasonable.

It may be that § 244 (a) cannot be interpreted as allowing a decision based on undisclosed information in every case involving a deportable alien qualified for suspension. Thus, it could be argued that, where there is no compelling reason to refuse to disclose the basis of a denial of an application, the statute does not contemplate arbitrary secrecy. However, the regulation under attack here limits the use of confidential information to instances where, in the opinion of the special inquiry officer or the Board of Immigration Appeals, "the disclosure . . . would be prejudicial to the public interest, safety, or security." If the statute permits any withholding of information from the alien, manifestly this is a reasonable class of cases in which to exercise that power.[22]

Our conclusion in this case is strongly supported by prior decisions of this Court. In both *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *Shaughnessy* v. *Mezei*, 345 U. S. 206, we upheld a regulation of the Attorney General calling for the denial of a hearing in exclusion cases where the Attorney General determined that an alien was ex-

[22] Petitioner presents the claim that the decision of the special inquiry officer was void in that the "so-called confidential matter . . . was of such a character that its consideration was not authorized by applicable regulations established by the Attorney General." See note 6, *supra*. To the extent that this is an allegation that the undisclosed information, if revealed, would not have been prejudicial to the public interest, petitioner is arguing that the decision violated 8 CFR, Rev. 1952, § 244.3. The Board of Immigration Appeals, the District Court, and the Court of Appeals concluded, in effect, that the special inquiry officer found that the disclosure of the information would have been contrary to public interest, safety or security. We accept that finding. Nothing more is required by the regulation.

cludable on the basis of confidential information, and where, as here, the disclosure of that information would be prejudicial to the public interest.[23] And again, as here, the statutes involved in those cases did not expressly authorize the use of such information in making the administrative ruling. It is true that a resident alien in a deportation proceeding has constitutional protections unavailable to a nonresident alien seeking entry into the United States, and that those protections may militate against construing an ambiguous statute as authorizing the use of confidential information in a deportation proceeding. Cf. *Kwong Hai Chew* v. *Colding,* 344 U. S. 590. But the issue involved here under § 244 (a) is not whether an alien is deportable, but whether, as a deportable alien who is qualified for suspension of deportation, he should be granted such suspension. In view of the gratuitous nature of the relief, the use of confidential information in a suspension proceeding is more clearly within statutory authority than were the regulations involved in the *Knauff* and *Mezei* cases.

Concluding that the challenged regulation is not inconsistent with the Act, we must look to petitioner's claim that the use of undisclosed confidential information is unlawful because inconsistent with related regulations governing suspension of deportation procedures. As previously noted, an application for suspension is considered as part of the "hearing" to determine deportability. 8 CFR, Rev. 1952, §§ 242.53 (c) and 242.54 (d); and see 8 CFR, Rev. 1952, § 242.5. The alien is entitled to "submit any evidence in support of his application which he believes should be considered by the special inquiry officer." 8 CFR, Rev. 1952, § 242.54 (d). The hearing to determine deportability, during which the sus-

[23] The substance of this regulation is now incorporated in § 235 (c) of the Act, 8 U. S. C. § 1225 (c). See pp. 356-357, *supra.*

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pension application is considered, is to be a "fair and impartial hearing." 8 CFR, Rev. 1952, § 242.53 (b). And a decision of the special inquiry officer on the request for suspension must contain "the reasons for granting or denying such application." 8 CFR, Rev. 1952, § 242.61 (a).

We conclude that, although undisclosed information was used as a basis for denying suspension of deportation, none of the above-mentioned regulations was transgressed. While an applicant for suspension is, by regulation, entitled to "submit any evidence in support of his application," that is merely a provision permitting an evidentiary plea to the discretion of those who are to make the decision. In this respect it is not unlike the "statement" and the opportunity to present "information in mitigation of punishment" to which a convicted defendant is entitled under Rule 32 (a) of the Federal Rules of Criminal Procedure before criminal sentence is imposed.[24] And the situation is not different because the matter of suspension of deportation is taken up in the "fair and impartial" deportation "hearing." Assuming that such a "hearing" normally precludes the use of undisclosed information, the "hearing" here involved necessarily contemplates the use of confidential matter in some circumstances. We must read the body of regulations governing suspension procedures so as to give effect, if possible, to all of its provisions. Cf. *Lawson* v. *Suwannee Fruit & S. S. Co.*, 336 U. S. 198.

This same rationale leads us to conclude that the requirement of a decision containing "reasons" is fully complied with by a statement to the effect that the application has been denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety or security. Section 244.3 says

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[24] See note 18, *supra*.

that such information may be used "without the disclosure thereof to the applicant." Reading the provision for a statement of the "reasons" for a decision in the light of § 244.3, it follows that express reliance on confidential information constitutes a statement of the "reasons" for a denial of suspension within the meaning of § 242.61 (a). If "reasons" must be disclosed but confidential information need not be, the former mandate, which certainly comprehends the latter provision, must be satisfied by an express invocation of the latter provision.

Congress has provided a general plan dealing with the deportation of those aliens who have not obtained citizenship although admitted to residence. Since it could not readily make exception for cases of unusual hardship or extenuating circumstances, those matters were left to the consideration and discretion of the Attorney General. We hold that in this case the Attorney General has properly exercised his powers under the suspension statute and we affirm the judgment below.

It is so ordered.

MR. CHIEF JUSTICE WARREN, dissenting.

In conscience, I cannot agree with the opinion of the majority. It sacrifices to form too much of the American spirit of fair play in both our judicial and administrative processes.

In the interest of humanity, the Congress, in order to relieve some of the harshness of the immigration laws, gave the Attorney General discretion to relieve hardship in deportation cases. I do not believe it was "an unfettered discretion," as stated in the opinion. It was an administrative discretion calling for a report to Congress on the manner of its use. The Attorney General, recognizing this, rightfully provided for an administrative hearing for the exercise of that discretion. On the other hand, he provided by his regulation that his numerous

subordinate hearing officers might, in spite of a record clearly establishing a right to relief, deny that relief if, on the basis of undisclosed "confidential" information, the relief would in their opinion be "prejudicial to the public interest, safety, or security." Such a hearing is not an administrative hearing in the American sense of the term. It is no hearing.

Yet, on the basis of such "confidential" information, after more than 40 years of residence here, we are tearing petitioner from his relatives and friends and from the country he fought to sustain,* when the record shows he has not offended against our laws, bears a good reputation, and would suffer great hardship if deported. Petitioner is not a citizen of the United States, but the Due Process Clause protects "persons." To me, this is not due process. If sanction of this use and effect of "confidential" information is confirmed against this petitioner by a process of judicial reasoning, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways.

I am unwilling to write such a departure from American standards into the judicial or administrative process or to impute to Congress an intention to do so in the absence of much clearer language than it has used here.

MR. JUSTICE BLACK, dissenting.

This is a strange case in a country dedicated by its founders to the maintenance of liberty under law. The petitioner, Cecil Reginald Jay, is being banished because he was a member of the Communist Party from 1935 to 1940. His Communist Party membership at that time did not violate any law. The Party was recognized then

*Petitioner's only absence from this country since his original entry in 1914 was during World War I to serve in the Armed Forces of our neighbor and ally, the Dominion of Canada.

as a political organization and had candidates in many state elections. Jay's Communist Party membership ended 10 years before such membership was made a ground for deportation by Congress. 64 Stat. 1006–1008. It is for this past Communist membership, wholly legal when it existed, that Jay has been ordered deported.[1]

Even though an alien has been found to be deportable, Congress has provided a procedure which he can invoke to have his deportation suspended. 66 Stat. 163, 214–216, 8 U. S. C. §§ 1254 (a)(5), 1254 (c). He is entitled to suspension "in the discretion" of the Attorney General if he "proves" that during the preceding 10 years he has been a person of good moral character and if deportation would result in exceptional and unusual hardship. The language of the statute plainly shows that an alien must be given an opportunity to "prove" these things if he can. This of course means that he must have a full and fair hearing. Jay asked to be allowed to give such proof and in fact proved his case to the complete satisfaction of the hearing officer who passed on it. But the hearing officer "after considering confidential information" refused to suspend deportation. The Board of Immigration Appeals dismissed Jay's appeal.

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[1] The constitutionality of this Act authorizing deportation for conduct legal when it occurred was sustained in *Galvan* v. *Press,* 347 U. S. 522. MR. JUSTICE DOUGLAS and I dissented. On April 6, 1953, President Eisenhower sent a message to Senator Arthur V. Watkins calling attention to the harshness of the immigration laws which were used here to deport Jay. In listing "injustices" claimed to exist in the legislation President Eisenhower referred to:

"Deportation provisions that permit an alien to be deported at any time after entry, irrespective of how long ago he was involved, after entry, in an active or [*sic*] affiliation designated as 'subversive.' Such alien is now subject to deportation even if his prior affiliation was terminated many years ago and he has since conducted himself as a model American." 99 Cong. Rec. 4321.

Jay is now 65 years of age. He came to this country from England for permanent residence in 1914. He has remained here ever since except for time he served in the army of our ally Canada during the First World War. Despite the Government's far-flung investigative network it has not been able to dig up one single incident of misconduct on the part of Jay during his entire 65 years which it is willing to produce in court.[2] That Jay is a person of good moral character and that his enforced exile from this country will work an "exceptional and extremely unusual hardship" have been found by the hearing officer.

I agree with THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS that the Attorney General's regulation authorizing Jay and others like him to be deported upon alleged anonymous information should be held invalid as beyond the statutory power of the Attorney General. But a majority of the Court holds otherwise. This makes it necessary to consider the constitutionality of the use of anonymous information for such a purpose. In Footnote 21 of its opinion the Court states, somewhat as an aside, that "the constitutionality of § 244 as herein interpreted gives us no difficulty." In this easy fashion the Court disposes of a challenge to the power of Congress to banish people

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[2] Included in the testimony for Jay was an affidavit by the Assistant Executive Director for the Seattle Housing Authority which employed him, stating:

"Mr. Jay was rated as one of the most conscientious and faithful employees of this Authority. His honesty was unquestioned. His interest in his work extended beyond the normal working hours and he was always willing to accept additional responsibilities without additional compensation. He was forthright in his opinions. His general moral character is evidenced by the fact that during his entire period of employment not one complaint was ever received from either the tenants or his fellow employees as to his relationships with people."

on information allegedly given federal officers by persons whose names are not revealed and whose statements (if made) are shrouded in the darkness which surrounds "confidential information."

What is meant by "confidential information"? According to officers of the Immigration Service it may be "merely information we received off the street"; or "what might be termed as hearsay evidence, which could not be gotten into the record . . ."; or "information from persons who were in a position to give us the information that might be detrimental to the interests of the Service to disclose that person's name . . ."; or "such things, perhaps, as income-tax returns, or maybe a witness who didn't want to be disclosed, or where it might endanger their life, or something of that kind . . . ."[3] No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by the slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported. In a court of law the triers of fact could not even listen to such gossip, much less decide the most trifling issue on it.

The Court today is not content with allowing exile on the basis of anonymous gossip. It holds that the hearing officer who condemned Jay could act in his "unfettered discretion," subject only to review by the Board of Immigration Appeals. Of course the Court refers to the

[3] Hearings before House Subcommittee on Legal and Monetary Affairs of the Committee on Government Operations: Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings, 84th Cong., 1st Sess. 18, 67, 138, 207.

Attorney General's "unfettered discretion," but participation of the Attorney General in this case is a fiction. The Court concedes in Note 8 of its opinion that the Attorney General does not personally exercise discretion in these cases. Therefore, the "unfettered discretion" to which the Court subjects persons like Jay is the unfettered discretion of inquiry officers of the Immigration Service, reviewable only by the Board of Immigration Appeals. Under our system of government there should be no way to subject the life and freedom of one individual to the "unfettered" or, more accurately, the "arbitrary" power of another. Article III of our Constitution and the Bill of Rights intend that people [4] shall not have valuable rights and privileges taken away from them by government unless the deprivation occurs after some kind of court proceeding where witnesses can be confronted and questioned and where the public can know that the rights of individuals are being protected.

Unfortunately, this case is not the first one in recent years where arbitrary power has been approved and where anonymous information has been used to take away vital rights and privileges of people.[5] The Court disposes of what has been done to Jay to its satisfaction by saying that his right to stay here if he proves he is a good

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[4] The fact that Jay is an alien should not mean that he is outside the protection of the Constitution. As Mr. Justice Brewer said in dealing with whether aliens are protected by the first 10 Amendments: "It is worthy of notice that in them the word 'citizen' is not found. In some of them the descriptive word is 'people,' but in the Fifth it is broader, and the word is 'person,' and in the Sixth it is the 'accused,' while in the Third, Seventh, and Eighth there is no limitation as to the beneficiaries suggested by any descriptive word." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 739 (dissenting).

[5] See, *e. g.*, *Ludecke* v. *Watkins*, 335 U. S. 160; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Carlson* v. *Landon*, 342 U. S. 524.

citizen "comes as an act of grace," like "probation or suspension of criminal sentence." But probation and suspension of criminal sentence come only after conviction of crime. Cf. *Williams* v. *New York,* 337 U. S. 241. Here the Government with all of its resources has not been able to prove that Jay ever committed a crime of any kind. And Congress provided the suspension procedure so that one in Jay's situation could get special relief if he proved his good moral character. Viewed realistically this suspension procedure is an integral part of the process of deciding who shall be deported.

No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country. Unfortunately there are some who think that the way to save freedom in this country is to adopt the techniques of tyranny. One technique which is always used to maintain absolute power in totalitarian governments is the use of anonymous information by government against those who are obnoxious to the rulers.[6] In connection with another case like this[7] I referred to a statement made by the Roman Emperor Trajan to Pliny the Younger around the end of the First Century. Rome

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[6] Recently Nikita Khrushchev is reported to have told the 20th Communist Party Congress that Stalin violated:

". . . all existing norms of morality and of Soviet laws.

"Arbitrary behavior by one person encouraged and permitted arbitrariness in others. Mass arrests and deportations of many thousands of people, execution without trial and without normal investigation created conditions of insecurity, fear and even desperation.

. . . . . .

". . . honest Communists were slandered, accusations against them were fabricated, and revolutionary legality was gravely undermined." Department of State Press Release, June 4, 1956, pp. 8–9, 14; Washington Post & Times Herald, June 6, 1956, p. 11, cols. 1, 6.

[7] *Carlson* v. *Landon,* 342 U. S. 524, 552 (dissenting opinion).

at that time was prosecuting the Christians for alleged subversive activities. Pliny expressed his doubts to Trajan as to the best method of handling the prosecutions. He wrote Trajan, "An anonymous information was laid before me containing a charge against several persons, who upon examination denied they were Christians, or had ever been so. . . ." Trajan replied, "You have adopted the right course, my dearest Secundus, in investigating the charges against the Christians who were brought before you. . . . Anonymous informations ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age." [8]

It was also foreign to the brave spirit of the American age that gave birth to our constitutional system of courts with their comprehensive safeguards for fair public trials. In those courts a defendant's fate is to be determined by independent judges and juries who hear evidence given by witnesses in their presence and in the presence of the accused.[9] But this case shows how far we have departed from the carefully conceived plan to safeguard individual liberty. Although the Court today pays lip service to judicial review, a hearing officer's condemnation of Jay is held final and unreviewable. His condemnation is in open defiance of all the public testimony given, and rests exclusively on "confidential information" he claims to have received from unrevealed sources. Unfortunately this condemnation of Jay on anonymous information is not unusual—it manifests the popular fashion in these days of fear. Legal rationalizations [10] have been con-

[8] 9 Harvard Classics 426–428.

[9] See *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11; *In re Oliver*, 333 U. S. 257. Cf. *Kinsella* v. *Krueger*, 351 U. S. 470; *Reid* v. *Covert*, 351 U. S. 487.

[10] As Mr. Justice Bradley said for the Court in *Boyd* v. *United States*, 116 U. S. 616, 635, "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches

trived to shift trials from constitutional courts to temporary removable appointees like the hearing officer who decided against Jay.[11] And when an accused rises to defend himself before such an officer he is met by a statement that "We have evidence that you are guilty of something, but we cannot tell you what, nor who gave us the evidence." If, taking the Bill of Rights seriously, he complains, he is met by the rather impatient rejoinder that the Government's safety would be jeopardized by according him the kind of trial the Constitution commands.[12] But the core of our constitutional system is

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and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. . . ." See also dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 744.

[11] See *Shaughnessy* v. *United States ex rel. Accardi,* 349 U. S. 280, 290–293 (dissenting); *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 17.

[12] The destruction of judicial protections for fair and open determinations of guilt is an essential to maintenance of dictatorships. After the murderous purge of hundreds of German citizens Hitler said: "If anyone reproaches me and asks why I did not resort to the regular courts of justice for conviction of the offenders, then all that I can say to him is this: in this hour I was responsible for the fate of the German people, and thereby I became the supreme Justiciar of the German people!

". . . If people bring against me the objection that only a judicial procedure could precisely weigh the measure of the guilt and of its expiation, then against this view I lodge my most solemn protest. He who rises against Germany is a traitor to his country: and the traitor to his country is not to be punished according to the range and the extent of his act, but according to the purpose which that act has revealed." Speech delivered by Hitler in the Reichstag on 13 July 1934, 1 Hitler's Speeches (Baynes ed. 1942), 321–323.

The Russian purges of the 1930's are reported to have been gov-

that individual liberty must never be taken away by shortcuts, that fair trials in independent courts must never be dispensed with. That system is in grave danger. This case emphasizes that fact. Prosecution of any sort on anonymous information is still too dangerous, just as it was when Trajan rejected it nearly two thousand years ago. Those who prize liberty would do well to ponder this.

MR. JUSTICE FRANKFURTER, dissenting.

Since the petitioner was found deportable under the Act of Oct. 16, 1918, 40 Stat. 1012, 8 U. S. C. § 137, as amended, 64 Stat. 1006, 1008, 8 U. S. C. (1946 ed., Supp. V) § 137–3, his deportation would follow automatically had not Congress, in § 244 (a)(5) of the Immigration and Nationality Act of 1952, entrusted the Attorney General with the power of relaxing this dire consequence by suspending the deportation. 66 Stat. 163, 214, 8 U. S. C. § 1254 (a)(5). This the Attorney General is authorized to do if the petitioner has been present in the United States for at least ten years since the grounds for his deportation arose, if he can prove that during all of such period he has been and is a person of good moral character, and, finally, if his deportation would, in the opinion of the Attorney General, "result in exceptional and ex-

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erned by a directive initiated by Stalin, which stated:

"I. Investigative agencies are directed to speed up the cases of those accused of the preparation or execution of acts of terror.

"II. Judicial organs are directed not to hold up the execution of death sentences pertaining to crimes of this category in order to consider the possibility of pardon, because the Presidium of the Central Executive Committee USSR does not consider as possible the receiving of petitions of this sort.

"III. The organs of the Commissariat of Internal Affairs are directed to execute the death sentences against criminals of the above-mentioned category immediately after the passage of sentences." Department of State Press Release, June 4, 1956, p. 15; Washington Post & Times Herald, June 6, 1956, p. 11, cols. 7–8.

tremely unusual hardship." If the Attorney General finds that all three conditions are satisfied, he "may, in his discretion, suspend deportation." Such is the feature of mitigation with which Congress qualified what obviously is, and was designed to be, a very drastic exercise of its constitutional power to turn aliens out of the country for some past misdeed, often unthinking foolishness, and, it may well be, long after genuine repentance and the evolution of the alien into a worthy member of society.

By this provision, Congress plainly responded to the dictates of humanity. But, just as Congress could have exercised to the utmost its power of constitutional severity, so it could appropriately define the mode for its alleviation. It has seen fit to make the Attorney General the agent for its quality of mercy, to be exercised by him "in his discretion." The power of dispensation given the Attorney General he can, I have no doubt, withhold without accounting to anyone, and certainly without recourse to judicial review. Congress was evidently content to leave to the conscience of the chief law officer of the Government, the head of the Department of Justice, both the carrying out of its humane purpose and the protection of the public interest.

If the Attorney General's conscience is satisfied to act on considerations that he does not desire to expose to the light of day or to impart to an alien whose liberty may be at stake, thereby involving the fate of an innocent family, Congress leaves him free to do so. But Congress has not seen fit to invest his subordinates with such arbitrary authority over the lives of men.

One is not unmindful of the fact that the Attorney General is burdened with a vast range of duties, and that he, too, has only twenty-four hours in a day. To be sure, one of his predecessors in the administration of our immigration laws, President Taft's Secretary of Commerce and Labor, himself examined every deportation file in which

an appeal was lodged. And Alfred E. Smith cannot have been the only Governor to read the records in the hundreds of applications that came before him each year for executive clemency. But, if in his wisdom the Attorney General devises a system for delegating the means for carrying out the responsibility for which Congress has given him discretion, he cannot also delegate his discretion. (That the nature of a delegated power may preclude redelegation, see, *e. g.,* the Canadian case, *Attorney-General of Canada* v. *Brent,* (1956) 2 D. L. R. (2d) 503, affirming [1955] 3 D. L. R. 587.)

If the Attorney General devises, as he has devised, an administrative system for effectuating § 244 (a)(5) of the Act of 1952, administrative arbitrariness is ruled out. If the Attorney General invokes the aid of administrative law, as he has done by establishing a procedure before a special inquiry officer of the Immigration and Naturalization Service and a review of that officer's decision by the Board of Immigration Appeals, these two agencies of administrative law cannot be authorized to defy the presuppositions of a fair hearing. The Attorney General may act on confidential information and Congress has left him to square it with his conscience. But he cannot shelter himself behind the appearance of legal procedure—a system of administrative law—and yet infuse it with a denial of what is basic to such a system. See, *e. g.,* *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 300.

President Eisenhower has explained what is fundamental in any American code. A code devised by the Attorney General for determining human rights cannot be less than Wild Bill Hickok's code in Abilene, Kansas:

> "It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met

> him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.
>
> "And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by that same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." Press release of remarks of the President, on November 23, 1953, on receiving America's Democratic Legacy Award at dinner on the occasion of the 40th anniversary of the Anti-Defamation League.

For me, the philosophy embodied in these remarks rules the situation before us. The petitioner sustained the burden which the statute put upon him to prove himself deserving to remain in this country and to save his family from being disrupted. On the record, the Attorney General's special inquiry officer found that the respondent "appears to be qualified for suspension of deportation," and this finding was not upset on appeal. But this finding for the petitioner was nullified on the basis of some "confidential information." The petitioner had no means of meeting this "confidential information." We can take judicial notice of the fact that in conspicuous instances, not negligible in number, such "confidential information" has turned out to be either baseless or false. There is no reason to believe that only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary. A system of administrative law cannot justify itself on the assumption that the "confidential information" avail-

able to these inquiry officers and the Board of Appeals is impregnable or even likely to be true. When the Attorney General scrutinizes "confidential information," at all events it is the Attorney General who does so. If he is unable to carry out the discretion vested solely in him to act on whatever he chooses to act upon, he must either devise a sifting process that meets the elementary decencies of procedure or advise Congress of his inability to carry out the extraordinary responsibility which it has reposed in him and not in his subordinates.

I would reverse.

MR. JUSTICE DOUGLAS, dissenting.

The statement that President Eisenhower made in 1953 on the American code of fair play is more than interesting Americana. As my Brother FRANKFURTER says, it is Americana that is highly relevant to our present problem. The President said: "In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." [1]

[1] The entire statement made at the B'Nai B'Rith Dinner in Washington, D. C., November 23, 1953, reads as follows:

"Why are we proud? We are proud, first of all, because from the beginning of this Nation, a man can walk upright, no matter who he is, or who she is. He can walk upright and meet his friend—or his enemy; and he does not feel that because that enemy may be in a position of great power that he can be suddenly thrown in jail to rot there without charges and with no recourse to justice. We have the habeas corpus act, and we respect it.

"I was raised in a little town of which most of you have never heard. But in the West it is a famous place. It is called Abilene, Kansas. We had as our Marshal for a long time a man named Wild Bill Hickock. If you don't know anything about him, read your Westerns more. Now that town had a code, and I was raised as a boy to prize that code.

"It was: meet anyone face to face with whom you disagree. You

That bit of Americana is relevant here because we have a question as to what a "hearing" is in the American meaning of the word. Fairness, implicit in our notions of due process, requires that any "hearing" be full and open with an opportunity to know the charge and the accusers, to reply to the charge, and to meet the accusers. And when Congress provides for a hearing, as it implicitly has in § 244 of the present Act, it should be assumed that Congress has the same lively sense of the requirements of fair play as the Eisenhower code demands.

The philosophy of the full hearing, especially as it involves the right to meet the accusers, has been put in classical words by Professor Zechariah Chafee, Jr., in his recent book The Blessings of Liberty (1956), p. 35:

> "One important benefit from confronting the suspect with his accusers is the opportunity to cross-examine them and rigorously test any dubious statement. As old Sir Matthew Hale says, it 'beats and boults out the truth much better.' Add to that the old-fashioned value of putting people face to face out in the open. Accusers who secretly confer in private with an official or two and a couple of clerks may, as in Hale's time, 'oftentimes deliver that which they will be ashamed to testify publicly.' An honest witness may feel quite differently when he has to re-

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could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.

"And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by that same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose."

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> peat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is. As for the false witness, the tribunal can learn ever so much more by looking at him than by reading an F. B. I. abstract of his story. The pathological liar and the personal enemy can no longer hide behind a piece of paper."

And see *Peters* v. *Hobby*, 349 U. S. 331, 350–352; O'Brian, National Security and Individual Freedom (1955), pp. 61–63.

Harry P. Cain, member of the Subversive Activities Control Board, recently joined the President in endorsing this code of fair play: [2]

> "In all of our traditional efforts to protect the individual against oppression and false conviction by the state, we have relied basically and primarily on confrontation and cross-examination. By no other means can those who must judge their fellow man minimize to the fullest and desired extent the mistakes which humans make. Without recourse to these means, it is impossible for anyone accused of anything to protect himself fully against enemies whose evidence may consist of nothing more than malice, vindictiveness, mistaken identity, intolerance, prejudice, or a perverted desire to destroy."

A hearing is not a hearing in the American sense if faceless informers or confidential information may be used to deprive a man of his liberty. That kind of hearing is so un-American that we should lean over backwards to avoid imputing to Congress a purpose to sanction it under § 244.

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[2] Address before New York Civil Liberties Union, New York City, February 22, 1956.

Syllabus.

UNITED STATES *v.* E. I. DU PONT DE NEMOURS & CO.

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

No. 5. Argued October 11, 1955.—Decided June 11, 1956.

In a civil action under § 4 of the Sherman Act, the Government charged that appellee had monopolized interstate commerce in cellophane in violation of § 2 of the Act. During the relevant period, appellee produced almost 75% of the cellophane sold in the United States; but cellophane constituted less than 20% of all flexible packaging materials sold in the United States. The trial court found that the relevant market for determining the extent of appellee's market control was the market for flexible packaging materials and that competition from other materials in that market prevented appellee from possessing monopoly powers in its sales of cellophane. Accordingly, it dismissed the complaint. *Held:* The judgment is affirmed. Pp. 378–404.

(a) The ultimate consideration in determining whether an alleged monopolist violates § 2 of the Sherman Act is whether the defendant controls prices and competition in the market for such part of trade or commerce as he is charged with monopolizing. P. 380.

(b) A party has monopoly power contrary to § 2 of the Sherman Act if it has, over "any part of the trade or commerce among the several States," a power of controlling prices or unreasonably restricting competition. Pp. 389–394.

(c) Determination of the competitive market for commodities depends upon how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. P. 393.

(d) It is not a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market. P. 394.

(e) Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. P. 394.

(f) In considering what is the relevant market for determining the control of price and competition, no more definite rule can be

declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce" monopolization of which may be illegal. P. 395.

(g) Cellophane's interchangeability with numerous other materials suffices to make it a part of the market for flexible packaging materials. Pp. 395–400.

(h) On the record in this case, it cannot be said that the variations in price between cellophane and other flexible packaging materials prevent them from being competitive or gave appellee monopoly power over prices. Pp. 400–401.

(i) On the record in this case, it cannot be said that appellee has excluded competitors from the flexible packaging material market. Pp. 402–404.

118 F. Supp. 41, affirmed.

Charles H. Weston argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, Ralph S. Spritzer* and *William J. Lamont.*

Gerhard A. Gesell argued the cause for appellee. With him on the brief were *James H. McGlothlin, Burke Marshall, Hugh M. Morris* and *Frank J. Zugehoer.*

MR. JUSTICE REED delivered the opinion of the Court.

The United States brought this civil action under § 4 of the Sherman Act against E. I. du Pont de Nemours and Company. The complaint, filed December 13, 1947, in the United States District Court for the District of Columbia, charged du Pont with monopolizing, attempting to monopolize and conspiracy to monopolize interstate commerce in cellophane and cellulosic caps and bands in violation of § 2 of the Sherman Act. Relief by injunction was sought against defendant and its officers, forbidding monopolizing or attempting to monopolize interstate trade in cellophane. The prayer also sought action to dissipate the effect of the monopolization by divestiture or other steps. On defendant's motion under 28 U. S. C. § 1404 (a), the case was transferred to the District of

Delaware. After a lengthy trial, judgment was entered for du Pont on all issues.[1]

The Government's direct appeal here does not contest the findings that relate to caps and bands, nor does it raise any issue concerning the alleged attempt to monopolize or conspiracy to monopolize interstate commerce in cellophane. The appeal, as specifically stated by the Government, "attacks only the ruling that du Pont has not monopolized trade in cellophane." At issue for determination is only this alleged violation by du Pont of § 2 of the Sherman Act.[2]

During the period that is relevant to this action, du Pont produced almost 75% of the cellophane sold in the United States, and cellophane constituted less than 20% of all "flexible packaging material" sales. This was the designation accepted at the trial for the materials listed in Finding 280, Appendix A, this opinion, *post*, p. 405.

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[1] *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41. The opinion occupies 192 pages of the volume. The Findings of Fact, 854 in number, cover 140 pages. The citations to findings in our opinion, where references are not made to our appendices (*post*, p. 405 *et seq.*), are to the Federal Supplement. We noted probable jurisdiction October 14, 1954, 348 U. S. 806.

[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. (1952 ed. Supp. III) § 1.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." *Id.*, § 2.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title . . . ." 15 U. S. C. § 4.

The Government contends that, by so dominating cellophane production, du Pont monopolized a "part of the trade or commerce" in violation of § 2. Respondent agrees that cellophane is a product which constitutes "a 'part' of commerce within the meaning of Section 2." Du Pont brief, pp. 16, 79. But it contends that the prohibition of § 2 against monopolization is not violated because it does not have the power to control the price of cellophane or to exclude competitors from the market in which cellophane is sold. The court below found that the "relevant market for determining the extent of du Pont's market control is the market for flexible packaging materials," and that competition from those other materials prevented du Pont from possessing monopoly powers in its sales of cellophane. Finding 37.

The Government asserts that cellophane and other wrapping materials are neither substantially fungible nor like priced. For these reasons, it argues that the market for other wrappings is distinct from the market for cellophane and that the competition afforded cellophane by other wrappings is not strong enough to be considered in determining whether du Pont has monopoly powers. Market delimitation is necessary under du Pont's theory to determine whether an alleged monopolist violates § 2. The ultimate consideration in such a determination is whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing. Every manufacturer is the sole producer of the particular commodity it makes but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: *i. e.*, whether there is a cross-elasticity of demand between cellophane and the other wrappings. This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the

competing commodities. The court below found that the flexible wrappings afforded such alternatives. This Court must determine whether the trial court erred in its estimate of the competition afforded cellophane by other materials.

The burden of proof, of course, was upon the Government to establish monopoly. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 423, 427. This the trial court held the Government failed to do, upon findings of fact and law stated at length by that court. For the United States to succeed in this Court now, it must show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were "clearly erroneous" within our rulings on Rule 52 (a) of the Rules of Civil Procedure. See *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 393–395. We do not try the facts of cases *de novo. Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 597.[3]

Two additional questions were raised in the record and decided by the court below. That court found that, even if du Pont did possess monopoly power over sales of cellophane, it was not subject to Sherman Act prosecution, because (1) the acquisition of that power was protected by patents, and (2) that power was acquired solely through du Pont's business expertness. It was thrust upon du Pont. 118 F. Supp., at 213–218.

Since the Government specifically excludes attempts and conspiracies to monopolize from consideration, a conclusion that du Pont has no monopoly power would obviate examination of these last two issues.

I. *Factual Background.*—For consideration of the issue as to monopolization, a general summary of the development of cellophane is useful.

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[3] See also *United States* v. *Yellow Cab Co.,* 338 U. S. 338; *United States* v. *Oregon Med. Soc.,* 343 U. S. 326, 339; *United Shoe Machinery Corp.* v. *United States,* 347 U. S. 521.

In the early 1900's, Jacques Brandenberger, a Swiss chemist, attempted to make tablecloths impervious to dirt by spraying them with liquid viscose (a cellulose solution available in quantity from wood pulp, Finding 361) and by coagulating this coating. His idea failed, but he noted that the coating peeled off in a transparent film. This first "cellophane" was thick, hard, and not perfectly transparent, but Brandenberger apparently foresaw commercial possibilities in his discovery. By 1908 he developed the first machine for the manufacture of transparent sheets of regenerated cellulose. The 1908 product was not satisfactory, but by 1912 Brandenberger was making a saleable thin flexible film used in gas masks. He obtained patents to cover the machinery and the essential ideas of his process.

It seems to be agreed, however, that the disclosures of these early patents were not sufficient to make possible the manufacture of commercial cellophane. The inadequacy of the patents is partially attributed to the fact that the essential machine (the Hopper) was improved after it was patented. But more significant was the failure of these patents to disclose the actual technique of the process. This technique included the operational data acquired by experimentation.[4]

In 1917 Brandenberger assigned his patents to La Cellophane Societe Anonyme and joined that organization.

[4] Initially, the proper cellulose content of the viscose must be determined. This viscous fluid is ripened according to a "ripening index," a test whereby viscose is put in a salt solution and shaken to bring out the coagulation point. The requisite strength of this solution varies according to the ripening time. Fourteen additional baths follow the first coagulating bath. The most advantageous ripening time, temperature, size, composition, and duration of each of the baths were all determined by the trials and errors of Brandenberger and La Cellophane, the corporation he directed. It was estimated that in 1923 it would have taken four or five years of experimentation by a new producer of cellophane to attain this production technique.

Thereafter developments in the production of cellophane somewhat paralleled those taking place in artificial textiles. Chemical science furnished the knowledge for perfecting the new products. The success of the artificial products has been enormous. Du Pont was an American leader in the field of synthetics and learned of cellophane's successes through an associate, Comptoir des Textiles Artificiel.

In 1923 du Pont organized with La Cellophane an American company for the manufacture of plain cellophane. The undisputed findings are that:

> "On December 26, 1923, an agreement was executed between duPont Cellophane Company and La Cellophane by which La Cellophane licensed duPont Cellophane Company exclusively under its United States cellophane patents, and granted duPont Cellophane Company the exclusive right to make and sell in North and Central America under La Cellophane's secret processes for cellophane manufacture. DuPont Cellophane Company granted to La Cellophane exclusive rights for the rest of the world under any cellophane patents or processes duPont Cellophane Company might develop." Finding 24.

Subsequently du Pont and La Cellophane licensed several foreign companies, allowing them to manufacture and vend cellophane in limited areas. Finding 601. Technical exchange agreements with these companies were entered into at the same time. However, in 1940, du Pont notified these foreign companies that sales might be made in any country,[5] and by 1948 all the technical exchange agreements were canceled.

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[5] Substantially identical letters were sent in this form:

"Question has been raised within our organization as to the existence of territorial limitations under our agreements with your company relating to regenerated cellulose film. In order that our position may

Sylvania, an American affiliate of a Belgian producer of cellophane not covered by the license agreements above referred to, began the manufacture of cellophane in the United States in 1930. Litigation between the French and Belgian companies resulted in a settlement whereby La Cellophane came to have a stock interest in Sylvania, contrary to the La Cellophane-du Pont agreement. This resulted in adjustments as compensation for the intrusion into United States of La Cellophane that extended du Pont's limited territory. The details do not here seem important. Since 1934 Sylvania has produced about 25% of United States cellophane.

An important factor in the growth of cellophane production and sales was the perfection of moistureproof cellophane, a superior product of du Pont research and patented by that company through a 1927 application. Plain cellophane has little resistance to the passage of moisture vapor. Moistureproof cellophane has a composition added which keeps moisture in and out of the packed commodity. This patented type of cellophane has had a demand with much more rapid growth than the plain.

In 1931 Sylvania began the manufacture of moistureproof cellophane under its own patents. After negotiations over patent rights, du Pont in 1933 licensed Sylvania to manufacture and sell moistureproof cellophane pro-

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be clearly and frankly established, we desire to record with you our conclusions.

"Based upon the provisions of the contracts, and in the light of legal developments in this country, we construe these agreements as imposing no restrictions upon the sale of regenerated cellulose film in any country in which the public is free to sell. Thus we regard each party as free to export such film to any country in the world, subject only to such limitations as lawfully may be based upon the unauthorized use of patented inventions or trade-marks in the country of manufacture, or in the country of use or sale.

"This letter is not intended to modify any of the provisions of our agreements involving the exchange of technical information." R. 3323.

duced under the du Pont patents at a royalty of 2% of sales. These licenses, with the plain cellophane licenses from the Belgian company, made Sylvania a full cellophane competitor, limited on moistureproof sales by the terms of the licenses to 20% of the combined sales of the two companies of that type by the payment of a prohibitive royalty on the excess. Finding 552. There was never an excess production. The limiting clause was dropped on January 1, 1945, and Sylvania was acquired in 1946 by the American Viscose Corporation with assets of over two hundred million dollars.

Between 1928 and 1950, du Pont's sales of plain cellophane increased from $3,131,608 to $9,330,776. Moistureproof sales increased from $603,222 to $89,850,416, although prices were continuously reduced. Finding 337. It could not be said that this immense increase in use was solely or even largely attributable to the superior quality of cellophane or to the technique or business acumen of du Pont, though doubtless those factors were important. The growth was a part of the expansion of the commodity-packaging habits of business, a by-product of general efficient competitive merchandising to meet modern demands. The profits, which were large, apparently arose from this trend in marketing, the development of the industrial use of chemical research and production of synthetics, rather than from elimination of other producers from the relevant market. That market is discussed later at p. 394. Tables appearing at the end of this opinion (Appendix A, Findings 279–292, inclusive, *post,* pp. 405–410) show the uses of cellophane in comparison with other wrappings.[6] See the discussion, *infra,* p. 399 *et seq.*

II. *The Sherman Act and the Courts.*—The Sherman Act has received long and careful application by this Court to achieve for the Nation the freedom of enterprise

[6] Further information from the findings as to competition will be found in Findings 150–278.

from monopoly or restraint envisaged by the Congress that passed the Act in 1890. Because the Act is couched in broad terms, it is adaptable to the changing types of commercial production and distribution that have evolved since its passage. Chief Justice Hughes wrote for the Court that "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 359–360. Compare on remedy, Judge Wyzanski in *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 348. It was said in *Standard Oil Co.* v. *United States,* 221 U. S. 1, 50, that fear of the power of rapid accumulations of individual and corporate wealth from the trade and industry of a developing national economy caused its passage. Units of traders and producers snowballed by combining into so-called "trusts." Competition was threatened. Control of prices was feared. Individual initiative was dampened. While the economic picture has changed, large aggregations of private capital, with power attributes, continue. Mergers go forward. Industries such as steel, automobiles, tires, chemicals, have only a few production organizations. A considerable size is often essential for efficient operation in research, manufacture and distribution.

Judicial construction of antitrust legislation has generally been left unchanged by Congress. This is true of the Rule of Reason.[7] While it is fair to say that the Rule

[7] This was set forth and defined in *Standard Oil Co.* v. *United States,* 221 U. S. 1, 58–62. It was based on the generality of §§ 1 and 2 of the Sherman Act, which were said to be "broad enough to embrace every conceivable contract or combination which could be made concerning commerce" and therefore required a "standard." The standard of reason, drawn from the common law, was adopted. See Adams, The "Rule of Reason," 63 Yale L. J. 348; and Oppenheim, Federal Antitrust Legislation, 50 Mich. L. Rev., at 1156, notes 11 and 13, *infra.*

is imprecise, its application in Sherman Act litigation, as directed against enhancement of price or throttling of competition, has given a workable content to antitrust legislation. See note 18, *infra*. It was judicially declared a proper interpretation of the Sherman Act in 1911, with a strong, clear-cut dissent challenging its soundness on the ground that the specific words of the Act covered every contract that tended to restrain or monopolize.[8] This Court has not receded from its position on the Rule.[9] There is not, we think, any inconsistency between it and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act.[10] It is logical that some agreements and practices are invalid *per se*, while others are illegal only as applied to particular situations.[11]

Difficulties of interpretation have arisen in the application of the Sherman Act in view of the technical changes in production of commodities and the new distribution practices.[12] They have called forth reappraisal of the effect of the Act by business and government.[13]

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[8] 221 U. S., at 86 *et seq.*

[9] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 529; *Times-Picayune Co.* v. *United States*, 345 U. S. 594, 614–615.

[10] See *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 813; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593.

[11] Cf. Oppenheim, Federal Antitrust Legislation, 50 Mich. L. Rev. 1139, 1151–1152; Adams, The "Rule of Reason," 63 Yale L. J. 348; and The Schwartz Dissent, 1 Antitrust Bulletin 37, 47.

[12] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 526.

[13] Final Report, Investigation of Concentration of Economic Power, S. Doc. No. 35, 77th Cong., 1st Sess.; Monograph No. 38 of that Investigation, Handler, A Study of the Construction and Enforcement of the Federal Antitrust Laws, 76th Cong., 3d Sess.; Effective Competition, Report to the Secretary of Commerce, Charles Sawyer, by his Business Advisory Council, December 18, 1952; Report of the Attorney General's National Committee to Study the Antitrust Laws,

That reappraisal has so far left the problems with which we are here concerned to the courts rather than to administrative agencies. Cf. Federal Trade Commission Act, 38 Stat. 721. It is true that Congress has made exceptions to the generality of monopoly prohibitions, exceptions that spring from the necessities or conveniences of certain industries or business organizations, or from the characteristics of the members of certain groups of citizens.[14] But those exceptions express legislative

March 31, 1955; Oppenheim, Federal Antitrust Legislation, 50 Mich. L. Rev. 1139; Kahn, A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts, 63 Yale L. J. 293; Adams, The "Rule of Reason," 63 Yale L. J. 348; Rostow, Monopoly Under the Sherman Act: Power or Purpose?, 43 Ill. L. Rev. 745.

[14] Numerous Acts contain specific exemptions from the operation of the antitrust laws: Clayton Act, 15 U. S. C. § 17 (1946) (all labor organizations); McCarran-Ferguson Act, 15 U. S. C. § 1013 (1952) (insurance companies); Webb-Pomerene Act, 15 U. S. C. § 62 (1946) (limited exemption for foreign trade associations); Capper-Volstead Act, 7 U. S. C. §§ 291, 292 (1927) (farm cooperatives); Interstate Commerce Act, 49 U. S. C. § 5 (11) (1952) (carriers participating in an approved transaction); Civil Aeronautics Act, 49 U. S. C. § 494 (1952) (exemption for acts ordered by the CAB).

Market entry is carefully regulated in some of the country's largest businesses: Natural Gas Act, 15 U. S. C. § 717f (natural gas companies); Federal Communications Act, 47 U. S. C. § 307 (a) (1952) (limits new stations); Civil Aeronautics Act, 49 U. S. C. § 481 (d) (1951) (limits market entry); Motor Carrier Act, 49 U. S. C. § 307 (1952) (motor vehicle common carriers). Price fixing in some areas is authorized by the legislature: Reed-Bulwinkle Act, 49 U. S. C. § 5b (1952) (railroad rate agreements); Civil Aeronautics Act, 49 U. S. C. § 492 (1952) (approval of transportation rate agreements); Miller-Tydings Act, 15 U. S. C. § 1 (1946) (resale price maintenance); Shipping Act, 46 U. S. C. § 814 (1952) (water carriers' rate agreements).

Combination of strong competitors in some major instances has been encouraged: Federal Communications Act, 47 U. S. C. §§ 221 (a), 222 (c) (1) (1952); Federal Power Act, 16 U. S. C. § 824a (b) (1952); Interstate Commerce Act, 49 U. S. C. § 5b (1952) (all common carriers).

That competition is not always to be encouraged is made evident

determination of the national economy's need of reasonable limitations on cutthroat competition or prohibition of monopoly. "[W]here exceptions are made, Congress should make them." *United States* v. *Line Material Co.*, 333 U. S. 287, 310. They modify the reach of the Sherman Act but do not change its prohibition of other monopolies. We therefore turn to § 2 (note 2, *supra*) to determine whether du Pont has violated that section by its dominance in the manufacture of cellophane in the before-stated circumstances.

III. *The Sherman Act, § 2 — Monopolization.*—The only statutory language of § 2 pertinent on this review is: "Every person who shall monopolize . . . shall be deemed guilty . . . ." This Court has pointed out that monopoly at common law was a grant by the sovereign to any person for the sole making or handling of anything so that others were restrained or hindered in their lawful trade. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51. However, as in England, it came to be recognized here that acts bringing the evils of authorized monopoly—unduly diminishing competition and enhancing prices—were undesirable (*id.*, at 56, 57, 58) and were declared illegal by § 2. *Id.*, at 60–62. Our cases determine that a party has monopoly power if it has, over "any part of the trade or commerce among the several States," a power of controlling prices or unreasonably restricting competition. *Id.*, at 58.

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by noting that the farmers have been actually barred from production in most major crops and some groups of workers are told that they may not, in production of commodities for commerce, work for less than a minimum wage. Fair Labor Standards Act, 29 U. S. C. § 206 (1952).

See Report of Attorney General's National Committee to Study the Antitrust Laws, pp. 261–313, for discussion of "Exemptions From Antitrust Coverage."

Senator Hoar, in discussing § 2, pointed out that monopoly involved something more than extraordinary commercial success, "that it involved something like the use of means which made it impossible for other persons to engage in fair competition." [15] This exception to the

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[15] 21 Cong. Rec. 3151:

"Mr. KENNA. Mr. President, I have no disposition to delay a vote on the bill, but I would like to ask, with his permission, the Senator from Vermont a question touching the second section:

" 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade, etc.'

"Is it intended by the committee, as the section seems to indicate, that if an individual engaged in trade between States or between States and Territories, or between States or Territories and the District of Columbia, or between a State and a foreign country, by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act? To make myself understood, if I am not clear——

"Mr. EDMUNDS. I think I understand the Senator.

"Mr. KENNA. Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?

"Mr. EDMUNDS. It is not intended by it and the bill does not do it. Anybody who knows the meaning of the word 'monopoly,' as the courts apply it, would not apply it to such a person at all; and I am sure my friend must understand that."

Id., at 3152:

"Mr. HOAR. I put in the committee, if I may be permitted to say so (I suppose there is no impropriety in it), the precise question which has been put by the Senator from West Virginia, and I had that precise difficulty in the first place with this bill, but I was answered, and I think all the other members of the committee agreed in the answer, that 'monopoly' is a technical term known to the common law, and that it signifies—I do not mean to say that they stated what the signification was, but I became satisfied that they

Sherman Act prohibitions of monopoly power is perhaps the monopoly "thrust upon" one of *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429, left as an undecided possibility by *American Tobacco Co.* v. *United States,* 328 U. S. 781. Compare *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 342.[16]

If cellophane is the "market" that du Pont is found to dominate, it may be assumed it does have monopoly power over that "market." [17] Monopoly power is the power to control prices or exclude competition.[18] It seems ap-

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were right and that the word 'monopoly' is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.

"Of course a monopoly granted by the King was a direct inhibition of all other persons to engage in that business or calling or to acquire that particular article, except the man who had a monopoly granted him by the sovereign power. I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business."

[16] See p. 381.

[17] Compare *Standard Oil Co.* v. *United States,* 221 U. S. 1, 74, and *American Tobacco Co.* v. *United States,* 328 U. S. 781, 813–814; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226, last paragraph, note 59.

[18] See *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 501; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 58. See Stocking and Mueller, The Cellophane Case and the New Competition, XLV American Economic Rev. 29, 54; Cole, An Appraisal of Economic Change, XLIV American Economic Rev. 35, 61; Wilcox, TNEC Monograph No. 21, pp. 9, 11; The Schwartz Dissent, 1 Antitrust Bulletin, at 39; Report of Attorney General's National Committee to Study the Antitrust Laws, p. 43; Neal, The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179, 205, 213.

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parent that du Pont's power to set the price of cellophane has been limited only by the competition afforded by other flexible packaging materials. Moreover, it may be practically impossible for anyone to commence manufacturing cellophane without full access to du Pont's technique. However, du Pont has no power to prevent competition from other wrapping materials. The trial court consequently had to determine whether competition from the other wrappings prevented du Pont from possessing monopoly power in violation of § 2. Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa. This approach to the determination of monopoly power is strengthened by this Court's conclusion in prior cases that, when an alleged monopolist has power over price and competition, an intention to monopolize in a proper case may be assumed.[19]

If a large number of buyers and sellers deal freely in a standardized product, such as salt or wheat, we have complete or pure competition. Patents, on the other hand, furnish the most familiar type of classic monopoly. As the producers of a standardized product bring about significant differentiations of quality, design, or packaging in the product that permit differences of use, competition becomes to a greater or less degree incomplete and the producer's power over price and competition greater over his article and its use, according to the differentiation he is able to create and maintain. A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station, or because no

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[19] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 525; *United States* v. *Paramount Pictures*, 334 U. S. 131, 173; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501; cf. Rostow, 43 Ill. L. Rev. 745, 753–763; Oppenheim, Federal Antitrust Legislation, 50 Mich. L. Rev. 1139, 1193.

one else makes a product of just the quality or attractiveness of his product, as for example in cigarettes. Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product.[20] However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.[21]

Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. For example, one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different. This is the interindustry competition emphasized by some economists. See Lilienthal, Big Business, c. 5. On the other hand, there are certain differences in the formulae for soft drinks but one can hardly say that each one is an illegal monopoly. Whatever the market may be, we hold that control of price or competition establishes the existence of monopoly power under § 2. Section 2 requires the application of a reasonable approach in determining the existence of monopoly power just as surely as did § 1. This of course does not mean that there can be a reasonable monopoly. See notes 7 and 9, *supra*. Our next step is to determine whether du Pont has monopoly power over cellophane: that is, power over its price in relation to or competition with

[20] See Chamberlin, Theory of Monopolistic Competition, c. IV.

[21] See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527; *Times-Picayune Co.* v. *United States*, 345 U. S. 594, 610; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 179.

other commodities. The charge was monopolization of cellophane. The defense, that cellophane was merely a part of the relevant market for flexible packaging materials.

IV. *The Relevant Market.*—When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot, as we said in *Times-Picayune Co.* v. *United States,* 345 U. S. 594, 612, give "that infinite range" to the definition of substitutes. Nor is it a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.

The Government argues:

> "We do not here urge that in *no* circumstances may competition of substitutes negative possession of monopolistic power over trade in a product. The decisions make it clear at the least that the courts will not consider substitutes other than those which are substantially fungible with the monopolized product and sell at substantially the same price."

But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market. To accept the Government's argument, we would have to conclude that the manufacturers of plain as well as moistureproof cellophane were monopolists, and so with films such as Pliofilm, foil, glassine, polyethylene, and Saran, for each of these wrapping materials is distinguishable. These were all exhibits in the case. New wrappings appear, generally similar to cellophane: is each a monopoly? What is called for is an appraisal of the "cross-elasticity" of demand in the trade. See Note, 54 Col. L. Rev. 580.

The varying circumstances of each case determine the result.[22] In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal. As respects flexible packaging materials, the market geographically is nationwide.

Industrial activities cannot be confined to trim categories. Illegal monopolies under § 2 may well exist over limited products in narrow fields where competition is eliminated.[23] That does not settle the issue here. In

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[22] *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, 579:

"It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

[23] The Government notes that the prohibitions of § 2 of the Sherman Act have often been extended to producers of single products and to businesses of limited scope. But the cases to which the Government refers us were not concerned with the problem that is now before the Court. In *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555, a conspiracy to monopolize trade in vegetable parchment was held to be a violation of § 2. Parchment paper is obviously no larger a part of commerce than cellophane. Recovery, however, was based on proven allegations of combination and conspiracy to monopolize, and the scope of the market was not in issue. P. 560. Similarly, *Indiana Farmer's Guide Co.* v. *Prairie Farmer Publishing Co.,* 293 U. S. 268, ruled that a combination or conspiracy for the purpose of monopolizing the farm-paper business in the north central part of the Nation would be illegal by reason of the second section of the Sherman Act. *Lorain Journal Co.* v. *United States,* 342 U. S. 143, a case not cited by the Government, was concerned with even a smaller

determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control. The selling price between commodities with similar uses and different characteristics may vary, so that the cheaper product can drive out the more expensive. Or, the superior quality of higher priced articles may make dominant the more desirable. Cellophane costs more than many competing products and less than a few. But whatever the price, there are various flexible wrapping materials that are bought by manufacturers for packaging their goods in their own plants or are sold to converters who shape and print them for use in the packaging of the commodities to be wrapped.

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geographical area (dissemination of news in a community and surrounding territory). But the Court held only that defendant had attempted to monopolize, not that he had in fact monopolized. Also, this Court found in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, that the "relevant competitive market" for determining whether there had been an unreasonable restraint of trade (or an attempt to monopolize) was the market for "rolled steel" products in an 11-state area. Women's dresses of "original design," *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457; "first run" motion pictures, *United States* v. *Paramount Pictures*, 334 U. S. 131; the news services of one news agency, *United States* v. *Associated Press*, 52 F. Supp. 362 (S. D. N. Y.), aff'd 326 U. S. 1; and newspaper advertising as distinguished from other means of news dissemination, *Times-Picayune Co.* v. *United States*, 345 U. S. 594, have all been designated as parts of commerce. All four were concerned only with the question of whether there had been an attempt to monopolize. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2d Cir.), did involve the question of monopolization. Judge Hand found that the relevant market for measuring Alcoa's power was the market for "virgin" aluminum; he refused to consider the close competition offered by "secondary" (used) aluminum. The reason for the narrow definition was that Alcoa's control over virgin aluminum permitted it to regulate the supply of used aluminum even though the latter should be actually sold by a competitor. Consequently, the case is not particularly helpful in the problem of market definition now before the Court.

Cellophane differs from other flexible packaging materials. From some it differs more than from others. The basic materials from which the wrappings are made and the advantages and disadvantages of the products to the packaging industry are summarized in Findings 62 and 63. They are aluminum, cellulose acetate, chlorides, wood pulp, rubber hydrochloride, and ethylene gas. It will adequately illustrate the similarity in characteristics of the various products by noting here Finding 62 as to glassine.[24] Its use is almost as extensive as cellophane, Appendix C, *post,* p. 412, and many of its characteristics equally or more satisfactory to users.[25]

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[24] "62. . . . *Greaseproof paper* is made by beating wood pulp in a vat filled with water until the fibers become saturated and gelatinous in texture. Resulting product is translucent and resistant to oil and grease.

"*Glassine* is produced by finishing greaseproof paper between highly polished metal rollers under heat and at pressure. This process develops the transparency and surface gloss which are characteristic of glassine. It is greaseproof, and can be sealed by heat, if coated. It is made moistureproof by coating and with appropriate lacquers or waxes and may be printed."

[25] "63. There are respects in which other flexible packaging materials are as satisfactory as cellophane:

. . . . . .

"*Glassine.*

"Glassine is, in some types, about 90% transparent, so printing is legible through it.

"Glassine affords low cost transparency.

"Moisture protection afforded by waxed or lacquered glassine is as good as that of moistureproof cellophane.

"Glassine has greater resistance to tearing and breakage than cellophane.

"Glassine runs on packaging machinery with ease equal to that of cellophane.

"Glassine can be printed faster than cellophane, and can be run faster than moistureproof cellophane on bag machines.

"Glassine has greater resistance than cellophane to rancidity-

It may be admitted that cellophane combines the desirable elements of transparency, strength and cheapness more definitely than any of the others. Comparative characteristics have been noted thus:

> "Moistureproof cellophane is highly transparent, tears readily but has high bursting strength, is highly impervious to moisture and gases, and is resistant to grease and oils. Heat sealable, printable, and adapted to use on wrapping machines, it makes an excellent packaging material for both display and protection of commodities.
>
> "Other flexible wrapping materials fall into four major categories: (1) opaque nonmoistureproof wrapping *paper* designed primarily for convenience and protection in handling packages; (2) moistureproof *films* of varying degrees of transparency designed primarily either to protect, or to display and protect, the products they encompass; (3) nonmoistureproof transparent *films* designed primarily to display and to some extent protect, but which obviously do a poor protecting job where exclusion or retention of moisture is important; and (4) moistureproof *materials* other than films of varying degrees of transparency (foils and paper products) designed to protect and display." [26]

An examination of Finding 59, Appendix B, *post*, p. 411, will make this clear.

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inducing ultraviolet rays.

"Glassine has dimensional stability superior to cellophane.

"Glassine is more durable in cold weather than cellophane.

"Printed glassine can be sold against cellophane on the basis of appearance.

"Glassine may be more easily laminated than cellophane.

"Glassine is cheaper than cellophane in some types, comparable in others."

[26] Stocking and Mueller, The Cellophane Case, XLV Amer. Economic Rev. 29, 48–49.

But, despite cellophane's advantages, it has to meet competition from other materials in every one of its uses. Cellophane's principal uses are analyzed in Appendix A, Findings 281 and 282. Food products are the chief outlet, with cigarettes next. The Government makes no challenge to Finding 283 that cellophane furnishes less than 7% of wrappings for bakery products, 25% for candy, 32% for snacks, 35% for meats and poultry, 27% for crackers and biscuits, 47% for fresh produce, and 34% for frozen foods. Seventy-five to eighty percent of cigarettes are wrapped in cellophane. Finding 292. Thus, cellophane shares the packaging market with others. The over-all result is that cellophane accounts for 17.9% of flexible wrapping materials, measured by the wrapping surface. Finding 280, Appendix A, *post,* p. 405.

Moreover a very considerable degree of functional interchangeability exists between these products, as is shown by the tables of Appendix A and Findings 150–278.[27] It will be noted, Appendix B, that except as to permeability to gases, cellophane has no qualities that are not possessed by a number of other materials. Meat will do as an example of interchangeability. Findings 205–220. Although du Pont's sales to the meat industry have reached 19,000,000 pounds annually, nearly 35%, this volume is attributed "to the rise of self-service retailing of fresh meat." Findings 212 and 283. In fact, since the popularity of self-service meats, du Pont has lost "a considerable proportion" of this packaging business to Pliofilm. Finding 215. Pliofilm is more expensive than cellophane, but its superior physical characteristics apparently offset cellophane's price advantage. While retail-

[27] There are eighteen classifications: White Bread; Specialty Breads; Cake and Sweet Goods; Meat; Candy; Crackers and Biscuits; Frozen Foods; Potato Chips, Pop Corn and Snacks; Cereals; Fresh Produce; Paper Goods and Textiles; Cigarettes; Butter; Chewing Gum; Other Food Products; Other Tobacco Products; Cheese; Oleomargarine.

ers shift continually between the two, the trial court found that Pliofilm is increasing its share of the business. Finding 216. One further example is worth noting. Before World War II, du Pont cellophane wrapped between 5 and 10% of baked and smoked meats. The peak year was 1933. Finding 209. Thereafter du Pont was unable to meet the competition of Sylvania and of greaseproof paper. Its sales declined and the 1933 volume was not reached again until 1947. Findings 209–210. It will be noted that greaseproof paper, glassine, waxed paper, foil and Pliofilm are used as well as cellophane, Finding 218. Findings 209–210 show the competition and 215–216 the advantages that have caused the more expensive Pliofilm to increase its proportion of the business.

An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other.[28] If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market. The court below held that the "[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes" prevented du Pont from possessing monopoly control over price. 118 F. Supp., at 207. The record sustains these findings. See references made by the trial court in Findings 123–149.

We conclude that cellophane's interchangeability with the other materials mentioned suffices to make it a part of this flexible packaging material market.

The Government stresses the fact that the variation in price between cellophane and other materials demonstrates they are noncompetitive. As these products are

[28] Scitovsky, Welfare and Competition (1951), 396; Bain, Pricing, Distribution, and Employment (1953 rev. ed.), 52.

all flexible wrapping materials, it seems reasonable to consider, as was done at the trial, their comparative cost to the consumer in terms of square area. This can be seen in Finding 130, Appendix C. Findings as to price competition are set out in the margin.[29] Cellophane costs two or three times as much, surface measure, as its chief competitors for the flexible wrapping market, glassine and greaseproof papers. Other forms of cellulose wrappings and those from other chemical or mineral substances, with the exception of aluminum foil, are more expensive. The uses of these materials, as can be observed by Finding 283 in Appendix A, are largely to wrap small packages for retail distribution. The wrapping is a relatively small proportion of the entire cost of the article.[30] Different producers need different qualities in wrappings and their need may vary from time to time as their products undergo change. But the necessity for flexible wrappings is the central and unchanging demand. We cannot say that these differences in cost gave du Pont monopoly power over prices in view of the findings of fact on that subject.[31]

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[29] "132. The price of cellophane is today an obstacle to its sales in competition with other flexible packaging materials.

"133. Cellophane has always been higher priced than the two largest selling flexible packaging materials, wax paper and glassine, and this has represented a disadvantage to sales of cellophane.

"134. DuPont considered as a factor in the determination of its prices, the prices of waxed paper, glassine, greaseproof, vegetable parchment, and other flexible packaging materials.

"135. DuPont, in reducing its prices, intended to narrow price differential between cellophane and packaging papers, particularly glassine and waxed paper. The objective of this effort has been to increase the use of cellophane. Each price reduction was intended to open up new uses for cellophane, and to attract new customers who had not used cellophane because of its price."

[30] See, *e. g.*, R. 4846.

[31] "140. Some users are sensitive to the cost of flexible packaging materials; others are not. Users to whom cost is important include

It is the variable characteristics of the different flexible wrappings and the energy and ability with which the manufacturers push their wares that determine choice. A glance at "Modern Packaging," a trade journal, will give, by its various advertisements, examples of the competition among manufacturers for the flexible packaging market. The trial judge visited the 1952 Annual Pack-

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substantial business: for example, General Foods, Armour, Curtiss Candy Co., and smaller users in the bread industry, cracker industry, and frozen food industry. These customers are unwilling to use more cellophane because of its relatively high price, would use more if the price were reduced, and have increased their use as the price of cellophane has been reduced.

"141. The cost factor slips accounts away from cellophane. This hits at the precarious users, whose profit margins on their products are low, and has been put in motion by competitive developments in the user's trade. Examples include the losses of business to glassine in candy bar wraps in the 30's, frozen food business to waxed paper in the late 40's, and recent losses to glassine in cracker packaging.

"142. The price of cellophane was reduced to expand the market for cellophane. DuPont did not reduce prices for cellophane with intent of monopolizing manufacture or with intent of suppressing competitors.

"143. DuPont reduced cellophane prices to enable sales to be made for new uses from which higher prices had excluded cellophane, and to expand sales. Reductions were made as sales volume and market conditions warranted. In determining price reductions, duPont considered relationship between its manufacturing costs and proposed prices, possible additional volume that might be gained by the price reduction, effect of price reduction upon the return duPont would obtain on its investment. It considered the effect its lowered price might have on the manufacture by others, but this possible result of a price reduction was never a motive for the reduction.

"144. DuPont never lowered cellophane prices below cost, and never dropped cellophane prices temporarily to gain a competitive advantage.

"145. As duPont's manufacturing costs declined, 1924 to 1935, duPont reduced prices for cellophane. When costs of raw materials increased subsequent to 1935, it postponed reductions until 1938 and 1939. Subsequent increases in cost of raw material and labor brought about price increases after 1947."

aging Show at Atlantic City, with the consent of counsel. He observed exhibits offered by "machinery manufacturers, converters and manufacturers of flexible packaging materials." He states that these personal observations confirmed his estimate of the competition between cellophane and other packaging materials. Finding 820. From this wide variety of evidence, the Court reached the conclusion expressed in Finding 838:

> "The record establishes plain cellophane and moistureproof cellophane are each flexible packaging materials which are functionally interchangeable with other flexible packaging materials and sold at same time to same customers for same purpose at competitive prices; there is no cellophane market distinct and separate from the market for flexible packaging materials; the market for flexible packaging materials is the relevant market for determining nature and extent of duPont's market control; and duPont has at all times competed with other cellophane producers and manufacturers of other flexible packaging materials in all aspects of its cellophane business."

The facts above considered dispose also of any contention that competitors have been excluded by du Pont from the packaging material market. That market has many producers and there is no proof du Pont ever has possessed power to exclude any of them from the rapidly expanding flexible packaging market. The Government apparently concedes as much, for it states that "lack of power to inhibit entry into this so-called market [*i. e.*, flexible packaging materials], comprising widely disparate products, is no indicium of absence of power to exclude competition in the manufacture and sale of cellophane." The record shows the multiplicity of competitors and the financial strength of some with individual assets running to the hundreds of millions. Findings 66–72. Indeed, the

trial court found that du Pont could not exclude competitors even from the manufacture of cellophane, Finding 727, an immaterial matter if the market is flexible packaging material. Nor can we say that du Pont's profits, while liberal (according to the Government 15.9% net after taxes on the 1937–1947 average), demonstrate the existence of a monopoly without proof of lack of comparable profits during those years in other prosperous industries. Cellophane was a leader, over 17%, in the flexible packaging materials market. There is no showing that du Pont's rate of return was greater or less than that of other producers of flexible packaging materials. Finding 719.

The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows.

On the findings of the District Court, its judgment is

Affirmed.

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

[For concurring opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 413.]

[For dissenting opinion of THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, see *post*, p. 414.]

APPENDIX A.

VIII. Results of du Pont's Competition With Other Materials.

(Findings 279–292.)

279. During the period du Pont entered the flexible packaging business, and since its introduction of moisture-proof cellophane, sales of cellophane have increased. Total volume of flexible packaging materials used in the United States has also increased. Du Pont's relative percentage of the packaging business has grown as a result of its research, price, sales and capacity policies, but du Pont cellophane even in uses where it has competed has not attained the bulk of the business, due to competition of other flexible packaging materials.

280. Of the production and imports of flexible packaging materials in 1949 measured in wrapping surface, du Pont cellophane accounted for less than 20% of flexible packaging materials consumed in the United States in that year. The figures on this are:

	Thousands of Square Yards
Glassine, Greaseproof and Vegetable Parchment Papers	3,125,826
Waxing Papers (18 Pounds and over)	4,614,685
Sulphite Bag and Wrapping Papers	1,788,615
Aluminum Foil	1,317,807
Cellophane	3,366,068
Cellulose Acetate	133,982
Pliofilm, Polyethylene, Saran and Cry-O-Rap	373,871
Total	14,720,854
Total du Pont Cellophane Production	2,629,747
Du Pont Cellophane Per Cent of Total United States Production and Imports of These Flexible Packaging Materials	17.9%

281. Eighty percent of cellophane made by du Pont is sold for packaging in the food industry. Of this quantity, 80% is sold for packaging baked goods, meat, candy, crackers and biscuits, frozen foods, fresh vegetables and produce, potato chips, and "snacks," such as peanut butter sandwiches, popcorn, etc. A small amount is sold for wrapping of textiles and paper products, etc. Largest non-food use of cellophane is the overwrapping of cigarette packages.

The breakdown of du Pont cellophane sales for the year 1949 was:

Use	*Sales (M pounds)*	*Percent of Total Sales*
TOBACCO		
Cigarettes	20,584	11.6
Cigars	3,195	1.8
Other Tobacco	1,657	0.9
Total	25,436	14.3
FOOD PRODUCTS		
Candy & Gum	17,054	9.6
Bread & Cake	40,081	22.5
Crackers & Biscuits	12,614	7.1
Meat	11,596	6.5
Noodles & Macaroni	2,602	1.5
Tea & Coffee	1,380	0.8
Cereals	2,487	1.4
Frozen Foods	5,234	2.9
Dried Fruit	333	0.2
Nuts	2,946	1.7
Popcorn & Potato Chips	6,929	3.9
Dairy Products	3,808	2.1
Fresh Produce	4,564	2.6
Unclassified Foods	8,750	4.9
Total	120,478	67.7

Use	*Sales (M pounds)*	*Percent of Total Sales*
MISCELLANEOUS		
Hosiery	1,370	0.7
Textiles	3,141	1.8
Drugs	1,031	0.6
Rubber	317	0.2
Paper	2,736	1.5
Unclassified	18,602	10.5
Total	27,197	15.3
Domestic Total	173,011	97.3
Export	4,820	2.7
Grand Total	177,831	100.0

282. Sales of cellophane by du Pont in 1951, by principal uses, were approximately as follows:

	Pounds
White bread	between 8 and 9,000,000
Specialty breads	15,700,000
Cake and other baked sweet goods	22,000,000
Meat	19,000,000
Candy (including chewing gum)	20,000,000
Crackers and biscuits	17,000,000
Frozen foods	5,800,000
Cigarettes	23,000,000

283. 1949 sales of 19 major representative converters whose business covered a substantial segment of the total converting of flexible packaging materials for that year showed the following as to their sales of flexible packaging materials, classified by end use:

End Use	*Quantity (Millions sq. in.)*	*Percent of Total End Use*
BAKERY PRODUCTS		
Cellophane	109,670	6.8
Foil	2,652	.2
Glassine	72,216	4.4
Papers	1,440,413	88.6
Films	215	.0
	1,625,166	100.0

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End Use	*Quantity (Millions sq. in.)*	*Percent of Total End Use*
CANDY		
Cellophane	134,280	24.4
Foil	178,967	32.5
Glassine	117,634	21.4
Papers	119,102	21.6
Films	484	.1
	550,467	100.0
SNACKS		
Cellophane	61,250	31.9
Foil	1,571	.8
Glassine	120,556	62.8
Papers	8,439	4.4
Films	79	.1
	191,895	100.0
MEAT AND POULTRY		
Cellophane	59,016	34.9
Foil	88	.1
Glassine	4,524	2.7
Papers	97,255	57.5
Films	8,173	4.8
	169,056	100.0
CRACKERS AND BISCUITS		
Cellophane	29,960	26.6
Foil	192	.2
Glassine	11,253	10.0
Papers	71,147	63.2
Films	8	.0
	112,560	100.0
FRESH PRODUCE		
Cellophane	52,828	47.2
Foil	43	.1
Glassine	96	.1
Papers	51,035	45.6
Films	7,867	7.0
	111,869	100.0

End Use FROZEN FOOD EXCLUDING DAIRY PRODUCTS	*Quantity (Millions sq. in.)*	*Percent of Total End Use*
Cellophane	31,684	33.6
Foil	629	.7
Glassine	1,943	2.1
Papers	56,925	60.3
Films	3,154	3.3
	94,335	100.0

284. About 96% of packaged white bread produced in the United States is wrapped in waxed paper or glassine, and about 6% in cellophane. The cellophane figure includes sales by all U. S. producers.

285. Forty-eight percent of specialty breads are wrapped in du Pont cellophane, the remainder in other cellophane or other materials. Most of this balance is wrapped in waxed paper and glassine.

286. Approximately 45% of cake and baked sweet goods packaged by wholesale bakers is wrapped in du Pont cellophane. The balance is wrapped in other cellophane or in waxed paper or glassine.

287. Between 25 and 35% of packaged candy units sold in the United States are wrapped in du Pont cellophane.

288. Of sponge and sweet crackers and biscuits combined approximately 25% to 30% of the packaged units produced in 1951 were wrapped in du Pont cellophane.

289. Du Pont cellophane at the present time is used on approximately 20 to 30% of packaged retail units of frozen foods. The remainder use waxed paper, waxed glassine, polyethylene, Pliofilm, Cry-O-Vac, or vegetable parchment.

290. Approximately 20 to 30% of packages of potato chips and other snacks are wrapped in du Pont cellophane. Most of the remainder are packaged in glassine and other flexible wraps.

291. Approximately 4 to 6% of the packaged units of cereal are wrapped in du Pont cellophane. The principal flexible packaging materials used are waxed paper and glassine.

292. Du Pont cellophane is used as an outer wrap on the paper-foil packages for approximately 75 to 80% of cigarettes sold in the United States. Sales for this use represent about 11.6% of du Pont's total sales of cellophane.

APPENDIX B.

59. The accompanying Table compares, descriptively, physical properties of cellophane and other flexible packaging materials:

PHYSICAL PROPERTIES

Packaging Materials	Heat Sealability	Printability	Clarity	Tear Strength (Elmendorf)	Bursting Strength	Water Absorption in 24 hrs. Immersion	Moisture Permeability	Permeability to Gases (2)	Dimens. Change With Humid. Diff.	Resistance to Grease & Oils	Wrapping Machine Running Qualities
Cellophane (plain)	Yes (if coated)	Yes	Highly Transparent	Low	High	High	High	Very Low	Large	Excellent	O.K.
Cellophane (Moisture-proof)	Yes (if coated)	Yes	Highly Transparent	Low	High	High	Low-Medium	Very Low	Large	Excellent	O.K.
Plain grease-proof paper	No	Yes	Opaque	Good	Low	High	High	Medium	Moderate	Good	O.K.
Plain Glassine	No	Yes	Commercially Transparent to Opaque	Good	Low	High	High	Low	Moderate	Good	O.K.
Lacquered Glassine	Yes	Yes	Commercially Transparent to Translucent	Good	Low	Low	Low-Medium	Low	Moderate	Good	O.K.
Waxed Glassine	Yes	(1)	Commercially Transparent to Translucent	Good	Low	Low	Low	Low	Moderate	Good	O.K.
Vegetable Parchment	No	Yes	Tends to be Opaque	Good	Good	High	High	Low	Moderate	Good	O.K.
Waxed Paper (18 lbs. or over)	Yes	(1)	Commercially Transparent	High	Good	Low	Low-Medium	High	Moderate	None	O.K.
Aluminum Foil	No	Yes	Opaque	Low	Low	Nil	Very Low	Very Low	None	Excellent	O.K.
Aluminum Foil (Heat Sealing)	Yes	Yes	Opaque	Low	Low	Nil	Nearly Nil	Very Low	None	Excellent	O.K.
Cellulose Acetate	Yes	Yes	Highly Transparent	Low	High	Low	High	Variable	Very Small	Excellent	O.K.
Pliofilm (rubber hydrochloride)	Yes (3)	Yes (3)	Highly Transparent with Slight Haze	Medium	High	Low	Medium	Low	Very Small	Excellent	Good (3)
Saran (Vinylidene Chloride)	Yes (3)	Yes (3)	Highly Transparent	High	High	Low	Very Low	Very Low	None	Excellent	Poor (3)
Polyethylene	Yes (3)	Yes (3)	Transparent with Slight Haze	High	High	Low	Medium	High	None	(4)	Poor (3)
Cry-O-Rap	Yes (3)	Yes (3)	Transparent with Slight Haze	High	High	Low	Medium	Low	None	Excellent	Poor (3)
Sulphite (high finish wrapper and label paper)	No	Yes	Opaque	High	Medium	High	Very High	High	Moderate	None	O.K.

References:
(1) Normally printed before waxing.
(2) The permeability to gases can vary greatly depending upon the gas and the humidity conditions. The levels indicated in this chart apply particularly to flavor type volatiles as found in many food products.
(3) Plastic films may require special heat sealing techniques, and printing processes or special machines.
(4) Not affected by greases but penetrated by some oils.
(5) The information on this chart is based upon the generally accepted properties of the materials listed; however, materials produced by different processes, formulations, coatings, raw materials, surface treatments, and thicknesses can show considerable variation from the properties indicated.

APPENDIX C.

(Finding of Fact 130.)

1949 average wholesale prices of flexible packaging materials in the United States were:

Packaging Material	*Price per 1,000 sq. in. (cents)*	*Price per lb. (cents)*	*Yield per lb. (sq. in.)*
Saran			
100 Gauge #517	6.1	99.0	16,300
Cellulose Acetate			
.00088″	3.3	82.0	25,000
Polyethylene			
.002″—18″ Flat Width	5.4	81.0	15,000
Pliofilm			
120 Gauge N 2	3.8	80.8	21,000
Aluminum Foil			
.00035″	1.8	52.2	29,200
Moistureproof Cellophane			
300 MST–51	2.3	47.8	21,000
Plain Cellophane			
300 PT	2.1	44.8	21,500
Vegetable Parchment			
27#	1.4	22.3	16,000
Bleached Glassine			
25#	1.0	17.8	17,280
Bleached Greaseproof			
25#	.9	15.8	17,280
Plain Waxed Sulphite			
25# Self-Sealing	1.1	15.2	14,400
Plain Waxed Sulphite			
25# Coated Opaque	.7	11.9	17,280
Cry-O-Rap	Sold only in converted form. No unconverted quotations.		

MR. JUSTICE FRANKFURTER, concurring.

I concur in the judgment of the Court and in so much of MR. JUSTICE REED'S opinion as supports the conclusion that cellophane did not by itself constitute a closed market but was a part of the relevant market for flexible packaging materials.

MR. JUSTICE REED has pithily defined the conflicting claims in this case. "The charge was monopolization of cellophane. The defense, that cellophane was merely a part of the relevant market for flexible packaging materials." Since this defense is sustained, the judgment below must be affirmed and it becomes unnecessary to consider whether du Pont's power over trade in cellophane would, had the defense failed, come within the prohibition of "monopolizing" under § 2 of the Sherman Act. Needless disquisition on the difficult subject of single-firm monopoly should be avoided since the case may be disposed of without consideration of this problem.

The boundary between the course of events by which a business may reach a powerful position in an industry without offending the outlawry of "monopolizing" under § 2 of the Sherman Act and the course of events which brings the attainment of that result within the condemnation of that section, cannot be established by general phrases. It must be determined with reference to specific facts upon considerations analogous to those by which § 1 of the Sherman Act is applied. These were illuminatingly stated by Mr. Justice Brandeis for the Court:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which

> the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. . . ." *Board of Trade of the City of Chicago* v. *United States,* 246 U. S. 231, 238.

Sections 1 and 2 of course implicate different considerations. But the so-called issues of fact and law that call for adjudication in this legal territory are united, and intrinsically so, with factors that entail social and economic judgment. Any consideration of "monopoly" under the Sherman law can hardly escape judgment, even if only implied, on social and economic issues. It had best be withheld until a case inescapably calls for it.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

This case, like many under the Sherman Act, turns upon the proper definition of the market. In defining the market in which du Pont's economic power is to be measured, the majority virtually emasculate § 2 of the Sherman Act. They admit that "cellophane combines the desirable elements of transparency, strength and cheapness more definitely than any of" a host of other packaging materials. Yet they hold that all of those materials are so indistinguishable from cellophane as to warrant their inclusion in the market. We cannot agree that cellophane, in the language of *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 613, is "the selfsame product" as glassine, greaseproof and vegetable parchment papers, waxed papers, sulphite papers,

aluminum foil, cellulose acetate, and Pliofilm and other films.[1]

The majority opinion states that "[I]t will adequately illustrate the similarity in characteristics of the various products by noting here Finding 62 as to glassine." But Finding 62 merely states the respects in which the selected flexible packaging materials are as satisfactory as cellophane; it does not compare all the physical properties of cellophane and other materials. The Table incorporated in Finding 59 does make such a comparison, and enables us to note cellophane's unique combination of qualities lacking among less expensive materials in varying degrees.[2] A glance at this Table reveals that cellophane has a high bursting strength while glassine's is low; that cellophane's permeability to gases is lower than that of glassine; and that both its transparency and its resistance to grease and oils are greater than glassine's.

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[1] In *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 612, note 31, the Court said:

"For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small."

[2] See 118 F. Supp., at 64. The majority opinion quotes at length from Stocking and Mueller, The Cellophane Case, XLV Amer. Economic Rev. 29, 48–49, in noting the comparative characteristics of cellophane and other products. Unfortunately, the opinion fails to quote the conclusion reached by these economists. They state: "The [trial] court to the contrary notwithstanding, the market in which cellophane meets the 'competition' of other wrappers is narrower than the market for all flexible packaging materials." *Id.,* at 52. And they conclude that ". . . cellophane is so differentiated from other flexible wrapping materials that its cross elasticity of demand gives du Pont significant and continuing monopoly power." *Id.,* at 63.

Similarly, we see that waxed paper's bursting strength is less than cellophane's and that it is highly permeable to gases and offers no resistance whatsoever to grease and oils. With respect to the two other major products held to be close substitutes for cellophane, Finding 59 makes the majority's market definition more dubious. In contrast to cellophane, aluminum foil is actually opaque and has a low bursting strength. And sulphite papers, in addition to being opaque, are highly permeable to both moisture and gases, have no resistance to grease and oils, have a lower bursting strength than cellophane, and are not even heat sealable. Indeed, the majority go further than placing cellophane in the same market with such products. They also include the transparent films, which are more expensive than cellophane. These bear even less resemblance to the lower priced packaging materials than does cellophane. The juxtaposition of one of these films, Cry-O-Rap, with sulphite in the Table facilitates a comparison which shows that Cry-O-Rap is markedly different and far superior.

If the conduct of buyers indicated that glassine, waxed and sulphite papers and aluminum foil were actually "the selfsame products" as cellophane, the qualitative differences demonstrated by the comparison of physical properties in Finding 59 would not be conclusive. But the record provides convincing proof that businessmen did not so regard these products. During the period covered by the complaint (1923–1947) cellophane enjoyed phenomenal growth. Du Pont's 1924 production was 361,249 pounds, which sold for $1,306,662. Its 1947 production was 133,502,858 pounds, which sold for $55,339,626. Findings 297 and 337. Yet throughout this period the price of cellophane was far greater than that of glassine, waxed paper or sulphite paper. Finding 136 states that in 1929 cellophane's price was seven times that of glassine; in 1934, four times, and in 1949 still more than twice

glassine's price. Reference to DX–994, the graph upon which Finding 136 is based, shows that cellophane had a similar price relation to waxed paper and that sulphite paper sold at even less than glassine and waxed paper. We cannot believe that buyers, practical businessmen, would have bought cellophane in increasing amounts over a quarter of a century if close substitutes were available at from one-seventh to one-half cellophane's price. That they did so is testimony to cellophane's distinctiveness.

The inference yielded by the conduct of cellophane buyers is reinforced by the conduct of sellers other than du Pont. Finding 587 states that Sylvania, the only other cellophane producer, absolutely and immediately followed every du Pont price change, even dating back its price list to the effective date of du Pont's change. Producers of glassine and waxed paper, on the other hand, displayed apparent indifference to du Pont's repeated and substantial price cuts. DX–994 shows that from 1924 to 1932 du Pont dropped the price of plain cellophane 84%, while the price of glassine remained constant.[3] And during the period 1933–1946 the prices for glassine and waxed paper actually increased in the face of a further 21% decline in the price of cellophane. If "shifts of business" due to "price sensitivity" had been substantial, glassine and waxed paper producers who wanted to stay in business would have been compelled by market forces to meet du Pont's price challenge just as Sylvania was. The majority correctly point out that:

> "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an

[3] The record provides no figures for waxed paper prior to 1933.

> indication that a high cross-elasticity of demand exists between them; that the products compete in the same market."

Surely there was more than "a slight decrease in the price of cellophane" during the period covered by the complaint. That producers of glassine and waxed paper remained dominant in the flexible packaging materials market without meeting cellophane's tremendous price cuts convinces us that cellophane was not in effective competition with their products.[4]

Certainly du Pont itself shared our view. From the first, du Pont recognized that it need not concern itself with competition from other packaging materials. For example, when du Pont was contemplating entry into cellophane production, its Development Department reported that glassine "is so inferior that it belongs in an entirely different class and has hardly to be considered as a competitor of cellophane." [5] This was still du Pont's view in 1950 when its survey of competitive prospects wholly omitted reference to glassine, waxed paper or sulphite paper and stated that "Competition for du Pont cellophane will come from competitive cellophane and from non-cellophane films made by us or by others." [6]

Du Pont's every action was directed toward maintaining dominance over cellophane. Its 1923 agreements with La Cellophane, the French concern which first produced commercial cellophane, gave du Pont exclusive

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[4] See Stocking and Mueller, The Cellophane Case, XLV Amer. Economic Rev. 29, 56.

[5] R. 3549, GX-392. The record contains many reports prepared by du Pont from 1928 to 1947. They virtually ignore the possibility of competition from other packaging materials. *E. g.*, R. 3651, 3678, 3724, 3739.

[6] R. 4070. It is interesting to note that du Pont had almost 70% of the market which this report considered relevant.

North and Central American rights to cellophane's technology, manufacture and sale, and provided, without any limitation in time, that all existing and future information pertaining to the cellophane process be considered "secret and confidential," and be held in an exclusive common pool.[7] In its subsequent agreements with foreign licensees, du Pont was careful to preserve its continental market inviolate.[8] In 1929, while it was still the sole domestic producer of cellophane, du Pont won its long struggle to raise the tariff from 25% to 60%, ad valorem, on cellophane imports,[9] substantially foreclosing foreign competition. When Sylvania became the second American cellophane producer the following year and du Pont filed suit claiming infringement of its moistureproof patents, they settled the suit by entering into a cross-licensing agreement. Under this agreement, du Pont obtained the right to exclude third persons from use of any patentable moistureproof invention made during the next 15 years by the sole other domestic cellophane producer, and, by a prohibitive royalty provision, it limited Sylvania's moistureproof production to approx-

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[7] See Finding 24; GX–1001, R. 3253; and GX–1002, R. 3257–3260. The agreement of June 9, 1923, in which the parties agreed to divide the world cellophane market, is illegal *per se* under *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596–599. The supplementary agreement providing for the interchange of technological information tightened the cellophane monopoly and denied to others any access to what went into the common pool—all in violation of *United States* v. *National Lead Co.*, 332 U. S. 319, 328. As was said in *United States* v. *Griffith*, 334 U. S. 100, 107: "The anti-trust laws are as much violated by the prevention of competition as by its destruction."

[8] See Finding 602; GX–1087, R. 3288; and GX–1109, R. 3301.

[9] Finding 633. On appeal from an adverse decision by the Commissioner of Customs, du Pont persuaded the United States Customs Court to order reclassification of cellophane.

imately 20% of the industry's moistureproof sales.[10] The record shows that du Pont and Sylvania were aware that, by settling the infringement suit, they avoided the possibility that the courts might hold the patent claims invalid and thereby open cellophane manufacture to additional competition.[11] If close substitutes for cellophane had been commercially available, du Pont, an enlightened enterprise, would not have gone to such lengths to control cellophane.

As predicted by its 1923 market analysis,[12] du Pont's dominance in cellophane proved enormously profitable from the outset. After only five years of production, when du Pont bought out the minority stock interests in its cellophane subsidiary, it had to pay more than fifteen times the original price of the stock.[13] But such success was not limited to the period of innovation, limited sales and complete domestic monopoly. A confidential du Pont report shows that during the period 1937–1947, despite great expansion of sales, du Pont's "operative return" (before taxes) averaged 31%, while its average "net return" (after deduction of taxes, bonuses, and fundamental research expenditures) was 15.9%.[14] Such profits provide a powerful incentive for the entry of com-

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[10] The agreement is summarized in Finding 545 and appears in full in GX–2487, R. 3383–3408. We believe that under the principles set forth in *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, 646, this agreement violated the Sherman Act.

[11] GX–2811, R. 6073–6074.

[12] R. 3563.

[13] When du Pont Cellophane was organized in 1923, du Pont received 52,000 shares of its stock in return for $866,666.67 in cash, or $16.67 per share. F. 22; DX–735, R. 5402. In 1929 du Pont had to surrender stock having a market value of $12,129,600 in order to obtain the 48,000 shares held by French interests, a sum equal to $252.70 per share. DX–735, R. 5403.

[14] R. 4155.

petitors.[15] Yet from 1924 to 1951 only one new firm, Sylvania, was able to begin cellophane production. And Sylvania could not have entered if La Cellophane's secret process had not been stolen.[16] It is significant that for 15 years Olin Industries, a substantial firm, was unsuccessful in its attempt to produce cellophane, finally abandoning the project in 1944 after having spent about $1,000,000.[17] When the Government brought this suit, du Pont, "to reduce the hazard of being judged to have a monopoly of the U. S. cellophane business," [18] decided to let Olin enter the industry. Despite this demonstration of the control achieved by du Pont through its exclusive dominion over the cellophane process, the District Court found that du Pont could not exclude competitors from the manufacture of cellophane. Finding 727. This finding is "clearly erroneous." [19] The majority avoid

[15] See Stocking and Mueller, The Cellophane Case, XLV Amer. Economic Rev. 29, 60–63, where the authors compare the domestic economic history of rayon with that of cellophane. The first American rayon producer earned 64.2% on its investment in 1920, thereby attracting du Pont. After a loss in 1921, du Pont's average return for the next four years was roughly 32%. As more firms began rayon production, du Pont's and the industry's return on investment began to drop. When 6 new firms entered the industry in 1930, bringing the number of producers to 20, average industry earnings for that year declined to 5% and du Pont suffered a net loss. "From the beginning of the depression in 1929 through the succeeding recovery and the 1938 recession du Pont averaged 29.6 per cent before taxes on its cellophane investment. On its rayon investment it averaged only 6.3 per cent." *Id.*, at 62–63.

[16] In 1924 two of La Cellophane's principal officials absconded with complete information on the cellophane process. A Belgian concern was then set up to use this process in making cellophane, and it later organized Sylvania as an American affiliate. Findings 615–618.

[17] R. 2733–2736.

[18] See memorandum du Pont submitted to prospective entrants. R. 3893.

[19] See Rule 52 (a), Federal Rules of Civil Procedure.

passing upon Finding 727 by stating that it is "immaterial . . . if the market is flexible packaging material." They do not appear to disagree with our conclusion, however, since they concede that ". . . it may be practically impossible for anyone to commence manufacturing cellophane without full access to du Pont's technique."

The trial court found that

> "Du Pont has no power to set cellophane prices arbitrarily. If prices for cellophane increase in relation to prices of other flexible packaging materials it will lose business to manufacturers of such materials in varying amounts for each of duPont cellophane's major end uses." Finding 712.

This further reveals its misconception of the antitrust laws. A monopolist seeking to maximize profits cannot raise prices "arbitrarily." Higher prices of course mean smaller sales, but they also mean higher per-unit profit. Lower prices will increase sales but reduce per-unit profit. Within these limits a monopolist has a considerable degree of latitude in determining which course to pursue in attempting to maximize profits. The trial judge thought that, if du Pont raised its price, the market would "penalize" it with smaller profits as well as lower sales.[20] Du Pont proved him wrong. When 1947 operating earnings dropped below 26% for the first time in 10 years, it increased cellophane's price 7% and boosted its earnings in 1948. Du Pont's division manager then reported that "If an operative return of 31% is considered inadequate then an upward revision in prices will be necessary to improve the return." [21] It is this latitude with respect to price, this broad power of choice, that the antitrust

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[20] 118 F. Supp., at 206.

[21] R. 4154–4155.

laws forbid.[22] Du Pont's independent pricing policy and the great profits consistently yielded by that policy leave no room for doubt that it had power to control the price of cellophane. The findings of fact cited by the majority cannot affect this conclusion.[23] For they merely demonstrate that, during the period covered by the complaint, du Pont was a "good monopolist," *i. e.*, that it did not engage in predatory practices and that it chose to maximize profits by lowering price and expanding sales. Proof of enlightened exercise of monopoly power certainly does not refute the existence of that power.

The majority opinion purports to reject the theory of "interindustry competition." Brick, steel, wood, cement and stone, it says, are "too different" to be placed in the same market. But cellophane, glassine, wax papers, sulphite papers, greaseproof and vegetable parchment papers, aluminum foil, cellulose acetate, Pliofilm and other films are not "too different," the opinion concludes. The majority approach would apparently enable a monopolist of motion picture exhibition to avoid Sherman Act consequences by showing that motion pictures compete in substantial measure with legitimate theater, television, radio, sporting events and other forms of entertainment. Here, too, "shifts of business" undoubtedly accompany fluctuations in price and "there are market alternatives that buyers may readily use for their purposes." Yet, in *United States* v. *Paramount Pictures,* 334 U. S. 131, where the District Court had confined the relevant market to that for nationwide movie exhibition, this Court remanded the case to the District Court with directions to determine whether there was a monopoly on the part of the five major distributors "in the *first-run* field for the entire

[22] See, *e. g., American Tobacco Co.* v. *United States,* 328 U. S. 781, 805–806.

[23] See note 31, majority opinion.

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country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities." 334 U. S., at 172. Similarly, it is difficult to square the majority view with *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, a landmark § 2 case. There Judge Learned Hand, reversing a district court, held that the close competition which "secondary" (used) aluminum offered to "virgin" aluminum did not justify including the former within the relevant market for measuring Alcoa's economic power. Against these and other precedents, which the Court's opinion approves but does not follow, the formula of "reasonable interchangeability," as applied by the majority, appears indistinguishable from the theory of "interindustry competition." The danger in it is that, as demonstrated in this case, it is "perfectly compatible with a fully monopolized economy." [24]

The majority hold in effect that, because cellophane meets competition for many end uses, those buyers for other uses who need or want only cellophane are not entitled to the benefits of competition within the cellophane industry. For example, Finding 282 shows that the largest single use of cellophane in 1951 was for wrapping cigarettes, and Finding 292 shows that 75 to 80% of all cigarettes are wrapped with cellophane. As the recent report of the Attorney General's National Committee to Study the Antitrust Laws states: "In the interest of rivalry that extends to *all* buyers and *all* uses, competition among rivals within the industry is always important." [25] (Emphasis added.) Furthermore, those buyers who have "reasonable alternatives" between cellophane

[24] Adams, The "Rule of Reason": Workable Competition or Workable Monopoly?, 63 Yale L. J. 348, 364.

[25] Report of Attorney General's National Committee to Study the Antitrust Laws, p. 322. The majority decision must be peculiarly frustrating to the cigarette industry, whose economic behavior has been restrained more than once by this Court in the interest of

and other products are also entitled to competition within the cellophane industry, for such competition may lead to lower prices and improved quality.

The foregoing analysis of the record shows conclusively that cellophane is the relevant market. Since du Pont has the lion's share of that market, it must have monopoly power, as the majority concede.[26] This being so, we think it clear that, in the circumstances of this case, du Pont is guilty of "monopolization." The briefest sketch of du Pont's business history precludes it from falling within the "exception to the Sherman Act prohibitions of monopoly power" (majority opinion, pp. 390–391) by successfully asserting that monopoly was "thrust upon" it. Du Pont was not "the passive beneficiary of a monopoly" within the meaning of *United States* v. *Aluminum Co. of America, supra,* at 429–430. It sought and maintained dominance through illegal agreements dividing the world market, concealing and suppressing technological information, and restricting its licensee's production by prohibitive royalties,[27] and through numerous maneuvers which might have been "honestly industrial" but whose necessary effect was nevertheless exclusionary.[28] Du Pont cannot bear "the burden of

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competition. See *American Tobacco Co.* v. *United States,* 328 U. S. 781; *United States* v. *American Tobacco Co.,* 221 U. S. 106.

[26] "If cellophane is the 'market' that du Pont is found to dominate, it may be assumed it does have monopoly power over that 'market.' Monopoly power is the power to control prices or exclude competition. It seems apparent that du Pont's power to set the price of cellophane has only been limited by the competition afforded by other flexible packaging materials. Moreover, it may be practically impossible for anyone to commence manufacturing cellophane without full access to du Pont's technique." Majority opinion, *ante,* pp. 391–392.

[27] See notes 7 and 10, our dissent.

[28] See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 431.

proving that it owes its monopoly *solely* to superior skill. . . ." (Emphasis supplied.) *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 342, aff'd *per curiam*, 347 U. S. 521.

Nor can du Pont rely upon its moistureproof patents as a defense to the charge of monopolization. Once du Pont acquired the basic cellophane process as a result of its illegal 1923 agreements with La Cellophane, development of moistureproofing was relatively easy. Du Pont's moistureproof patents were fully subject to the exclusive pooling arrangements and territorial restrictions established by those agreements. And they were the subject of the illicit and exclusionary du Pont-Sylvania agreement. Hence, these patents became tainted as part and parcel of du Pont's illegal monopoly. Cf., *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670. Any other result would permit one who monopolizes a market to escape the statutory liability by patenting a simple improvement on his product.

If competition is at the core of the Sherman Act, we cannot agree that it was consistent with that Act for the enormously lucrative cellophane industry to have no more than two sellers from 1924 to 1951. The conduct of du Pont and Sylvania illustrates that a few sellers tend to act like one and that an industry which does not have a competitive structure will not have competitive behavior. The public should not be left to rely upon the dispensations of management in order to obtain the benefits which normally accompany competition. Such beneficence is of uncertain tenure. Only actual competition can assure long-run enjoyment of the goals of a free economy.

We would reverse the decision below and remand the cause to the District Court with directions to determine the relief which should be granted against du Pont.

SEARS, ROEBUCK & CO. *v.* MACKEY ET AL.

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

No. 34. Argued February 28, 1956.—Decided June 11, 1956.

In a multiple claims action, the Federal District Court expressly directed that judgment be entered for the defendant on two, but less than all, of the claims presented. The court also expressly determined that there was no just reason for delay in making the entry. On appeal from that judgment, the Court of Appeals upheld its jurisdiction and denied a motion to dismiss, relying upon 28 U. S. C. § 1291 and Rule 54 (b) of the Federal Rules of Civil Procedure, as amended in 1946. *Held:* The appellate jurisdiction of the Court of Appeals is sustained, and its judgment denying the motion to dismiss the appeal for lack of appellate jurisdiction is affirmed. Pp. 428–438.

(a) Rule 54 (b), as amended, does not relax the finality required of each decision, as an individual claim, to render it appealable, but does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case. Pp. 434–435.

(b) The application of the amended rule is limited expressly to multiple claims actions in which "one or more but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal. P. 435.

(c) The amended rule requires that for "one or more but less than all" multiple claims to become appealable, the District Court must make both "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment." Pp. 435–436.

(d) In this case, each of the claims dismissed was a "claim for relief" within the meaning of Rule 54 (b), and the dismissal of each constituted a "final decision" on the individual claim. P. 436.

(e) The claims adjudged by the District Court could properly be decided independently of the claims which the court did not adjudge. P. 436.

(f) Amended Rule 54 (b) does not constitute an unauthorized extension of 28 U. S. C. § 1291, since the District Court cannot, in

the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. Pp. 436–437.

(g) In the exercise of its discretion under amended Rule 54 (b), the District Court may release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions; and any abuse of that discretion is reviewable by the Court of Appeals. P. 437.

(h) Rule 54 (b), as amended, does not supersede any statute controlling appellate jurisdiction; and it scrupulously recognizes the statutory requirement of a "final decision" under § 1291 as a basic requirement for an appeal to the Court of Appeals. P. 438.

(i) Rule 54 (b), as amended, is valid in both its "affirmative" and "negative" aspects. The rule is not rendered invalid because, through its "affirmative" operation, a final decision may be released for appeal to the Court of Appeals at a time when, under prior law, it would not have been appealable. P. 438.

218 F. 2d 295, affirmed.

Walter J. Rockler argued the cause and filed a brief for petitioner.

Edward I. Rothschild argued the cause for respondents. With him on a brief for Mackey, respondent, was *John Paul Stevens.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This action, presenting multiple claims for relief, was brought by Mackey and another in the United States District Court for the Northern District of Illinois, Eastern Division, in 1953. The court expressly directed that judgment be entered for the defendant, Sears, Roebuck & Co., on two, but less than all, of the claims presented. It also expressly determined that there was no just reason for delay in making the entry. After Mackey's notice of appeal from that judgment to the Court of Appeals for the Seventh Circuit, Sears, Roebuck & Co. moved to dismiss the appeal for lack of appellate jurisdiction. The Court of Appeals upheld its jurisdiction and denied the

motion, relying upon 28 U. S. C. § 1291 and Rule 54 (b) of the Federal Rules of Civil Procedure, as amended in 1946. 218 F. 2d 295. Because of the importance of the issue in determining appellate jurisdiction and because of a conflict of judicial views on the subject,[1] we granted certiorari. 348 U. S. 970. For the reasons hereafter stated, we sustain the Court of Appeals and its appellate jurisdiction.

Although we are here concerned with the present appealability of the judgment of the District Court and not with its merits, we must examine the claims stated in the complaint so as to consider adequately the issue of appealability.

The complaint contains six counts. We disregard the fifth because it has been abandoned and the sixth because it duplicates others. The claims stated in Counts I and II are material and have been dismissed without leave to amend. The claim contained in Count III and that in amended Count IV are at issue on the answers filed by Sears, Roebuck & Co. The appeal before us is from a

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[1] For decisions directly or impliedly sustaining the validity of amended Rule 54 (b), as applied in the instant case, see *Rieser* v. *Baltimore & O. R. Co.*, 224 F. 2d 198 (C. A. 2d Cir.), and cases cited at 203, n. 7; *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213 (C. A. 2d Cir.); *Clarksville* v. *United States*, 198 F. 2d 238 (C. A. 4th Cir.); *Boston Medical Supply Co.* v. *Lea & Febiger*, 195 F. 2d 853 (C. A. 1st Cir.); *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267 (C. A. 3d Cir.); *Lopinsky* v. *Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (C. A. 2d Cir.), concr. op. of Judge Clark, at 424–430; *Pabellon* v. *Grace Line, Inc.*, 191 F. 2d 169 (C. A. 2d Cir.). See 6 Moore's Federal Practice (2d ed. 1953) 220–230, and Note, 62 Yale L. J. 263.

Contra: See *Rieser* v. *Baltimore & O. R. Co.*, *supra*, concr. op. of Judge Frank, at 205–208; *Bendix Aviation Corp.* v. *Glass*, *supra*, concr. op. of Judge Hastie, at 277–282; *Pabellon* v. *Grace Line, Inc.*, *supra*, concr. op. of Judge Frank, at 176–181; *Flegenheimer* v. *General Mills, Inc.*, 191 F. 2d 237 (C. A. 2d Cir.). See also, *Gold Seal Co.* v. *Weeks*, 93 U. S. App. D. C. 249, 209 F. 2d 802.

judgment striking out Counts I and II without disturbing Counts III and IV, and the question presented is whether such a judgment is presently appealable when the District Court, pursuant to amended Rule 54 (b), has made "an express determination that there is no just reason for delay" and has given "an express direction for the entry of judgment."

In Count I, Mackey, a citizen of Illinois, and Time Saver Tools, Inc., an Illinois corporation owned by Mackey, are the original plaintiffs and the respondents here. Sears, Roebuck & Co., a New York corporation doing business in Illinois, is the original defendant and the petitioner here. Mackey charges Sears with conduct violating the Sherman Antitrust Act in a manner prejudicial to three of Mackey's commercial ventures causing him $190,000 damages, for which he seeks $570,000 as treble damages. His first charge is unlawful destruction by Sears, since 1949, of the market for nursery lamps manufactured by General Metalcraft Company, a corporation wholly owned by Mackey. Mackey claims that this caused him a loss of $150,000. His second charge is unlawful interference by Sears, in 1952, with Mackey's contract to sell, on commission, certain tools and other products of the Vascoloy-Ramet Corporation, causing Mackey to lose $15,000. His third charge is unlawful destruction by Sears, in 1952, of the market for a new type of carbide-tipped lathe bit and for other articles manufactured by Time Saver Tools, Inc., resulting in a loss to Mackey of $25,000. Mackey combines such charges with allegations that Sears has used its great size to monopolize commerce and restrain competition in these fields. He asks for damages and equitable relief.

In Count II, Mackey claims federal jurisdiction by virtue of diversity of citizenship. He incorporates the allegations of Count I as to the Metalcraft transactions and asks for $250,000 damages for Sears' wilful destruc-

tion of the business of Metalcraft, plus $50,000 for Mackey's loss on obligations guaranteed by him.

In Count III, Mackey seeks $75,000 in a common-law proceeding against Sears for unlawfully inducing a breach of his Vascoloy commission contract.

In Count IV, Time Saver seeks $200,000 in a common-law proceeding against Sears for unlawfully destroying Time Saver's business by unfair competition and patent infringement.

The jurisdiction of the Court of Appeals to entertain Mackey's appeal from the District Court's judgment depends upon 28 U. S. C. § 1291, which provides that "The courts of appeals shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States . . . ." (Emphasis supplied.)

If Mackey's complaint had contained only Count I, there is no doubt that a judgment striking out that count and thus dismissing, in its entirety, the claim there stated would be both a final and an appealable decision within the meaning of § 1291. Similarly, if his complaint had contained Counts I, II, III and IV, there is no doubt that a judgment striking out all four would be a final and appealable decision under § 1291. The controversy before us arises solely because, in this multiple claims action, the District Court has dismissed the claims stated in Counts I and II, but has left unadjudicated those stated in Counts III and IV.[2]

Before the adoption of the Federal Rules of Civil Procedure in 1939, such a situation was generally regarded as leaving the appellate court without jurisdiction of an attempted appeal. It was thought that, although the judgment was a final decision on the respective claims in Counts I and II, it obviously was not a final decision of

[2] Sears also contends that the Court of Appeals misconstrued amended Rule 54 (b). See *Flegenheimer* v. *General Mills, Inc.*, *supra*. The meaning of that rule is considered hereafter.

the whole case, and there was no authority for treating anything less than the whole case as a judicial unit for purposes of appeal.[3] This construction of the judicial unit was developed from the common law which had dealt with litigation generally less complicated than much of that of today.[4]

With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims. Largely to

[3] At common law, a writ of error did not lie to review a judgment that failed to adjudicate every cause of action asserted in the controversy. See *Holcombe* v. *McKusick*, 20 How. 552; *United States* v. *Girault*, 11 How. 22; *Metcalfe's Case*, 11 Co. Rep. 38a, 77 Eng. Rep. 1193. The rule generally followed in the federal courts was that, in a case involving a single plaintiff and a single defendant, a judgment was not appealable if it disposed of some, but less than all, of the claims presented. See *Collins* v. *Miller*, 252 U. S. 364; *Sheppy* v. *Stevens*, 200 F. 946 (C. A. 2d Cir.). In cases involving multiple parties where the alleged liability was joint, a judgment was not appealable unless it terminated the action as to all the defendants. See *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262. But if, in a multiple party case, a judgment finally disposed of a claim that was recognized to be separate and distinct from the others, that judgment, under some circumstances, was appealable. See *Republic of China* v. *American Express Co.*, 190 F. 2d 334 (C. A. 2d Cir.).

[4] The appellate jurisdiction of the United States Courts of Appeals, with exceptions not directly pertinent here, is still largely restricted to the review of cases appealed under 28 U. S. C. § 1291. But see *Forgay* v. *Conrad*, 6 How. 201; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541; 28 U. S. C. §§ 1292, 1651.

meet this need, in 1939, Rule 54 (b) was promulgated in its original form through joint action of Congress and this Court.[5] It read as follows:

> "(b) JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

It gave limited relief. The courts interpreted it as not relaxing the requirement of a "final decision" on each individual claim as the basis for an appeal, but as author-

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[5] The Supreme Court's authority to promulgate the Federal Rules of Civil Procedure is derived from the Enabling Act, now appearing as 28 U. S. C. § 2072. It authorizes this Court to promulgate rules governing "the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States . . . in civil actions." It provides that such rules "shall not abridge, enlarge or modify any substantive right . . . ." And, by reason of Article I, § 8, of the Constitution, it has been held repeatedly that only Congress may define the jurisdiction of the lower federal courts. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1; *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176; and Fed. Rules Civ. Proc., 82. "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." 28 U. S. C. § 2072.

izing a limited relaxation of the former general practice that, in multiple claims actions, *all* the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them.[6] Thus, original Rule 54 (b) modified the single judicial unit theory but left unimpaired the statutory concept of finality prescribed by § 1291. However, it was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability. The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased.

Largely to overcome this difficulty, Rule 54 (b) was amended, in 1946, to take effect in 1948.[7] Since then it has read as follows:

> "(b) JUDGMENT UPON MULTIPLE CLAIMS. *When more than one claim for relief is presented in an action,* whether as a claim, counterclaim, cross-claim, or third-party claim, *the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination*

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[6] See *Pabellon* v. *Grace Line, Inc., supra,* at 174.

[7] ". . . situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question." Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70–71 (June 1946).

> *that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Emphasis supplied.)

In this form, it does not relax the finality required of each decision, as an individual claim, to render it appealable, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case. The amended rule does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which "one or more but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal.

To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal. This arrangement already has lent welcome certainty to the appellate procedure. Its "negative effect" has met with uniform approval. The effect so referred to is the rule's specific requirement that for "one or more but less than all" multiple claims to become appealable, the District Court must make both "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment." A party adversely affected by a final decision thus knows that

his time for appeal will *not* run against him until this certification has been made.[8]

In the instant case, the District Court made this certification, but Sears, Roebuck & Co. nevertheless moved to dismiss the appeal for lack of appellate jurisdiction under § 1291. The grounds for such a motion ordinarily might be (1) that the judgment of the District Court was not a decision upon a "claim for relief," (2) that the decision was not a "final decision" in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order.

In the case before us, there is no doubt that each of the claims dismissed is a "claim for relief" within the meaning of Rule 54 (b), or that their dismissal constitutes a "final decision" on individual claims. Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other.

Petitioner contends that amended Rule 54 (b) attempts to make an unauthorized extension of § 1291. We disagree. It could readily be argued here that the claims stated in Counts I and II are sufficiently independent of those stated in Counts III and IV to satisfy the requirements of Rule 54 (b) even in its original form. If that were so, the decision dismissing them would also be appealable under the amended rule. It is nowhere contended today that a decision that would have been appealable under the original rule is not also appealable under the amended rule, provided the District Court makes the required certification.

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[8] For favorable comment on this aspect of the rule, see *Dickinson* v. *Petroleum Corp.*, 338 U. S. 507, 511–512.

While it thus might be possible to hold that in this case the Court of Appeals had jurisdiction under original Rule 54 (b), there at least would be room for argument on the issue of whether the decided claims were separate and independent from those still pending in the District Court.[9] Thus the instant case affords an excellent illustration of the value of the amended rule which was designed to overcome that difficulty. Assuming that the requirements of the original rule are not met in this case, we nevertheless are enabled to recognize the present appellate jurisdiction of the Court of Appeals under the amended rule. The District Court *cannot,* in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court *may,* by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals.

Rule 54 (b), in its original form, thus may be said to have modified the single judicial unit practice which had been developed by court decisions. The validity of that rule is no longer questioned. In fact, it was applied by this Court in *Reeves* v. *Beardall,* 316 U. S. 283, without its validity being questioned.

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[9] In the instant case, the claim dismissed by striking out Count I is based on the Sherman Act, while Counts III and IV do not rely on, or even refer to, that Act. They are largely predicated on common-law rights. The basis of liability in Count I is independent of that on which the claims in Counts III and IV depend. But the claim in Count I does rest in part on some of the facts that are involved in Counts III and IV. The claim stated in Count II is clearly independent of those in Counts III and IV.

Rule 54 (b), in its amended form, is a comparable exercise of the rulemaking authority of this Court. It does not supersede any statute controlling appellate jurisdiction. It scrupulously recognizes the statutory requirement of a "final decision" under § 1291 as a basic requirement for an appeal to the Court of Appeals. It merely administers that requirement in a practical manner in multiple claims actions and does so by rule instead of by judicial decision. By its negative effect, it operates to restrict in a valid manner the number of appeals in multiple claims actions.

We reach a like conclusion as to the validity of the amended rule where the District Court acts affirmatively and thus assists in properly timing the release of final decisions in multiple claims actions. The amended rule adapts the single judicial unit theory so that it better meets the current needs of judicial administration. Just as Rule 54 (b), in its original form, resulted in the release of some decisions on claims in multiple claims actions before they otherwise would have been released,[10] so amended Rule 54 (b) now makes possible the release of more of such decisions subject to judicial supervision. The amended rule preserves the historic federal policy against piecemeal appeals in many cases more effectively than did the original rule.[11]

Accordingly, the appellate jurisdiction of the Court of Appeals is sustained,[12] and its judgment denying the motion to dismiss the appeal for lack of appellate jurisdiction is

Affirmed.

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[10] See *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C. A. 2d Cir.), cited in *Reeves* v. *Beardall*, 316 U. S. 283.

[11] See *Cobbledick* v. *United States*, 309 U. S. 323.

[12] Mackey also argues that the Court of Appeals has jurisdiction under 28 U. S. C. § 1292 (1). In view of our disposition of this case, we do not reach that contention.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, concurring in No. 34 and dissenting in No. 76.

The result in these two litigations of course has significance for the parties. That is, however, of relative insignificance compared to the directions which judges in the district courts and courts of appeals will draw from the Court's opinions. For me, what is said has not a little kinship with the pronouncements of the Delphic oracle.

The opinion in *Cold Metal Process Co.* v. *United Engineering & Foundry Co., post,* p. 445, declares that 28 U. S. C. § 1291 remains unimpaired, but surely that section does not remain what it was before these opinions were written. Rule 54 (b) is apparently the transforming cause. The Court could have said that Rule 54 (b), promulgated under congressional authority and having the force of statute, has qualified 28 U. S. C. § 1291. It does not say so. The Court could have said that it rejects the reasoning of the decisions in which this Court for over a century has interpreted § 1291 as expressing a hostility toward piecemeal appeals. It does not say so. The Court could have said that Rule 54 (b)'s requirement of a certificate from a district judge means that the district judges alone determine the content of finality. The Court does not say that either.

The Court does indicate that what has been the core of the doctrine of finality as applied to multiple claims litigation—that only that part of a litigation which is separate from, and independent of, the remainder of the litigation can be appealed before the completion of the entire litigation—is no longer to be applied as a standard, or at least as an exclusive standard, for deciding what is final for purposes of § 1291. The Court does not, however, indicate what standards the district courts and the courts of appeals are now to apply in determining when a decision is final. It leaves this problem in the first

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instance to the district courts, subject to review by the courts of appeals for an abuse of discretion. In other instances where a district court's ruling can be upset only for an abuse of its discretion, the scope of review is necessarily narrow. Here, in regard to the present problem, what is to come under review is a newly modified requirement of finality. But the requirement continues to be based upon a statute, *viz.*, 28 U. S. C. § 1291, and that statute defines and constricts the jurisdiction of the courts of appeals. Therefore the issue of compliance with this congressional command would, I should suppose, cast upon the courts of appeals a duty of independent judgment broader than is implied by the usual flavor of the phrase "abuse of discretion."

For me, the propositions emerging from analysis of the relationship of Rule 54 (b) to 28 U. S. C. § 1291 are clear.

1. 28 U. S. C. § 1291 is left intact by Rule 54 (b). It could not be otherwise with due regard for the congressional policy embodied in that section and in view of what the Advisory Committee on the Rules said in its Note to amended Rule 54 (b):

> "The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. . . . Rule 54 (b) was originally adopted in view of the wide scope and possible content of the newly created 'civil action' in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above . . . .
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> . . . . . .
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> ". . . After extended consideration, it [the Committee] concluded that a retention of the older fed-

eral rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54 (b). It re-establishes an ancient policy with clarity and precision. . . ." Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70–72.

2. 28 U. S. C. § 1291 is not a technical rule in a game. It expresses not only a deeply rooted but a wisely sanctioned principle against piecemeal appeals governing litigation in the federal courts. See *Cobbledick* v. *United States,* 309 U. S. 323; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123–127. The great importance of this characteristic feature of the federal judicial system—its importance in administering justice—is made luminously manifest by considering the evils where, as in New York, piecemeal reviews are allowed.

3. While the principle against piecemeal appeals has been compendiously and therefore, at times, loosely phrased as implying that the whole of a litigation, no matter what its nature, must be completed before any appeal is allowed, see *Collins* v. *Miller,* 252 U. S. 364, 370, the underlying rationale of the principle has been respected when not susceptible of this mechanical way of putting it. What have been called exceptions are not exceptions at all in the sense of inroads on the principle. They have not qualified the core, that is, that there should be no premature, intermediate appeal.

Thus the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury. See *Forgay* v. *Conrad,* 6 How. 201; *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545–547; *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 688–689. A

second situation in which the Court has found that an appeal before termination of the entire litigation did not conflict with the congressional policy against piecemeal appeals is that in which a party to the completed portion of the litigation has no interest in the rest of the proceedings and to make him await their outcome would merely cause unfairness. See *Williams* v. *Morgan,* 111 U. S. 684, 699; *United States* v. *River Rouge Co.,* 269 U. S. 411, 413–414.

4. The expansion by the Federal Rules of the allowable content of a proceeding and the range of a litigation inevitably enlarged the occasions for severing one aspect or portion of a litigation from what remains under the traditional test of a "final decision." On the basis of prior cases, we held that it was not a departure from the policy against piecemeal appeals to permit an appeal with respect to that part of a multiple claims litigation based on a set of facts separate and independent from the facts on which the remainder of the litigation was based. *Reeves* v. *Beardall,* 316 U. S. 283. The Note of the Advisory Committee, quoted *supra,* demonstrates that the amended Rule 54 (b) was designed in accordance with the historic policy against premature appeal and with the decisions of this Court allowing appeal from a "judgment of a distinctly separate claim." What the Rule did introduce, however, was a discretionary power in the district judge to control appealability by preventing a party from even attempting to appeal a severable part of a litigation unless the district judge has expressly certified that there is no just reason for delay and has expressly directed entry of judgment on that phase of the litigation. This provision was directed to the kind of difficulty encountered in *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507, in ascertaining whether the district judge is in fact finished with a separable part of the litigation.

The Court casually disregards this long history of § 1291 and the bearing of Rule 54 (b) to it by rejecting the separate-and-independent test as the basis for determining the finality of a part of a multiple claims litigation. The Court says that its decision "does not impair the statutory concept of finality embraced in § 1291." The Court may not do so in words, for it pays lip-service to § 1291. But that section's function as a brake against piecemeal appeals in future multiple claims litigation is greatly impaired. Encouragement is abundantly given to parties to seek such appeals.

The principles which this Court has heretofore enunciated over a long course of decisions under § 1291 furnish ready guides for deciding the appealability of the certified parts of the litigation in the two cases now before the Court. Count II in *Sears, Roebuck & Co.* v. *Mackey, ante,* p. 427, is appealable since the transactions and occurrences involved in it do not involve any of those embraced in Counts III and IV. Count I involves at least two transactions which are also the subject matter of Counts III and IV, but is appealable under § 1292 (1) as an interlocutory order denying an injunction. In *Cold Metal Process Co.* v. *United Engineering & Foundry Co., post,* p. 445, the counterclaim, even if not compulsory, is based in substantial part on the transactions involved in the main litigation and hence not appealable.

5. Of course, as the Court's opinion appears to recognize, that crucial principle of the doctrine of finality that the court of appeals has no jurisdiction unless there is a "final decision" cannot be left to the district court. It is one thing for a district court to determine whether it is or is not through with a portion of a litigation. It is quite another thing for it to determine whether the requirements of § 1291 are satisfied so as to give jurisdiction to the court of appeals. A district court can no more confer

jurisdiction on a court of appeals outside the limits of 28 U. S. C. § 1291 than a state supreme court can confer jurisdiction on this Court beyond the bounds of 28 U. S. C. § 1257. In a particular litigation the opinion of the district judge may properly be deemed a valuable guide. But flexibility would be a strange name for authority in the district court to command the court of appeals to exercise jurisdiction.

6. In summary, then, the Court rightly states, even if it does not hold, that § 1291 is unimpaired by Rule 54 (b). Section 1291 is what a long course of decision has construed it to be. The unifying principle of decisions for over a century is observance of hostility in the federal judicial system to piecemeal appellate review (with a few strictly defined exceptions not here relevant, see 28 U. S. C. § 1292) of one litigation, no matter how many phases or parts there may be to a single judicial proceeding, so long as no part has become separated from, and independent of, the others. This rooted principle against piecemeal appeals of an organic whole—the core of § 1291—is not left unimpaired when its enforcement is committed without guidance to the individualized notions about finality of some two hundred and fifty district judges, themselves accountable to the discordant views of eleven essentially independent courts of appeals. Allowing such leeway to the district courts and courts of appeals is not flexibility but anarchy.

COLD METAL PROCESS CO. ET AL. *v.* UNITED ENGINEERING & FOUNDRY CO.

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

No. 76. Argued February 28, 1956.—Decided June 11, 1956.

In a multiple claims action, the Federal District Court, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, as amended in 1946, expressly determined that there was no just reason for delay and expressly directed entry of judgment on one of the claims. The unadjudicated claim was a counterclaim arising in part out of the same transactions and occurrences as the adjudicated claim. *Held:* The Court of Appeals had jurisdiction under 28 U. S. C. § 1291 to entertain an appeal from the judgment. Pp. 446–453.

(a) Rule 54 (b), as amended, treats counterclaims, whether "compulsory" or "permissive," like other multiple claims. P. 452.

(b) Under amended Rule 54 (b), the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion. P. 452.

(c) That the order in this case is appealable at a time when it would not have been appealable prior to the Federal Rules of Civil Procedure, or under Rule 54 (b) in its original form, does not mean that Rule 54 (b), as amended, is invalid. Pp. 452–453.

(d) Amended Rule 54 (b) meets the needs and problems of modern judicial administration by adjusting the unit for appeal to fit multiple claims actions, while retaining a right of judicial review over the discretion exercised by the District Court in determining when there is no just reason for delay. P. 453.

(e) Rule 54 (b), as amended, does not impair the statutory concept of finality embraced in 28 U. S. C. § 1291, and it is within the rulemaking power of this Court. P. 453.

221 F. 2d 115, affirmed.

William H. Webb argued the cause for petitioners. With him on the brief were *Clarence B. Zewadski* and *William Wallace Booth.*

Jo. Baily Brown argued the cause for respondent. With him on the brief was *Julian Miller.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This is a multiple claims action in which the District Court entered a judgment disposing of but one claim. Pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, as amended in 1946,[1] that court expressly determined that there was no just reason for delay and expressly directed the entry of judgment. Thereupon, an appeal was taken to the Court of Appeals, and the issue before us is whether the latter court has jurisdiction to entertain that appeal under 28 U. S. C. § 1291,[2] although an unadjudicated counterclaim awaits disposition in the District Court. The issue is comparable to that decided in *Sears, Roebuck & Co.* v. *Mackey, ante,* at 427, except that here the unadjudicated claim is a counterclaim arising in part out of the same transactions and occurrences as the adjudicated claim. By applying the reasoning used in the *Sears* case, we reach a like conclusion here and uphold the jurisdiction of the Court of Appeals.

While the counterclaim arises in part out of the same transactions as does the adjudicated claim, it was filed long after the principal proceeding was begun, and is in the nature of an action ancillary to the principal proceeding and bears a separate case number. Upon request of both parties, the District Court has removed the counterclaim from the trial calendar, without prejudice to either party, leaving it subject to reinstatement for trial at any time by order of the court upon its own initiative, or upon request of either party after reasonable notice. A brief review of the entire proceedings and a disclosure of its subject matter throws light on the relationship between the adjudicated claim and the counterclaim.

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[1] For text, see *Sears, Roebuck & Co.* v. *Mackey, ante,* at 434–435.

[2] For text, see *Sears, Roebuck & Co.* v. *Mackey, ante,* at 431.

In 1927, petitioner, The Cold Metal Process Company, an Ohio corporation, and United Engineering & Foundry Company, a Pennsylvania corporation, entered into a contract for the purpose of securing a patent in the name of Cold Metal relating to a certain type of steel rolling mill and of granting to United an exclusive license to make, use and sell mills under such patent. To that end, the parties contributed claims under their respective patent applications and it was agreed that the license should be granted when the patent was issued. The parties also agreed to try, by negotiation, to determine the amount of the payment by United for the license. If the parties could not agree on that point, the subject was to be submitted to arbitration in a manner specified in the contract.[3]

In 1930, the patent was issued but Cold Metal refused to treat the 1927 contract as conferring an exclusive license on United. Cold Metal maintained that United was not a licensee until the amount due Cold Metal had been determined and paid. United, on the other hand, treated the contract as an enforceable exclusive license under which the license fee was to be determined later.

After litigation not now material,[4] Cold Metal, in 1934, instituted the present proceeding, Equity No. 2991, against United in the United States District Court for the Western District of Pennsylvania. Cold Metal asked (1) for an injunction restraining United from prosecuting certain suits, pending in Ohio and elsewhere, founded upon United's claim of exclusive rights under the patent, and (2) for determination of the amount to be paid by United under the 1927 contract. The court declined to issue a preliminary injunction, 9 F. Supp. 994, but Cold Metal appealed from such denial and, in 1935, obtained

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[3] The entire agreement appears in 107 F. 2d 27, 28–29, n. 1.

[4] See 3 F. Supp. 120, 68 F. 2d 564, cert. denied, 291 U. S. 675, all relating to Equity No. 2506.

a reversal directing the injunction to be issued, 79 F. 2d 666.

In 1936, Cold Metal, in line with the foregoing results, filed a supplemental complaint asking that the 1927 contract be "cancelled, revoked and annulled" and that United be enjoined from further operations under the patent. However, in 1938, the District Court, after trial, held the contract valid and enforceable, and directed an accounting before a master. 83 F. Supp. 914.

Cold Metal appealed but, in 1939, the Court of Appeals reversed its 1935 decision and largely sustained United's position. It ordered that the injunction against United's infringement suits be dissolved and held that the 1927 contract created a valid and enforceable exclusive license in favor of United. It also stated that the master could determine, from an "understanding" between the parties as shown by the record, the amount due from United under the 1927 contract. 107 F. 2d 27.

In 1941, United asked leave to file an amended answer and counterclaim, complaining that Cold Metal's recent acts were inconsistent with the 1939 judgment of the Court of Appeals. In 1942, the District Court denied that motion on the ground that it could carry out only the existing mandate of the Court of Appeals. 43 F. Supp. 375. It suggested, however, that the injunction sought by United in its counterclaim should be the subject matter of another action, and that United could assert, before the master, Cold Metal's breaches of the 1927 contract. In 1943, the District Court modified its 1938 decree to make it conform to the Court of Appeals' order of 1939. It also appointed a master to determine not only the amount due Cold Metal from United for its past operations, but the payments to be made on licensed mills in the future.

In 1949, United refiled its claims as an "Ancillary Cross Complaint" in Civil Action No. 7744. United sought,

inter alia, (1) to enjoin the prosecution of infringement suits by Cold Metal against parties using mills under licenses granted by United, (2) to require Cold Metal to account for any funds it had collected for the use of such mills within the field of United's exclusive license, and (3) to set off those funds from any payment or royalty that might be due from United to Cold Metal under the 1927 contract. In 1950, the District Court dismissed the cross complaint on the ground that it was not ancillary to Equity No. 2991. 92 F. Supp. 596. However, in 1951, the Court of Appeals reversed the District Court. It held that United's cross complaint was, in reality, a counterclaim, ancillary to Equity No. 2991, and, therefore, within the jurisdiction of the District Court. 190 F. 2d 217. The Court of Appeals reviewed the previous course of the proceedings and pointed out that the claims now made by United in this counterclaim are entirely dependent upon the 1939 decision of that court, 107 F. 2d 27, which upheld the validity of United's exclusive license.

Into this situation, in 1954, came the master's report on the accounting in Equity No. 2991. It listed the licensed mills, fixed the compensation payable under the 1927 contract, and found that United's license had existed from 1930 to 1947 and that United's customers were duly licensed to use the patented mills. It also held that certain United mills were exempt from royalty, that Cold Metal had failed to respect the license or to perform all of its obligations under the 1927 contract, but that United owed Cold Metal a substantial sum under it.

In 1955, the District Court approved the master's report in all respects and entered judgment against United for $387,650, with interest at 6% from the date of filing of the report. Both parties appealed. Cold Metal at once moved to dismiss United's appeal on the ground that the District Court had not made the certification required by Rule 54 (b). With permission of the Court of Ap-

peals, the District Court then amended its judgment to add such certification.[5]

Again both parties appealed. Again Cold Metal moved to dismiss United's appeal from the amended judgment because the Court of Appeals lacked jurisdiction to entertain it. This time the motion was denied with a *per curiam* opinion in which the Court of Appeals said "We think the determination made under the circumstances of this case is the very kind of thing Rule 54 (b) was written to provide for. We see no violation of discretion on the part of the district judge in entering it." 221 F. 2d 115.

Accordingly, on October 3, 1955, in the Court of Appeals, the parties argued their respective appeals on their merits in Equity No. 2991. However, before any decision was rendered on the merits, we granted certiorari upon Cold Metal's petition questioning the jurisdiction of the Court of Appeals to entertain the appeal. 350 U. S. 819. We agree with the Court of Appeals that

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[5] The amendment included an express determination that there was "no just reason for delay in entering an order and final judgment disposing of the issues raised by the Report of the Special Master . . . ." This was done after a hearing during which the District Court said "I think, so far as this Court is concerned, without a decision by the Court of Appeals on that report [of the special master], that we would just be wandering in an area where we couldn't see our way out if we tried any other issue until this case is decided."

After the master's report was filed, and before objections to it had been filed, counsel for each side jointly informed the court that they desired to dispose of the master's report before trying the issues in the pending (counterclaim) Civil Action No. 7744, and that the final action on the master's report might even make it undesirable to try that action. The court, thereupon, continued, *sine die*, the pretrial conference it had scheduled in Civil Action No. 7744, and removed the case from the trial calendar, without prejudice to either party and subject to reinstatement. That is the present status of the "counterclaim."

this is the very kind of case for which amended Rule 54 (b) was designed. The appealability of the adjudicated claim is upheld so that the merits of the existing judgment may be determined at this stage of the proceedings.

Prior to the promulgation of the Federal Rules of Civil Procedure in 1939, it may well have been true that the Court of Appeals would not, at this stage, have had jurisdiction over United's appeal. Under the single judicial unit theory of finality which was then recognized, the Court of Appeals would have been without jurisdiction until United's counterclaim also had been decided by the District Court. That would have been so even if the counterclaim did not arise out of the same transaction and occurrence as Cold Metal's claim.[6] However, as stated in *Sears, Roebuck & Co.* v. *Mackey, ante,* Rule 54 (b), in its original form, modified the judicial unit theory in respect to multiple claims actions. Accordingly, under that rule, it is likely that if United's counterclaim qualified as "permissive," [7] rather than as "compulsory," [8] the Court of Appeals would have had jurisdiction to enter-

[6] See *Ayres* v. *Carver,* 17 How. 591; *Bowker* v. *United States,* 186 U. S. 135; *General Electric Co.* v. *Marvel Rare Metals Co.,* 287 U. S. 430; *Toomey* v. *Toomey,* 80 U. S. App. D. C. 77, 149 F. 2d 19.

[7] Fed. Rules Civ. Proc., 13 (b), defines a "permissive" counterclaim as follows: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

[8] Fed. Rules Civ. Proc., 13 (a), defines a compulsory counterclaim as follows:

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

tain the appeal now before us.[9] This conclusion follows from the fact that the test of appealability under the original rule was whether the adjudicated claims were separate from, and independent of, the unadjudicated claims. See *Reeves* v. *Beardall,* 316 U. S. 283.

However, as set forth in *Sears, Roebuck & Co.* v. *Mackey, ante,* that test led to uncertainty, of which the present case might have been an example.[10] The amended rule overcomes that difficulty and, under its terms, we need not decide whether United's counterclaim is compulsory or permissive. The amended rule, in contrast to the rule in its original form, treats counterclaims, whether compulsory or permissive, like other multiple claims. It provides that "When more than one claim for relief is presented *in an action, whether as a claim, counterclaim, cross-claim, or third-party claim,* the [district] court may direct the entry of a final judgment upon one or more but less than all of the claims . . ." (Emphasis supplied.) Counterclaims and cross-claims are thus equated with the others. See *Bendix Aviation Corp.* v. *Glass,* 195 F. 2d 267 (C. A. 3d Cir.). Therefore, under the amended rule, the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion. If the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable.

The reasoning and the result in *Sears, Roebuck & Co.* v. *Mackey, ante,* is dispositive of this case. The order appealed from finally adjudicates Cold Metal's claim for relief, and the Court of Appeals has held that the trial

[9] See *Audi Vision, Inc.* v. *RCA Mfg. Co.,* 136 F. 2d 621 (C. A. 2d Cir.); *Toomey* v. *Toomey, supra.*

[10] See *Sears, Roebuck & Co.* v. *Mackey, ante,* at 433–434.

court did not abuse its discretion in certifying the absence of just reasons for delay. That this order is appealable at a time when it would not have been appealable prior to the Federal Rules of Civil Procedure, or under Rule 54 (b) in its original form, does not mean that Rule 54 (b), as amended, is invalid. It applies only to a final decision of one or more claims for relief. The amended rule meets the needs and problems of modern judicial administration by adjusting the unit for appeal to fit multiple claims actions, while retaining a right of judicial review over the discretion exercised by the District Court in determining when there is no just reason for delay. This does not impair the statutory concept of finality embraced in § 1291, and, as held in *Sears, Roebuck & Co.* v. *Mackey, ante,* is within the rulemaking power of this Court.

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN, dissenting in this case, but concurring in *Sears, Roebuck & Co.* v. *Mackey,* see *ante,* p. 439.]

UNITED STATES EX REL. DARCY *v.* HANDY, WARDEN, ET AL.

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

No. 323. Argued May 1–2, 1956.—Decided June 11, 1956.

Petitioner, a state prisoner under a sentence of death for murder committed during the course of an armed robbery, brought a habeas corpus proceeding in a Federal District Court, claiming that his conviction was obtained in violation of his rights to due process of law as guaranteed by the Fourteenth Amendment. He charged that he was tried under prejudicial circumstances and improper influences in that an atmosphere of hysteria and prejudice prevailed at the state trial, including the prejudicial conduct and frequent presence in the courtroom of another judge of the same court, who recently had presided over a trial of two associates of petitioner which had resulted in a like conviction and sentence for the murder. *Held:* On the record in this case, petitioner was not denied due process of law. Pp. 455–467.

(a) The burden was on petitioner to show such essential unfairness as vitiates his trial, and the burden must be sustained not as a matter of speculation but as a demonstrable reality. P. 462.

(b) The most that petitioner has shown is that, in certain respects, opportunity for prejudice existed. P. 462.

(c) The record does not support the claim that the news coverage of the crime and of the proceedings prior to petitioner's trial created such an atmosphere of hysteria and prejudice as precluded a fair trial. Pp. 463–464.

(d) There is no merit in petitioner's claim that he was "forced" to trial immediately after the trial of his associates, or in his claim that the trial judge, *sua sponte,* should have changed the venue or continued the trial. P. 464.

(e) On the record in this case, the other judge's presence and conduct on the bench and in the courtroom were not so prejudicial as to deny due process. Pp. 464–467.

(f) Petitioner has not sustained the burden of showing that his trial was essentially unfair in a constitutional sense. P. 467.

224 F. 2d 504, affirmed.

Charles J. Margiotti argued the cause for petitioner. With him on the brief was *Morton Witkin.*

Frank P. Lawley, Jr., Deputy Attorney General of Pennsylvania, argued the cause for respondents. With him on the brief were *Herbert B. Cohen,* Attorney General, and *Donald W. Van Artsdalen.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether the accused, who is under a sentence of death, imposed by a Pennsylvania court and jury for murder committed during the course of an armed robbery, was tried under such prejudicial circumstances and improper influences that he was denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The charges in this federal habeas corpus proceeding are that an atmosphere of hysteria and prejudice prevailed at the state trial, including the prejudicial conduct and frequent presence in the courtroom of another judge of the same court, who recently had presided over a trial of two associates of petitioner and which had resulted in a like conviction and sentence for the murder committed. For the reasons hereafter stated, we agree with the considered judgments of the state court, *Pennsylvania ex rel. Darcy* v. *Claudy,* 367 Pa. 130, 79 A. 2d 785; the Federal District Court, 130 F. Supp. 270; and the Court of Appeals, 224 F. 2d 504; holding that the accused was not denied due process of law.

Late on December 22, 1947, petitioner Darcy and three associates, Foster, Zeitz and Capone, armed with revolvers, held up a tavern in Feasterville, near Doylestown, Bucks County, Pennsylvania.[1] During the robbery

[1] This statement of facts and review of the relevant procedural steps in the case are taken largely from the opinion rendered in the instant case by the two judges constituting the United States District

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two patrons of the tavern were shot and severely wounded. As petitioner and his companions left the scene, Zeitz fired at and killed a bystander, William Kelly. About a half hour later, petitioner and his companions committed another armed robbery in which shots also were fired but no one was injured. Before 2 a. m., they were arrested by Philadelphia police. While in that custody, they voluntarily admitted their participation not only in the above robberies but in seven others committed since November 30. In these a total of seven persons had been shot or otherwise injured.

On January 5, 1948, petitioner and his three companions were brought to Bucks County, charged with the murder of William Kelly and committed, without bail, to await action by the grand jury. On February 10, all four being present and all but one being represented by counsel of his own choice, they were severally indicted for murder. The District Attorney moved for a continuance because Foster was without counsel, and because one prosecution witness was in a critical condition from the wound received at the time of the robbery. The continuance was granted. On March 1, counsel for petitioner and Capone moved for a severance and separate trials. Judge Keller of the *nisi prius* or trial court (Court of Oyer and Terminer and General Jail Delivery of Bucks County) suggested the advisability of a combination trial, but granted the motions when counsel insisted on their right to them. On March 3, Judge Boyer, of the same court, appointed two local attorneys to represent Foster.

In March, defense counsel were advised that the Foster-Zeitz case would be called first, petitioner's case the following week, and then Capone's case.

Court for the Middle District of Pennsylvania. 130 F. Supp. 270. They conducted a full hearing on the petition for habeas corpus. It lasted eight days. More than 30 witnesses testified and much documentary evidence was introduced.

When it became apparent that the Foster-Zeitz trial, which began May 24, would continue into the week of June 1, the court directed the sheriff's office to notify the prospective jurors who had been summoned for June 1 not to appear until June 7. They were so notified and, with one exception, did not appear for duty until the latter date. For the Foster-Zeitz and petitioner's trials, the prospective jurors waited outside the main courtroom, were called in individually and were subjected to a searching examination on *voir dire*. While neither Foster, Zeitz nor petitioner exercised all of his peremptory challenges, two extra venires were called in order to complete the two juries. No jurors sat in both cases. Once accepted, the respective juries were kept together during each trial under the supervision of court officials. The jurors were not permitted to see newspapers, listen to radios, or see television programs, and were kept free from any outside influence or contact.

At no time during either the Foster-Zeitz trial or petitioner's trial was the courtroom filled to capacity and at no time was there any need for the court to call for order. No outbursts, disturbances or untoward incidents occurred in the courtroom or elsewhere in the county.[2] The proceedings were reported daily in the press and, on occasion, by radio. The reporting was factual, with some editorials.[3] The news coverage diminished a few weeks after the robbery, increased and subsided again after the grand-jury proceedings, and increased just before the trials.

In Pennsylvania, the jury fixes the penalty for murder in the first degree.[4] No question was raised as to identity or as to petitioner's participation in the robbery. The strategy of the defense in both trials was to seek to keep the punishment down to life imprisonment. On Friday,

[2] 130 F. Supp., at 283–285, n. 39–42.

[3] 130 F. Supp., at 285–289, n. 43–47.

[4] Purdon's Pa. Stat. Ann., 1945, Tit. 18, § 4701.

June 4, the jury in the Foster-Zeitz trial returned a verdict of guilty and fixed the penalty at death. After receiving the verdict, the trial judge, Judge Boyer, was, on June 5, quoted in the local newspaper as having said to that jury:

> " 'I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision.' " 130 F. Supp., at 291–292.

A few moments earlier, Judge Keller, in discharging the remainder of the May 24 panel, had, in the same courtroom, commended them for their satisfactory verdicts, the last one of which had been an acquittal on a charge of rape.

On Monday, June 7, petitioner's trial began. The court opened at 10 a. m., with both Judge Boyer and Judge Keller presiding. As usual, miscellaneous business, unrelated to the impending trial, was first disposed of by the court. Petitioner was then arraigned. He pleaded not guilty and, upon Judge Keller's direction, the selection of the jury was commenced. At various times during petitioner's trial, although it was presided over by Judge Keller, Judge Boyer was in attendance, sitting either on the bench with Judge Keller or in the courtroom within the enclosure reserved for attorneys, the parties and the press. In this connection, the Federal District Court found that—

> "By long established tradition in Bucks County, each morning and afternoon at the opening of court both judges take the bench to entertain motions and

other miscellaneous matters in the Criminal, Common Pleas—law and equity—and Orphans Court. Once this work is completed, one of the judges, if engaged in a trial in that court room, remains on the bench; the other judge leaving to perform duties in another court room or in chambers. The practice used in many Pennsylvania courts . . . was continued daily no matter what court was in session or the nature of the trial [but] not on June 4 when Judge Boyer charged the jury [trying Foster and Zeitz]; and . . . not on June 8 and 10.

"The criminal docket . . . a record of individual trials, shows both judges on the bench at 10:00 A. M. May 24 . . . 9:30 A. M. June 2 . . . 10:00 A. M. June 7 . . . . The court reporter's notes of testimony show only one instance of Judge Boyer taking any part whatsoever in the Darcy trial, i. e., during a sidebar discussion out of the hearing of the jury shortly after court convened on Saturday morning, June 12 . . . . Under consideration was a difficult question of law on the admissibility of evidence of other offenses . . . in view of the Act of July 3, 1947, P. L. 1239, 19 P. S. Pa. § 711 note. Judge Boyer indicated his thinking on the matter. Upon objection by counsel the discussion ended; Judge Keller ruled; Judge Boyer left the bench shortly after and did not return during the remainder of the trial. It may be that during the Foster-Zeitz trial Judge Keller shortly after 9:30 A. M. June 2 . . . listened to but did not express any opinion during a similar discussion.

"Honorable Hiram H. Keller . . . who presided . . . throughout the trial, has certified . . . that after the miscellaneous business was completed, 'On several occasions . . . Judge Boyer remained for brief periods while evidence was presented

. . .', and that with the exception of the incident [noted above], 'At no other time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case.'

"The District Attorney . . . testified, and we find as a fact, that Judge Boyer did not at any time during the Darcy trial assist, attempt to assist, make any suggestion to or in any other manner aid the Commonwealth in the prosecution of the case against David Darcy; that Judge Boyer did not pass any note or message of any kind to the District Attorney in connection with the trial for the use of the District Attorney or Judge Keller.

"On several occasions during the Darcy trial—not on Friday evening or during the charge of the court on Monday, June 14—Judge Boyer sat for brief intervals on a chair just inside the court room door from the judges' chambers, apparently listening to the proceedings. . . .

"During the Darcy trial Judge Boyer did not at any time sit at or near the table reserved for the press; at or near the table reserved for the District Attorney; at no time did Judge Boyer sit on a chair next to or anywhere near a chair occupied by the District Attorney.

"Throughout the trial, the only chairs occupied by the District Attorney or his assistant were at the table reserved for that purpose, or in chairs immediately in front of the table reserved for the press.

"At no time other than that noted [above] did Judge Boyer take any part whatsoever in the proceedings of the Darcy trial." 130 F. Supp., at 296–297.

On Monday, June 14, petitioner's case went to the jury. It returned a verdict of guilty and fixed the penalty at death. The subsequent proceedings in this case, extend-

ing over eight years, are summarized in the margin.[5] Those proceedings uniformly sustained the State, but we granted certiorari to review the charge now made by petitioner that he was denied due process. 350 U. S. 872.

Petitioner's charge is that (a) the news coverage of the robbery and of the proceedings prior to his trial, including the Foster-Zeitz trial and Judge Boyer's reported remarks to the jury in that case, created such an atmosphere of hysteria and prejudice that it prevented him from having a fair trial, (b) notwithstanding that he was granted a severance, he was forced to go to trial within one week of the trial of his companions, Foster and Zeitz, and (c) in the light of (a) and (b) above, Judge Boyer's presence and participation in petitioner's trial prevented him from

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[5] Motion for new trial, denied; appeal to the Pennsylvania Supreme Court, conviction affirmed, 362 Pa. 259, 66 A. 2d 663; petition for habeas corpus to the Pennsylvania Supreme Court, denied, without opinion; petition for certiorari to review those judgments, denied, 338 U. S. 862; applications to the Pennsylvania Board of Pardons for commutation of sentence, denied; second petition for habeas corpus to the Pennsylvania Supreme Court filed April 2, 1951, raising for the first time the constitutional questions now before us; on the same day, a similar petition for habeas corpus filed in the United States District Court for the Middle District of Pennsylvania; second petition for habeas corpus to the Pennsylvania Supreme Court, denied, 367 Pa. 130, 79 A. 2d 785 (after passing on the merits of the petition); petition to the United States District Court, dismissed, 97 F. Supp. 930; petition for certiorari to review the Pennsylvania Supreme Court's denial of the writ of habeas corpus, denied, 342 U. S. 837; appeal to the United States Court of Appeals for the Third Circuit from the District Court's dismissal of the petition for habeas corpus, heard *en banc*, reversed by a divided court and remanded for hearing, 203 F. 2d 407; after rehearing denied by the Third Circuit, the State sought certiorari in this Court, denied, 346 U. S. 865; after hearing before Chief Judge Watson and District Judge Murphy, of the District Court, petition for habeas corpus denied, 130 F. Supp. 270; on appeal to the Third Circuit, heard *en banc*, the District Court's judgment was affirmed, 4–3, 224 F. 2d 504. Throughout these proceedings, petitioner has been represented by competent counsel.

being fairly tried since Judge Boyer, in effect, acted as an "overseer judge" and effectively guided and influenced petitioner's jury.

Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 281. See also, *Buchalter* v. *New York,* 319 U. S. 427, 431; *Stroble* v. *California,* 343 U. S. 181, 198. Justice Holmes, speaking for a unanimous Court in *Holt* v. *United States,* 218 U. S. 245, 251, cautioned that "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced. The law recognizes that prejudice may infect any trial and provides protection against it. For example, provision is made for the *voir dire* examination and for challenges of jurors who indicate that they may be prejudiced. In addition, a substantial number of peremptory challenges is allowed. This gives to each party a large discretion to exclude jurors deemed objectionable for any reason or no reason. Another protection is available through the severance of the trials of the defendants and through continuances of the respective trials. Still another means of protection is that of a change of venue for proper cause.

In the instant case, notwithstanding the fact that competent counsel for petitioner did not use all of his peremptory challenges after a searching examination of prospective jurors on *voir dire,* and did not seek a continuance of the trial or a change of venue, petitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. The failure of petitioner's counsel to exhaust the means provided to prevent the drawing of an unfair trial jury from a community allegedly infected with hysteria and prejudice against petitioner, while not dispositive, is significant.[6] Here, the issue was not raised until almost three years after the trial, yet we are asked to read the news reports and the testimony as to other incidents and to find, contrary to the Supreme Court of Pennsylvania and two federal courts, that these reports and incidents did create such an atmosphere that it infected the jurors and deprived petitioner of a fair trial on the evidence presented to them. We see no justification in the record to warrant our so finding.

On the other hand, the Federal District Court, familiar with the local conditions, has found, on the evidence before it, that petitioner's trial was conducted in a calm judicial manner, without any disturbances, and that the news coverage was "factual, with an occasional descriptive word or phrase, and, on occasion, words of compassion or commendation." 130 F. Supp., at 286. It has found that counsel for petitioner conducted a thorough *voir dire* examination. In all, 49 persons were challenged for cause or excused—14 for fixed opinion or bias. Petitioner used 10 of the 20 peremptory challenges allowed him,

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[6] See *Stroble* v. *California,* 343 U. S. 181, 193–194.

the Commonwealth only eight. The record shows that counsel for petitioner was informed almost three months before petitioner's trial that petitioner would be tried immediately after Foster and Zeitz, but he made no motion for a continuance [7] or for a change of venue. Of the prospective jurors called for service at petitioner's trial, only one was found to have attended the Foster-Zeitz trial and that person was challenged for cause. There is nothing in the record to show, as a "demonstrable reality," that petitioner was denied due process of law because of community hysteria and prejudice. The District Court's findings, sustained by the Court of Appeals and supported by the record, dispose of this aspect of the case.

Nor do we conclude that petitioner was prevented from obtaining a fair jury trial by reason of Judge Boyer's commendatory remarks to the Foster-Zeitz trial jury, reported in the local press two days before petitioner's trial. At most, petitioner has shown that this created a possible opportunity for prejudice. There is no merit in petitioner's claim that he was "forced" to trial immediately after the Foster-Zeitz trial or in his claim that the trial judge should have, *sua sponte,* changed the venue or continued the trial. See 130 F. Supp., at 292–295.

Petitioner's remaining claim rests largely upon facts which the District Court has found against him. Petitioner alleges that, during the charge to the jury, Judge Boyer passed a note to the District Attorney, who immediately interposed an objection to Judge Keller's charge, and the latter allegedly corrected himself. Petitioner argues that the testimony of the District Attorney and his assistant that they had no recollection of such an incident is insufficient to offset the direct testimony of petitioner's

[7] Counsel for Capone sought and was granted a continuance on May 17, 1948, one week prior to the Foster-Zeitz trial.

witnesses that the incident did occur, that Judge Boyer did sit at the table reserved for the press, and that the District Attorney and his assistant sat immediately in front of Judge Boyer. The issue thus raised is largely one of credibility to be determined by the trier of the facts. *Hawk* v. *Olson,* 326 U. S. 271, 279. The District Court's positive findings on this aspect of the case (at 458–460, *supra*) find support in the record. We are not justified in upsetting them.

We also are asked to find that the presence of Judge Boyer on the bench at the beginning of each session of the court, his remaining on the bench after the miscellaneous business was disposed of, and his presence thereafter in the courtroom created such a prejudicial effect upon the jury that it became impossible for it to return a fair verdict and penalty. Except for the one incident where Judge Boyer participated in a sidebar conference out of the hearing of the jury,[8] the District Court found that he did not participate in petitioner's trial. Petitioner's counsel objected to Judge Boyer's participation in the sidebar conference[9] and he left the bench shortly thereafter.

Petitioner makes much of the fact that the majority opinion of the Court of Appeals states that Judge Boyer's conduct showed a "striking manifestation of extraordinary interest in the proceedings," and that the jury knew who he was and it was "very probable" they knew that he had just completed the Foster-Zeitz trial. 224 F. 2d, at 508.

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[8] The ruling made following this incident was in favor of petitioner, since the statements of prior offenses then before the court were admitted for a purpose more limited than the Pennsylvania Supreme Court approved on appeal. See *Pennsylvania* v. *Darcy,* 362 Pa. 259, 283, 66 A. 2d 663, 675.

[9] The ground for this objection was that Judge Boyer had "disqualified himself from sitting in on this case, and it is prejudicial to the defendant [petitioner]." See 130 F. Supp., at 296, n. 54.

We agree with the Court of Appeals that petitioner attaches too much significance to Judge Boyer's conduct. Judge Boyer's presence on the bench, particularly in the light of the long-established practice for both judges to sit on the bench at the beginning of each session to dispose of miscellaneous business, did not amount to a denial of due process. Nor did his subsequent presence on the bench or in the courtroom make out a denial of due process. Under the cases cited earlier,[10] petitioner must show that he was prejudiced in some way by the judge's presence. Aside from the sidebar conference and the contested note-passing incident, petitioner relies upon Judge Boyer's statement to the Foster-Zeitz jury and his subsequent remarks made on June 11, in another case, in sentencing another Philadelphia youth, to show that Judge Boyer was "hostile" to petitioner and that the jury recognized such hostility. But the remarks on June 11 could not have prejudiced petitioner's jury since that jury had no access to any source of news that reported the incident. Petitioner, thus, is left with Judge Boyer's commendatory remark to the Foster-Zeitz trial jury. This, read in its proper context and examined in the light of Judge Keller's remarks made to the remainder of the jury panel, does not raise a substantial due process question. Petitioner seeks to have this Court speculate that the jurors knew that Judge Boyer had made this statement and that they were prejudiced by it or by Judge Boyer's presence. We can no more speculate on this aspect of the case than on the others. Petitioner's counsel must have been aware of Judge Boyer's statement and of its possible effect, if any, on the jury, and the possible effect of Judge Boyer's manifestation of interest. However, he took no action to prevent this possibility from infecting petitioner's trial. Accordingly, we may as well

[10] See cases cited at 462, *supra*.

speculate that he did not deem it necessary to take any such action because the possibility of prejudice was too remote to justify it. It is not necessary for this Court to enter into such speculations. Petitioner has not sustained the burden resting upon him to show that his trial was essentially unfair in a constitutional sense and that the several courts which have reviewed it are all in error. The judgment of the Court of Appeals, therefore, is

Affirmed.

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

I would reverse the judgment below on the basis of Judge Boyer's conduct. The central facts against which this conduct must be viewed are that: (1) Zeitz, not petitioner, did the actual killing on which petitioner's trial was based, and (2) petitioner's participation in the robbery being uncontested, the only real issue at his trial was whether he should suffer the death penalty or life imprisonment, which, under the Pennsylvania statute, was a question for the jury. If these facts be kept in mind, I think that the Court, in holding that the case presents no violation of due process, has disposed of Judge Boyer's conduct too lightly.

The Court states that the general atmosphere of the trial was not prejudicial, that Judge Boyer's remarks to the Foster-Zeitz jury raise no substantial due process questions, and that we should not disturb the District Court's findings that the alleged note-passing incident did not occur and that Judge Boyer's participation in the trial was limited to the "sidebar" episode. Accepting this, as I do, it does not end the matter for me, for there still remain these undisputed facts, and the inferences which I think should be drawn from them: The crime was a particularly atrocious one, and Judge Boyer shared

the community sense of outrage over it.[1] The trial took place in a small rural community of which Judge Boyer had been a respected member for many years, and he was presumably known to the jurors, at least by reputation. Judge Boyer, as it is fair to assume the jurors knew, had presided over the Foster-Zeitz trial in which the jury, three days before petitioner's trial began, had returned a death verdict against two of petitioner's associates in this crime.[2] Judge Boyer remained in the courtroom at petitioner's trial beyond the call of duty, and his presence there on some days after other matters had been disposed of was wholly unexplained. On such occasions he sat not with the ordinary spectators, but sometimes on the bench

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[1] In imposing sentence in a case tried during petitioner's trial, Judge Boyer said (as reported by a local newspaper the next day):

"We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything which isn't being watched. . . . What business did you have to come up here in the first place? . . . Have you heard what's going on downstairs [referring to petitioner's trial]? . . . Do you want to wind up like that? . . . We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it."

Since petitioner's jury had no access to this newspaper, these statements could not have affected his trial. But they are indicative of Judge Boyer's sentiments, and of community reaction.

[2] The local newspaper reported the following on the day after the Foster-Zeitz trial ended:

"JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO ELECTRIC CHAIR

. . . . . .

" 'I don't see how you could, under the evidence, have reached any other verdict,' Judge Boyer said.

" 'Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.

" 'The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision,' Judge Boyer said."

and other times within the bar in full view of the jury. The "sidebar" conference, in which Judge Boyer participated, was in sight of the jury. Judge Boyer was in the courtroom during the court's charge. From these admitted facts, I consider that the jury must have been conscious of the unusual interest which Judge Boyer had in the case, and that it might well have concluded that he felt the defendant should be dealt with severely.

Having regard to the character of the issue with which the jury was confronted, I think these undisputed facts, and the inferences which may be drawn from them, require us to hold that the petitioner has been denied due process. I cannot say that the support lent to the prosecution by Judge Boyer's manifest interest in the trial might not have tipped the scales with the jury in favor of a death verdict, and in a capital case I would resolve that doubt in favor of a new trial. The reasons for my conclusion are those which Judge Kalodner has well stated in his dissenting opinion in the Court of Appeals, 224 F. 2d 504, 509. We should be especially scrupulous in seeing to it that the right to a fair trial has not been jeopardized by the conduct of a member of the judiciary.

KINSELLA, WARDEN, *v.* KRUEGER.

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

No. 713. Argued May 3, 1956.—Decided June 11, 1956.

Pursuant to Article 2 (11) of the Uniform Code of Military Justice, a dependent wife of an officer of the United States Army residing in quarters provided by the Army in Japan, where her husband was stationed, was tried and convicted by a court-martial in Japan for the murder of her husband there. She was sentenced to life imprisonment and brought to a federal prison in the United States, where she brought this habeas corpus proceeding. *Held:* Article 2 (11) of the Uniform Code of Military Justice is constitutional. Pp. 471–480.

(a) A civilian dependent of an American serviceman authorized to accompany him on foreign duty may constitutionally be tried by an American military court-martial in a foreign country for an offense committed there. Pp. 474–480.

(b) The Constitution does not require trial in a foreign country before a court conforming to Article III for offenses committed there by an American citizen, and Congress may establish legislative courts for that purpose. Pp. 474–476.

(c) In the circumstances of this case, it was reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose. Pp. 476–480.

(d) There is no constitutional defect in the fact that the Uniform Code of Military Justice does not provide for indictment by grand jury or trial by a petit jury, since in these respects it does not differ from the procedures specifically approved by this Court in other types of legislative courts established abroad by Congress. P. 479.

137 F. Supp. 806, affirmed.

Marvin E. Frankel argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard.*

Frederick Bernays Wiener argued the cause for respondent. With him on the brief was *Adam Richmond.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Congress, in Article 2 (11) of the Uniform Code of Military Justice, has provided that all persons "accompanying the armed forces without the continental limits of the United States" and certain named territories shall be subject to the Code if such jurisdiction is authorized under "any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law." 50 U. S. C. § 552. Pursuant to this article and a subsequent agreement between the United States and Japan,[1] Mrs. Dorothy Krueger Smith was tried by a gen-

[1] Relevant portions of the administrative agreement are:

"*Article IX*

"1. The United States shall have the right to bring into Japan for purposes of this Agreement persons who are members of the United States armed forces, the civilian component, and their dependents.

. . . . . .

"*Article XVII*

"1. Upon the coming into force with respect to the United States of the 'Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces', signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal jurisdiction similar to the corresponding provisions of that Agreement.

"2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States.

. . . . . .

"4. The United States undertakes that the United States service courts and authorities shall be willing and able to try and, on conviction, to punish all offenses against the laws of Japan which members of the United States armed forces, civilian component,

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eral court-martial in Tokyo, Japan, for the premeditated murder of her husband, a colonel in the United States Army. She was found guilty and sentenced to life imprisonment. 10 C. M. R. 350. Her conviction was affirmed by the Board of Review, 17 C. M. R. 314, and the Court of Military Appeals, 5 U. S. C. M. A. 314, and she began serving her sentence in the Federal Reformatory for Women, Alderson, West Virginia.

Thereafter, a petition for a writ of habeas corpus was filed on Mrs. Smith's behalf by her father, respondent herein. The petition alleged that the court-martial had no jurisdiction to try Mrs. Smith because Article 2 (11) of the Uniform Code of Military Justice violates both Art. III, § 2, and Amendment VI of the Federal Constitution, which guarantee the right to trial by jury to a civilian. The United States District Court for the

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and their dependents may be alleged on sufficient evidence to have committed in Japan, and to investigate and deal appropriately with any alleged offense committed by members of the United States armed forces, the civilian component, and their dependents, which may be brought to their notice by Japanese authorities or which they may find to have taken place. The United States further undertakes to notify the Japanese authorities of the disposition made by United States service courts of all cases arising under this paragraph. The United States shall give sympathetic consideration to a request from Japanese authorities for a waiver of its jurisdiction in cases arising under this paragraph where the Japanese Government considers such waiver to be of particular importance. Upon such waiver, Japan may exercise its own jurisdiction.

"5. In the event the option referred to in paragraph 1 is not exercised by Japan, the jurisdiction provided for in paragraph 2 and the following paragraphs shall continue in effect. In the event the said North Atlantic Treaty Agreement has not come into effect within one year from the effective date of this Agreement, the United States will, at the request of the Japanese government, reconsider the subject of jurisdiction over offenses committed in Japan by members of the United States armed forces, the civilian component, and their dependents." 3 UST (Part 3) 3346, 3353–3356.

Southern District of West Virginia issued a preliminary writ. After a hearing, which included the submission of briefs and unlimited oral argument, the writ was discharged and Mrs. Smith was remanded to the custody of the Warden. 137 F. Supp. 806. In order to expedite the determination of the case, the Government itself sought certiorari while an appeal was pending before the Court of Appeals for the Fourth Circuit. We granted review on March 12, 1956, 350 U. S. 986, because of the serious constitutional question presented and its far-reaching importance to our Armed Forces stationed in some sixty-three different countries throughout the world. We agree with the decision of the District Court.

In its entirety, Art. 2 (11), 50 U. S. C. § 552, provides that:

> "The following persons are subject to this chapter:
>
> . . . . .
>
> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands . . . ."

Mrs. Smith comes squarely within the terms of this provision. As a military dependent, she had accompanied her husband beyond the continental limits of the United States. Prior to her husband's death they lived together in Washington Heights, an American community in Tokyo composed exclusively of American servicemen and their dependents. Japan, at the time of the offense, had ceded to the United States "exclusive jurisdiction over all

offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents . . . ." Art. XVII, 3 UST (Part 3) 3354. Since Article 2 (11) concededly applies to this case if it was within the power of Congress to enact, the constitutionality of that provision is the sole question presented. Essentially, we are to determine only whether the civilian dependent of an American serviceman authorized to accompany him on foreign duty may constitutionally be tried by an American military court-martial in a foreign country for an offense committed in that country.

Trials by court-martial are governed by the Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. § 551 *et seq.* The Code was carefully drawn by Congress to include the fundamental guarantees of due process, and in operation it has provided a fair and enlightened system of justice. However, courts-martial are not required to provide all the protections of constitutional courts; therefore, to try by court-martial a civilian entitled to trial in an Article III court is a violation of the Constitution. *Toth* v. *Quarles,* 350 U. S. 11. Accordingly, our first inquiry is directed to the question whether, as a matter of constitutional right, an American citizen outside of the continental limits of the United States and in a foreign country is entitled to trial before an Article III court for an offense committed in that country.

In making this determination, we are not faced with the question "whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." [2] Entirely aside from the power of Con-

[2] Mr. Justice White concurring in *Downes* v. *Bidwell,* 182 U. S. 244, 292. See *Dorr* v. *United States,* 195 U. S. 138. "The *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes* v. *Bidwell,* has become the settled law of the court." Taft, C. J., in *Balzac* v. *Porto Rico,* 258 U. S. 298, 305.

gress under Article III of the Constitution, it has been well-established since Chief Justice Marshall's opinion in *American Insurance Co.* v. *Canter,* 1 Pet. 511, that Congress may establish legislative courts outside the territorial limits of the United States proper. The procedure in such tribunals need not comply with the standards prescribed by the Constitution for Article III courts. In cases arising from Hawaii,[3] the Philippines,[4] and Puerto Rico,[5] this Court has recognized the power of Congress to enact a system of laws which did not provide for trial by jury. By 1922 it was regarded as "clearly settled" that the jury provisions of Article III and the Sixth and Seventh Amendments "do not apply to territory belonging to the United States which has not been incorporated into the Union." *Balzac* v. *Porto Rico,* 258 U. S. 298, 304–305.

In an earlier case, this Court had sustained the constitutionality of an Act of Congress which created consular courts to try, pursuant to treaties, American citizens for crimes committed in Japan, China, and other countries. *In re Ross,* 140 U. S. 453. Ross, an American seaman convicted of murder by a consular court in Yokohama, Japan, contended that he had been deprived of his constitutional right to both grand and petit juries. In rejecting this claim, the Court pointed out that these constitutional guarantees were not applicable to a consular court sitting outside the continental United States. 140 U. S., at 464. Recounting the long-established practice of governments to provide "for the exercise of judicial authority in other countries by [their] officers appointed to reside therein," *id.,* at 463, the Court noted that the requirement of a grand and petit jury in these circumstances "would defeat the main purpose of investing the

[3] *Hawaii* v. *Mankichi,* 190 U. S. 197.

[4] *Dorr* v. *United States,* 195 U. S. 138.

[5] *Balzac* v. *Porto Rico,* 258 U. S. 298.

consul with judicial authority." 140 U. S., at 465. In 1929, citing *Ross* with approval in *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, this Court reaffirmed the doctrine that "legislative courts . . . exercise their functions within particular districts in foreign territory and are invested with a large measure of jurisdiction over American citizens in those districts. The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this Court and is well recognized." These cases establish beyond question that the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen and that Congress may establish legislative courts for this purpose.

Having determined that one in the circumstances of Mrs. Smith may be tried before a legislative court established by Congress,[6] we have no need to examine the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article I of the Constitution. If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained.

In the present day, we, as a Nation, have found it necessary to the preservation of our security to maintain American forces in some sixty-three foreign countries. The practical necessity of allowing these men to be

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[6] In this respect this case is entirely different from *Toth* v. *Quarles, supra,* where the defendant, after discharge from military service and return to this country, was entitled to trial before an Article III court, and we found "no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury." 350 U. S., at 22–23. In *Toth* we found that Article 3 (a) of the Uniform Code of Military Justice "necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution." 350 U. S., at 15. No like constitutional bar exists in the present case.

accompanied by their families where possible has been recognized by Congress as well as the services, and the result has been the creation of American communities of mixed civilian and military population at bases throughout the world. In all matters of substance, the lives of military and civilian personnel alike are geared to the local military organization which provides their living accommodations, medical facilities and transportation from and to the United States. We could not find it unreasonable for Congress to conclude that all should be governed by the same legal standard to the end that they receive equal treatment under law. The effect of a double standard might well create sufficient unrest and confusion to result in the destruction of effective law enforcement.[7] By the enactment of Article 2 (11) of the Code, Congress has provided that all shall be subject to the same system of justice and that the military commander who bears full responsibility for the care and safety of those civilians attached to his command shall also have authority to regulate their conduct.

It was conceded before this Court that Congress could have established, or might yet establish, a system of territorial or consular courts to try offenses committed by

[7] One need only consider the disruptive effect of establishing another type of legislative court to deal with the same offenses in the same territorial jurisdiction as the military tribunals. In cases of conspiracy or joint crime, parallel trials would have to be held in separate courts. Since the trials could not proceed at the same time, one would of necessity precede and influence the other, and results could understandably be disparate. Nor is the problem of insignificant proportions. Reliable figures show that our Armed Forces overseas are accompanied by approximately a quarter of a million dependents and civilian workers. Figures relating to the Army alone show that in the 6 fiscal years from July 1, 1949, to June 30, 1955, a total of 2,280 civilians were tried by courts-martial. While it is true that the vast majority of these prosecutions were for minor offenses, the volume alone shows the serious problem that would be presented by the administration of a dual system of courts.

civilian dependents abroad. While this would be within the power of Congress, *In re Ross, supra,* clearly nothing in the Constitution compels it. The power to create a territorial or consular court does not preclude, but must necessarily include, the power to provide for trial before a military tribunal unless that alternative is "so clearly arbitrary or capricious that legislators acting reasonably could not have believed it necessary or appropriate for the public welfare." [8] The choice among different types of legislative tribunals is peculiarly within the power of Congress, *Ex parte Bakelite Corp.,* 279 U. S. 438, 451, and we are concerned only with the constitutionality, not the wisdom, of this choice.

In selecting the Uniform Code of Military Justice, Congress might have sought to avoid needless and potentially harmful duplication of a legal system already extant in every foreign nation where our troops are stationed. On the other hand, Congress could well have determined that the Code was adequate to the purpose to be achieved and would afford more safeguards to an accused than any other available procedure. The Code is a uniform system of legal procedure, applicable beyond any constitutional question to all servicemen stationed abroad. It was adopted by Congress only after an exhaustive study of several years duration and the consultation of acknowledged authorities in the fields of constitutional and military law.[9] In addition to the fundamentals of due process, it includes protections which this Court has not required a State to provide [10] and some procedures which would

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[8] Mr. Justice Brandeis dissenting in *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 534.

[9] See Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess. (1949).

[10] *E. g.,* self-incrimination, compare Art. 31 and ¶149b, and ¶72b, Manual for Courts-Martial, with *Adamson* v. *California,* 332 U. S. 46; former jeopardy, compare Arts. 44 and 63 with *Palko* v. *Con-*

compare favorably with the most advanced criminal codes. We find no constitutional defect in the fact that the Code does not provide for indictment by grand jury or trial by petit jury. In these respects it does not differ from the procedures specifically approved by this Court in other types of legislative courts established abroad by Congress. *In re Ross, supra; Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico, supra.*

Furthermore, since under the principles of international law each nation has jurisdiction of the offenses committed within its own territory, *Schooner Exchange* v. *McFaddon,* 7 Cranch 116, 136, the essential choice involved here is between an American and a foreign trial. Foreign nations have relinquished jurisdiction to American military authorities only pursuant to carefully drawn agreements which presuppose prompt trial by existent authority.[11] Absent the effective exercise of jurisdiction thus obtained, there is no reason to suppose that the nations involved would not exercise their sovereign right to try and punish for offenses committed within their borders. Under these circumstances, Congress may well have determined that trial before an American court-martial in which the fundamentals of due process are assured was preferable to leaving American servicemen and their dependents throughout the world subject to widely varying standards of justice unfamiliar to our people.[12]

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necticut, 302 U. S. 319; use of illegally obtained evidence, compare ¶152, Manual for Courts-Martial, with *Wolf* v. *Colorado,* 338 U. S. 25.

[11] See note 1, *supra,* and Schwartz, International Law and the NATO Status of Forces Agreement, 53 Col. L. Rev. 1091; Re, The NATO Status of Forces Agreement and International Law, 50 N. W. U. L. Rev. 349.

[12] It has been suggested that bringing American citizens to this country for trial for offenses committed abroad may be a preferable solution even if it is not required by the Constitution. Congress

We note that this case presents no problem of the jurisdiction of a military court-martial sitting within the territorial limits of the United States or the power of Congress to provide for trial of Americans sojourning, touring, or temporarily residing abroad. No question of the legal relation between treaties and the Constitution is presented. On the question before us, we find no constitutional bar to the power of Congress to enact Article 2 (11) of the Uniform Code of Military Justice.

The judgment is

Affirmed.

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might well have concluded that this suggestion was completely impractical. First, a condition precedent to trial in this country would be the consent of the foreign nation concerned in each individual case. This consent could always be withheld and it is likely that foreign nations would refuse to cede jurisdiction over serious offenses when trial might be held many thousands of miles away. Even where jurisdiction was obtained, the deterrent effect of such prosecutions might well be vitiated by the distance and delay involved. Secondly, both the Government and the accused would face serious problems in the production of witnesses. Depositions for the Government are not permitted in criminal cases. See Rule 15, Federal Rules of Criminal Procedure. Attendance of foreign witnesses could be only on a voluntary basis and the testimony of no foreign witness could be compelled if the witness or his government refused. The expense of transporting witnesses would be considerable for the Government and probably impossible for a defendant, whose successful defense may depend on the demeanor of one witness. In fairness, the Government would have to bear the expense of transporting the defendant's witnesses as well as its own, and the possibilities of abuse are obvious.

Finally, a breakdown of the figures on trial by courts-martial of civilians abroad from 1950–1955 shows that some 2,000 of the 2,280 cases tried involved offenses for which the maximum punishment was six months or less. The Government might be unwilling to undergo the heavy expense and inconvenience of trial here for such minor offenses. The alternatives would be either trial by the foreign country or no trial at all; the result must be the practical abdication of American judicial authority, precisely what Congress wished to avoid.

Reservation of MR. JUSTICE FRANKFURTER.†

The Court today sustains Mrs. Clarice B. Covert's conviction by a general court-martial in England for the murder of her husband, a sergeant in the United States Air Force, and the conviction of Mrs. Dorothy Krueger Smith by a general court-martial in Japan for the murder of her husband, a colonel in the United States Army. The Court does so, although it announces that "we have no need to examine the power of Congress 'To make Rules for the Government and Regulation of the land and naval Forces' under Article I of the Constitution." The plain inference from this is that the Court is not prepared to support the constitutional basis upon which the Covert and Smith courts-martial were instituted and the convictions were secured.

The Uniform Code of Military Justice which governed these proceedings, and the international arrangements with England and Japan whereby the United States was allowed to exercise jurisdiction over the alleged crimes, are concerned with, directed toward, and explicitly acknowledged as legal measures that had their source in, and were obviously to be an exercise of, the constitutional power of Congress "To make Rules for the Government and Regulation of the land and naval Forces." As provided by the Uniform Code of Military Justice, Mrs. Smith and Mrs. Covert were tried as though they were members of the Armed Forces. In view of this Court's opinion in *Toth* v. *Quarles,* 350 U. S. 11, and the fact that the Constitution "clearly distinguishes the military from the civil class as separate communities" and "recognizes no third class which is part civil and part military—military for a particular purpose or in a particular

†[NOTE: This reservation applies also to *Reid* v. *Covert, post,* p. 487.]

situation, and civil for all other purposes and in all other situations . . . ," Winthrop, Military Law and Precedents (2d ed. 1896), 145, the Court's failure to rest its decision upon the congressional power "To make Rules for the Government and Regulation of the land and naval Forces" is significant.

Having put out of consideration reliance on the immediately pertinent constitutional provision bearing on the difficulties raised by these cases, the Court sustains the convictions by two lines of argument that obviously have nothing whatever to do with the regulation of the Armed Forces of the United States. The Court relies on *In re Ross,* 140 U. S. 453, a case that represents, historically and juridically, an episode of the dead past about as unrelated to the world of today as the one-hoss shay is to the latest jet airplane. In complete disregard of the political and legal sources purporting to render women like Mrs. Smith and Mrs. Covert amenable to military courts-martial for crimes committed abroad, the Court draws on the system of capitulations whereby Western countries, including the United States, compelled powerless Eastern and Asiatic nations to surrender their authority over conduct within their confines by citizens of these Western nations to the rule of Western "consular courts." The Eastern nations were made to yield because "of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused . . . ." *In re Ross, supra,* at 463. I do not suppose that the arrangements by which Great Britain and Japan gave the United States jurisdiction over the murders with which Mrs. Smith and Mrs. Covert were charged are to be deemed concessions wrung by the United States as were the capitulations wrung, often by force, from the Ottoman Empire and other

Eastern nations because they were deemed inferior by the West, long ago and far away.*

The Court derives its second line of argument from the decisions of this Court which have evolved the power of Congress to deal with territory acquired by purchase or through war, beginning with the statute of 1822, which set up the government of Florida. See *American Insurance Co.* v. *Canter,* 1 Pet. 511. I must confess inability to appreciate the bearing of the series of complicated adjudications dealing with the difficult problems relating to "organized" and "unorganized" territories of the United States to legislation by Congress treating civilians accompanying members of the Armed Forces abroad as though they were part of the Armed Forces and therefore amenable to the Code of Military Justice.

Grave issues affecting the status of American civilians throughout the world are raised by these cases; they are made graver by the arguments on which the Court finds it necessary to rely in reaching its result. Doubtless because of the pressure under which the Court works during its closing weeks, these arguments have been merely adumbrated in its opinion. To deal adequately with them, however, demands of those to whom they are not persuasive more time than has been available to exam-

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*See the opinion, in 1855, of Attorney General Caleb Cushing: "The legal rationale of the treaty stipulations as to China, with which we are now chiefly concerned, and their relation to the legislative authority of the United States, are explained in a dispatch of the Minister who negotiated the treaty, as follows:

"'I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations,—in a word, a Christian state. . . .'" 7 Op. Atty. Gen. 495, 496–497.

ine and to analyze in detail the historical underpinning and implication of the cases relied upon by the Court, as a preliminary to a searching critique of their relevance to the problems now before the Court. For the moment, it must suffice, by way of example, to indicate that by resorting to *In re Ross* the Court has torn from its historical context an institution—the consular court—that had a totally different source and a totally different purpose than the source and purpose of Art. 2 (11) of the Uniform Code of Military Justice, 64 Stat. 107, 109. A glimpse into the international environment and political assumptions out of which the consular court system derived and of which it was a part suffices to indicate the scope of the inquiry for which the Court's opinion calls. Such a glimpse is afforded by the justification for consular courts urged by the Government on this Court 65 years ago. Reliance was placed on this authoritative view of Secretary of State Hamilton Fish:

> "A report made to Congress by my predecessor, Mr. Seward . . . shows that it has been the habit of this Department to regard the judicial power of our consular officers in Japan as resting upon the assent of the Government of that kingdom, whether expressed by formal convention or by tacit acquiescence in the notorious practice of the consular courts. In other words, they were esteemed somewhat in the same light as they would have been if they were constituted by the Mikado with American citizens as judges, and with all the authority with which a Japanese tribunal is invested in respect to the native subjects of Japan, to the extent that our Government will admit a jurisdiction understood to be extremely arbitrary. They were, so to speak, the agents of a depotism [*sic*], only restrained by such safeguards as

> our own Government may interpose for the protection of citizens who come within its sway." Brief for the United States, p. 25, in *In re Ross*, 140 U. S. 453.

Time is required not only for the primary task of analyzing in detail the materials on which the Court relies. It is equally required for adequate reflection upon the meaning of these materials and their bearing on the issues now before the Court. Reflection is a slow process. Wisdom, like good wine, requires maturing.

Moreover, the judgments of this Court are collective judgments. They are neither solo performances nor debates between two sides, each of which has its mind quickly made up and then closed. The judgments of this Court presuppose full consideration and reconsideration by all of the reasoned views of each. Without adequate study there cannot be adequate reflection. Without adequate reflection there cannot be adequate deliberation and discussion. And without these, there cannot be that full interchange of minds which is indispensable to wise decision and its persuasive formulation.

The circumstances being what they are, I am forced, deeply as I regret it, to reserve for a later date an expression of my views.

MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS dissent.*

The decisions just announced have far-reaching importance. They subject to military court-martial, even in time of peace, the wives, mothers and children of members of the Armed Forces serving abroad even though these dependents have no connection whatever with the Armed Forces except their kinship to military personnel and their presence abroad. The questions raised are complex, the

*[NOTE: This dissent applies also to *Reid* v. *Covert*, *post*, p. 487.]

remedy drastic, and the consequences far-reaching upon the lives of civilians. The military is given new powers not hitherto thought consistent with our scheme of government.

For these reasons, we need more time than is available in these closing days of the Term in which to write our dissenting views. We will file our dissents during the next Term of Court.

Syllabus.

REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL, *v.* COVERT.

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

No. 701. Argued May 3, 1956.—Decided June 11, 1956.

Pursuant to Article 2 (11) of the Uniform Code of Military Justice, the dependent wife of a United States Air Force sergeant was tried and convicted by a military court-martial in England for the murder of her husband there. She was sentenced to life imprisonment and brought to a federal prison in the United States. On appeal, her conviction was set aside, and she was transferred to the District of Columbia jail to await retrial by court-martial at an air base in Washington, D. C. While there, she petitioned the local federal district court for a writ of habeas corpus, claiming that she was not subject to military jurisdiction because Article 2 (11) was unconstitutional. The court ordered the writ to issue, directed to the Superintendent of the jail, and he appealed directly to this Court. *Held:*

1. Article 2 (11) of the Uniform Code of Military Justice is constitutional. *Kinsella* v. *Krueger, ante,* p. 470. P. 488.

2. As custodian of a federal prisoner, the Superintendent of the jail is an officer or employee of the United States for purposes of 28 U. S. C. § 1252, and this Court has jurisdiction of his direct appeal under that section. Pp. 489–490.

3. Military jurisdiction, once validly attached, continues until final disposition of the case. Therefore, jurisdiction of the Air Force to try appellee by court-martial under Article 2 (11) was not lost by her return to the United States and delivery to the custody of civilian authorities. *Toth* v. *Quarles,* 350 U. S. 11, distinguished. Pp. 490–492.

Reversed.

Marvin E. Frankel argued the cause for appellant. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard.*

Frederick Bernays Wiener argued the cause and filed a brief for appellee.

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MR. JUSTICE CLARK delivered the opinion of the Court.

Mrs. Clarice Covert was convicted and sentenced to life imprisonment by a military court-martial which tried her at a United States Air Force base in England for the murder of her husband, an Air Force sergeant. She was brought to the United States and confined in the Federal Reformatory for Women, Alderson, West Virginia. On appeal, the United States Court of Military Appeals set aside her conviction on grounds not material here, and she was transferred to the District of Columbia jail to await a rehearing by court-martial at Bolling Air Force Base, Washington, D. C. While there she filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that she was not subject to court-martial jurisdiction because Article 2 (11) of the Uniform Code of Military Justice, 50 U. S. C. § 552, was unconstitutional. The District Court ordered the writ to issue, and the Government appealed directly to this Court. Postponing the question of jurisdiction until a hearing on the merits, 350 U. S. 985, we scheduled this case for argument with *Kinsella* v. *Krueger, ante,* p. 470, decided this day.

At the outset, appellee questions the jurisdiction of this Court to hear the case on direct appeal from the District Court. For reasons hereafter stated, we conclude that we have jurisdiction.

Appellee's principal argument on the merits is answered by our decision in *Kinsella* v. *Krueger, ante,* p. 470. It is also contended, however, that whatever jurisdiction the military may have had to try Mrs. Covert by court-martial under Article 2 (11) was lost by her return to the United States and delivery to the custody of civilian authorities. We conclude that in the circumstances of this case this argument is without merit.

I.

The question of our jurisdiction involves an interpretation of 28 U. S. C. § 1252:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

It is conceded that, in issuing the writ of habeas corpus, the District Court held an Act of Congress unconstitutional. Appellee's sole contention is that appellant, the Superintendent of the District of Columbia jail, does not come within the requirement of § 1252 that "the United States, or any of its agencies, or any officer or employee thereof, as such officer or employee," be a party.

The Superintendent is responsible to the Director of the Department of Corrections of the District of Columbia, who in turn is selected by the Board of Commissioners of the District. Reorganization Order No. 34, D. C. Code, 1951, App. to Title 1, Supp. III, p. 34. The Commissioners are appointed by the President and are officers of the United States under Art. II, § 2, of the Constitution. The Superintendent has a statutory duty to "receive and keep in the Washington Asylum and Jail all prisoners committed thereto for offenses against the United States." D. C. Code, 1951, § 24–410. Mrs. Covert was placed in the District jail on orders of the Air Force, because there are no accommodations for women prisoners at Bolling Air Force Base, where the rehearing of her trial by court-martial is scheduled.

It has long been settled that an officer, while holding prisoners for the United States, is the "keeper of the

United States," *Randolph* v. *Donaldson,* 9 Cranch 76, 86, and, as such, is an officer of the United States. Since appellant was required to "receive and keep" prisoners of the United States, he is, to that extent, an officer of the United States. It is not necessary to say, and we do not say, that the District of Columbia in these circumstances is an "agency" of the United States. For, whether the Government should maintain its own jail in the District of Columbia, or utilize the local facilities, is simply a matter of administrative convenience, and it would do violence to the purpose of Congress to provide a "prompt review of the constitutionality of federal acts," *Fleming* v. *Rhodes,* 331 U. S. 100, 104, to interpret § 1252 restrictively. For all practical purposes, the District of Columbia jail is, in this case, the "jail of the United States," *Randolph* v. *Donaldson, supra,* and the Superintendent is its keeper. As the custodian of Mrs. Covert, a federal prisoner, appellant is an officer or employee of the United States for purposes of § 1252.

II.

On the merits, Mrs. Covert contends that Article 2 (11) should be restricted geographically, and therefore military jurisdiction over her expired upon her return to the United States. She also contends that, as a civilian, she is no longer subject to the Code, since she is not in "custody of the armed forces" under Article 2 (7).

An entirely different case might be presented if Mrs. Covert had terminated her status as a person "accompanying the armed forces without the continental limits of the United States" by returning to this country voluntarily. But that is not this case. The issue here is whether we should create an exception to the general rule that jurisdiction of a tribunal, once acquired, continues until final disposition. At the time of her court-

martial in England, Mrs. Covert was subject to military jurisdiction under Article 2 (11), *Kinsella* v. *Krueger, ante,* p. 470. Her transfer under orders of the Air Force was in furtherance of that jurisdiction. To accept Mrs. Covert's argument would result in the anomalous situation that military jurisdiction, validly exercised under Article 2 (11), would be defeated by the imposition of a sentence under Article 58, 50 U. S. C. § 639, which provides for confinement "in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use." It would be unreasonable to hold that the services retained jurisdiction of military prisoners that they kept in foreign countries but lost jurisdiction of prisoners confined in penal institutions in the United States.

Nor is jurisdiction defeated by reversal of Mrs. Covert's conviction and the ordering of a rehearing. The military courts have recognized rehearings to be but continuations of the original proceedings, *United States* v. *Padilla,* 5 C. M. R. 31, 42; *United States* v. *Moore,* 5 C. M. R. 438, 444; *United States* v. *Milbourne,* 15 C. M. R. 527, 528; and the legislative history of Article 63 of the Code bears out the fact that they were so intended by Congress. H. R. Rep. No. 491, 81st Cong., 1st Sess. 30; S. Rep. No. 486, 81st Cong., 1st Sess. 27.

We also note that this case is clearly distinguishable from *Toth* v. *Quarles,* 350 U. S. 11. Toth had returned to the United States and been honorably discharged months before the specifications were filed charging him with an offense committed while a soldier in Korea. The Air Force had relinquished all jurisdiction over Toth before any charge was filed against him. But here, Mrs. Covert was charged, tried, convicted, sentenced and imprisoned pursuant to a valid exercise of court-martial jurisdiction while she was concededly within the

provisions of Article 2 (11). We are not deciding here when, in other circumstances, Article 2 (11) jurisdiction may terminate. In this case we hold only that military jurisdiction, once validly attached, continues until final disposition of the case.

Reversed.

[For reservation of MR. JUSTICE FRANKFURTER, see *ante,* p. 481.]

[For dissent of MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS, see *ante,* p. 485.]

Syllabus.

SOUTHERN PACIFIC CO. *v.* GILEO ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 257. Argued May 1, 1956.—Decided June 11, 1956.

1. An employee of an interstate railroad who is injured while engaged in building new cars which are to be used by the railroad and its subsidiary in interstate commerce is within the coverage and entitled to the benefits of the Federal Employers' Liability Act, as amended in 1939. Pp. 496–500.

   (a) Under the 1939 amendment of § 1 of the Act, the test of coverage is whether any part of the employee's duties as a railroad employee furthers interstate commerce or in any way directly or closely and substantially affects such commerce—not whether the employee is engaged in "new construction." Pp. 498–499.
2. An employee of an interstate railroad who was employed as a wheel molder in the railroad's wheel foundry, where worn wheels are sent from the railroad's lines for remolding and eventual return to the railroad's rolling stock, is within the coverage and entitled to the benefits of the Federal Employers' Liability Act, as amended in 1939. P. 500.
3. An employee of an interstate railroad who was injured while laying rails in a retarder yard, which the railroad was constructing for the purpose of facilitating the movement of freight trains in interstate commerce and which was opened to interstate traffic four months after the employee was injured, is within the coverage and entitled to the benefits of the Federal Employers' Liability Act, as amended in 1939. Pp. 500–501.
4. A decision of the Supreme Court of California in a case under the Federal Employers' Liability Act, the effect of which is to remand the case to the trial court, where the issues of negligence and damages remain to be tried, is not a final judgment reviewable by this Court under 28 U. S. C. § 1257. Pp. 495–496.

44 Cal. 2d 539, 543, 547, 282 P. 2d 872, 875, 877, affirmed.
44 Cal. 2d 881, 882, 282 P. 2d 879, 880, certiorari dismissed.

Arthur B. Dunne argued the cause for petitioner. With him on the brief was *Horace B. Wulff*.

Clifton Hilderbrand argued the cause for Gileo et al., respondents, and filed a brief for Gileo, respondent.

Thomas C. Perkins argued the cause for Eufrazia, respondent. With him on the brief was *Archibald Marison Mull, Jr.*

Nathaniel S. Colley argued the cause and filed a brief for Moreno et al., respondents.

MR. JUSTICE MINTON delivered the opinion of the Court.

These five cases present questions of the extent of coverage of the Federal Employers' Liability Act, as amended.[1]

Petitioner, an interstate common carrier by railroad, owns and operates a large carshop, known as Shop No. 9, at Sacramento, California. This shop contains a department for repair of petitioner's cars temporarily removed from service and a department engaged in the construction of new cars for use in interstate commerce by petitioner and a subsidiary.

Respondents Gileo, Eufrazia and Eelk were employed by petitioner in Shop No. 9. Gileo worked on repair of petitioner's cars already in service for almost 10 years prior to his transfer to new car construction 5 months before he was injured. Eufrazia did repair work for 9 months before he was assigned to new car construction a month prior to his injury. Eelk had worked a month on repairs, was transferred to new car construction for 5 weeks, was reassigned to repair work for a month and had been back on new car construction for 3 months when he incurred his injury. Thus, all three of these respondents had at one time worked on repair jobs in Shop No. 9, but there is no dispute that they were engaged exclusively in new car construction when their injuries were incurred.

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[1] 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. § 51.

Respondents brought separate suits against petitioner for recovery under the F. E. L. A. Respondent Gileo sued in the Superior Court for the City and County of San Francisco, and respondents Eufrazia and Eelk sued in the Superior Court for the County of Sacramento. In all three suits, petitioner claimed that the F. E. L. A. did not apply because neither it nor respondents were engaged in interstate commerce and that therefore the courts were without jurisdiction to entertain the actions, the exclusive remedy for injured employees in these circumstances resting with the Industrial Accident Commission under the California Workmen's Compensation Act. This challenge to the jurisdiction of the court was rejected in the *Gileo* case, the court ruling as a matter of law that the F. E. L. A. governed the situation before it. Petitioner having stipulated the issues of negligence and the amount of damages, judgment was entered for Gileo. The trial court in the *Eufrazia* and *Eelk* cases ruled in favor of petitioner's contention that it lacked jurisdiction because the F. E. L. A. was not applicable, and judgment was entered for petitioner before trial was had on the issues of negligence and damages. The Supreme Court of California held, in separate decisions, that the Act applied to each of the respondents.[2] We granted certiorari, 350 U. S. 818, because the cases involve interpretation of an important federal statute governing railroad employer obligations to its injured employees.

In the *Eufrazia* and *Eelk* cases, the Supreme Court of California simply entered an order reversing the decisions

[2] *Gileo* v. *Southern Pacific Co.*, 44 Cal. 2d 539, 282 P. 2d 872; *Eufrazia* v. *Southern Pacific Co.*, 44 Cal. 2d 881, 282 P. 2d 879; *Eelk* v. *Southern Pacific Co.*, 44 Cal. 2d 882, 282 P. 2d 880. The decisions below holding the two remaining respondents covered by the Act are reported in *Aranda* v. *Southern Pacific Co.*, 44 Cal. 2d 543, 282 P. 2d 875, and *Moreno* v. *Southern Pacific Co.*, 44 Cal. 2d 547, 282 P. 2d 877.

of the trial court. Unlike *Gileo,* petitioner did not stipulate with respect to the issues of negligence and damages. There were no trials of these issues, and, under California practice, the effect of the Supreme Court of California's unqualified reversal is to remand the cases to the trial court. See *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546. Since the issues of negligence and damages remain to be tried, there is no final judgment in the highest court of the State, and this Court, therefore, lacks jurisdiction to review the *Eufrazia* and *Eelk* cases. 28 U. S. C. § 1257. We therefore dismiss the writs in those two cases.

The sole question which the *Gileo* case presents is whether or not an employee of an interstate rail carrier who is injured while performing work on new cars to be used in interstate commerce by the carrier and its subsidiary can maintain an action for damages against his employer under the F. E. L. A., as amended.

Section 1 of the F. E. L. A., with which we are here concerned, originally provided that "every common carrier by railroad while engaging in commerce" between the States "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce" for injury or death resulting wholly or partly from the negligence of the carrier.[3] This Court early

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[3] 35 Stat. 65:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of

construed the statute to require that the employee be "at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it" in order to qualify for coverage under the Act. *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, 558. Later, in *Raymond* v. *Chicago, M. & St. P. R. Co.*, 243 U. S. 43, 45, and *New York Central R. Co.* v. *White*, 243 U. S. 188, 192, this Court held that employees engaged in or connected with new construction for their railroad employers were not engaged in interstate commerce within the meaning of the Act and were therefore not entitled to its benefits. See also *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146, 152. The "moment of injury" and "new construction" doctrines were the source of much confusion to the railroads, their employees and the courts, with the result that the reports were replete with decisions drawing very fine distinctions in determining whether an employee was engaged in interstate commerce within the contemplation of the Act so as to entitle him to bring suit for damages thereunder for injuries incurred while in the carrier's employ. The uncertainty had grown to such proportions that Congress, in 1939, added the following paragraph to § 1 of the Act: [4]

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such

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any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[4] 53 Stat. 1404.

carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

The Senate, in its report on the amendments to the Act, characterized one aim of the amendment in this manner: "1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce." [5] Petitioner concedes that the 1939 amendment abolishes the "moment of injury" rule of the *Shanks* case, *supra*. But it vigorously contends that, because Congress, in amending the Act, did not alter the first paragraph of § 1, it is liable only for employee injuries incurred while the railroad is "engaging in commerce" between the States. It is argued that, since the railroad was here engaged in the construction of new cars, which activity, under the "new construction" doctrine of *Raymond* and *White, supra,* is not commerce between the States, employees injured while engaging in new construction are not covered by the 1939 amendment. With this we cannot agree.

The 1939 amendment to § 1 of the Act provides that "[a]ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce," as described in the first paragraph of § 1, "shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits" of the Act. This amendatory language makes it plain that if a railroad employee either

[5] S. Rep. No. 661, 76th Cong., 1st Sess. 2.

furthers interstate commerce in the performance of any part of his duties or in any way "directly or closely and substantially" affects such commerce, Congress has placed such an employee on an equal footing, for purposes of coverage under the Act, with those employees who, prior to the 1939 amendment, were held to be employed by the railroads in commerce between the States. Therefore, in determining whether respondent Gileo is entitled to the benefits of the F. E. L. A., the pertinent inquiry is not whether "new construction" is interstate commerce under the test of *Raymond* and *White*. Rather, the crucial question is whether any part of Gileo's duties as a railroad employee furthers interstate commerce or in any way directly or closely and substantially affects such commerce.

Petitioner is engaged in the manufacture of its own railroad cars for use in performing its transportation function in interstate commerce. Such new construction is an integral element in the carrier's total operations, and it follows that workmen employed to build these new cars perform duties which are in "furtherance" of interstate commerce. Furthermore, in carrying out these duties, such employees affect interstate commerce "directly or closely and substantially." Failure to perform their duties would preclude delivery to the railroad of cars which it considers essential to its transportation needs and would substantially impede the carrier's performance of its transportation function and thus the interstate commerce in which it is engaged. This interpretation is consistent with the letter and spirit of the 1939 amendment, which Congress enacted to cure the evils of hypertechnical distinctions which had developed in over 30 years of F. E. L. A. litigation. Whatever justification there may have been before the amendment for holding that employees working on repairs of a railroad's instrumentalities were engaged in interstate commerce and therefore

entitled to the benefits of the Act, *Pedersen* v. *Delaware, L. & W. R. Co., supra,* while those who were working on construction of new railroad facilities were not engaged in interstate commerce and therefore were not covered by the Act, *Raymond* and *White, supra,* has been swept away by the 1939 amendment. This Court recently rejected the "new construction" doctrine in determining whether an employee is "engaged in commerce" within the meaning of a like provision in the Fair Labor Standards Act. *Mitchell* v. *C. W. Vollmer & Co.,* 349 U. S. 427. We hold that § 1 of the F. E. L. A., as amended, covers respondent Gileo.

Respondent Aranda was injured while employed by petitioner as a wheel molder in its wheel foundry at Sacramento, California. There wheels are made to be joined to axles which form the truck base for the petitioner's cars, both new and those already in interstate service. Since wheels which wear out cannot be repaired, they must be recast or remolded and, as a result, worn wheels are continually shipped from all points on petitioner's rail network to its Sacramento foundry for remolding and eventual return to petitioner's rolling stock. A certain level of inventory is indispensable to effective utilization of this mode of operation. The operation itself is a vital link in the chain of petitioner's function as an interstate rail carrier. It is thus plain that Aranda's duties as a wheel molder both served to further interstate commerce and directly or closely and substantially affected such commerce. We therefore hold that he is entitled to the benefits of the Act.

Respondent Moreno was employed as a laborer and was injured while laying rails in a retarder yard which petitioner was constructing for the purpose of facilitating the movement of freight trains in interstate commerce by use of a new "switching" method. The yard was to be used in connection with petitioner's main line of track.

It was opened to interstate traffic 4 months after Moreno was injured. Passage of the 1939 amendment makes unnecessary indulgence in nice distinctions relating to whether Moreno was engaged in new construction or construction which, although new, was merely a substitute for petitioner's existing method of switching cars. Cf. *Agostino* v. *Pennsylvania R. Co.,* 50 F. Supp. 726. In view of what we have said above, it is clear that Moreno, in the performance of his duties, was furthering interstate commerce and that his work directly or closely and substantially affected commerce, within the meaning of the 1939 amendment.

The judgments in

Gileo v. *Southern Pacific Co.,*
Aranda v. *Southern Pacific Co.,*
Moreno v. *Southern Pacific Co.,* are

Affirmed.

The writs in

Eufrazia v. *Southern Pacific Co.,*
Eelk v. *Southern Pacific Co.,* are

Dismissed.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER agree that the writs in *Southern Pacific Co.* v. *Eufrazia* and *Southern Pacific Co.* v. *Eelk* must be dismissed because they were improvidently granted for want of final state court judgments. Regarding *Southern Pacific Co.* v. *Gileo, Southern Pacific Co.* v. *Aranda,* and *Southern Pacific Co.* v. *Moreno,* they disagree with the Court's theory in applying the Act of 1939, for the reasons set forth in MR. JUSTICE FRANKFURTER's dissent in *Reed* v. *Pennsylvania R. Co., post,* p. 508.

REED *v.* PENNSYLVANIA RAILROAD CO.

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

No. 621. Argued May 1, 1956.—Decided June 11, 1956.

Petitioner is a clerical employee of an interstate railroad whose duties consist of filing original tracings of all of the carrier's rolling stock, equipment and structures, from which tracings blueprints are made. Without these documents, maintenance of the carrier's operating system would be impossible. Petitioner was injured in her office when a cracked window pane blew in upon her. *Held:* Petitioner is within the coverage of the Federal Employers' Liability Act, as amended in 1939; and the Federal District Court has jurisdiction of her suit under the Act. Pp. 503–508.

(a) The test for coverage under the amended Act is not whether the employee is engaged in interstate transportation, but whether what he does in any way furthers or substantially affects interstate transportation. P. 505.

(b) The issue in this case cannot be resolved in terms of whether or not clerical employees as a class are excluded from the benefits of the Act. Pp. 505–506.

(c) Petitioner is employed in interstate commerce within the meaning of the 1939 amendment to § 1 of the Act. Pp. 506–507.

(d) The performance by petitioner of her duties is in "furtherance" of interstate commerce and has a close and substantial effect upon the railroad's interstate activities. P. 507.

227 F. 2d 810, reversed.

Joseph S. Lord, III, argued the cause and filed a brief for petitioner.

Theodore Voorhees argued the cause for respondent. With him on the brief were *Philip Price* and *Gordon W. Gerber.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The question we have for decision here is whether petitioner, a clerical employee of respondent railroad, is within the coverage of the Federal Employers' Liability Act. § 1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. § 51. Petitioner is employed entirely in respondent's office building in Philadelphia. Her duties consist of filing original tracings of all of respondent's engines, cars, parts, tracks, bridges, and other structures, from which blueprints of those items are made. There are some 325,000 tracings on file in the office in which petitioner works. Whenever an order for blueprints comes in from anywhere in respondent's system, it is petitioner's responsibility to fill the order by securing the correct tracings from the files. These she takes to the blueprint maker in the same office building. After the blueprints are made, it is petitioner's further duty to return the original tracings to the appropriate file. About 67% of the blueprints so made are sent to points outside Pennsylvania. The files which petitioner attends are the sole depository of the original tracings of the structural details of all of respondent's rolling stock, trackage, and other equipment and installations, and as such represent a fund of documents without which maintenance of the operating system would be impossible.

Petitioner was injured when a cracked window pane in her office blew in upon her. She brought suit for personal injury under the Federal Employers' Liability Act. On respondent's motion to dismiss, the District Court held that petitioner was not within the coverage of § 1 of the Act and, there being no diversity of citizenship between the parties, dismissed the complaint for lack of jurisdiction. The Court of Appeals affirmed. 227 F. 2d 810.

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We granted certiorari because of the importance of the question presented in the administration of the Act. 350 U. S. 965.

As originally enacted, § 1 provided that every railroad, "while engaging" in interstate commerce,

> "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 Stat. 65.

A further paragraph was added to the section in 1939, and it is clear that two specific problems which the amendment sought at least to remedy were the results of this Court's holdings that, at the moment of his injury, the employee as well as the railroad had to be engaged in interstate commerce in order to come within the coverage of § 1, and that employees engaged in construction of new facilities were not covered. S. Rep. No. 661, 76th Cong., 1st Sess. 2–3; *Southern Pacific Co.* v. *Gileo,* decided today, *ante,* p. 493. The amendment took the form of an expanded definition of "person . . . employed" in interstate commerce. The amendment reads:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act . . . ." 53 Stat. 1404.

No argument is made that Congress could not constitutionally include petitioner within the coverage of the Act. The argument is that the amendment was narrowly drawn to remedy specific evils and that to construe it to include petitioner would amount to inclusion in the Act of virtually all railroad employees—a result which respondent assumes is unintended and undesirable. The argument takes several forms. First, it is said that "commerce" in the Act means only transportation and that petitioner is not employed in transportation. See *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 559–560. But the interstate commerce in which respondent is engaged is interstate transportation. If "any part" of petitioner's duties is in "furtherance" of or substantially affects interstate commerce, it also is in "furtherance" of or substantially affects interstate transportation. The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation. Nor can we resolve the issue presented here in terms of whether or not clerical employees as a class are excluded from the benefits of the statute. The 1939 amendment was designed to obliterate fine distinctions as to coverage between employees who, for the purpose of this remedial legislation, should be treated alike. There is no meaningful distinction, in terms of whether the employee's duties are clerical or not, between petitioner and, for illustration, an assistant chief timekeeper, *Straub* v. *Reading Co.,* 220 F. 2d 177, or a messenger boy carrying waybills and grain orders between separate local offices and freight stations, *Bowers* v. *Wabash R. Co.,* 246 S. W. 2d 535, or a lumber inspector hurt while inspecting ties at a lumber company, *Ericksen* v. *Southern Pacific Co.,* 39 Cal. 2d 374, 246 P. 2d 642—all of whom have been held covered by the 1939 amendment. See also *Lillie* v. *Thompson,* 332 U. S. 459. Nor are the benefits of the

Act limited to those exposed to the special hazards of the railroad industry. The Act has not been so interpreted, and the 1939 amendment specifically affords protection to "any employee" whose duties bring him within that amendment. There is no basis in the language of § 1 for confining liability of the railroad so as to exclude any class of railroad employees as a class. The benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands. Section 1 cannot be interpreted to exclude petitioner from its benefits without further consideration of the function she performs and its impact on interstate commerce.

We think that the present petitioner is employed by the respondent in interstate commerce within the meaning of the 1939 amendment to § 1. Although the amendment may have been prompted by a specific desire to obviate certain court-made rules limiting coverage, the language used goes far beyond that narrow objective. It evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage. Under the amendment, it is the "duties" of the employee that must further or affect commerce, and it is enough if "any part" of those duties has the requisite effect. The statute commands us to examine the purpose and effect of the employee's function in the railroad's interstate operation, without limitation to nonclerical employees or determination on the basis of the employee's importance as an individual in the railroad's organization.

Here respondent railroad has chosen to arrange its operations so that repairs and construction anywhere within its system which require blueprints must go through its Philadelphia office. No such work can be done without recourse to the files of 325,000 original tracings in petitioner's custody. Loss or misplacing of those tracings could promptly cause delay, confusion, or worse in the day-to-day operation of respondent's lines. If all em-

ployees who perform petitioner's duties were removed from service, respondent could not conduct its operations without a change in its organizational system. To recognize this is to attribute to petitioner neither an exaggerated nor an attenuated relationship to respondent's transportation system. The filing of tracings and the dispatch of blueprints taken from them comprise a direct link in the maintenance of respondent's lines and rolling stock. Together with the makers of blueprints, petitioner constitutes the means by which men throughout respondent's system obtain the information they must have to maintain the railroad's trains, equipment, track, and structures.

The very purpose of petitioner's job is to further physical maintenance of an interstate railroad system. Proper performance of her duties makes an obvious contribution to the maintenance of that system. We hold that the petitioner, by the performance of her duties, is furthering the interstate transportation in which the respondent is engaged. "The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic." *Shelton* v. *Thomson,* 148 F. 2d 1, 3. Petitioner's duties here come within the confines of that concept.

Similarly, those duties which "in any way directly or closely and substantially affect" interstate commerce in the railroad industry must necessarily be marked out through the process of case-by-case adjudication. This definition and the "furtherance" definition of employment in interstate commerce in the 1939 amendment are set forth in the disjunctive. In some situations they may overlap. Here we hold that, for the reasons already given, performance of petitioner's duties has a close and substantial effect upon the operation of respondent's interstate activities. Cf. *Overstreet* v. *North Shore Corp.,* 318 U. S. 125.

Petitioner's duties brought her within the coverage of § 1 as amended, and the District Court therefore had jurisdiction over this suit under the Federal Employers' Liability Act. The judgment below is reversed and the cause remanded to the District Court for further proceedings.

Reversed.

MR. JUSTICE BURTON dissents for the reasons stated below in the opinion of the Court of Appeals.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED and MR. JUSTICE HARLAN join, dissenting.

Dissenters are not empowered to define the scope of a decision, but the way they read it may induce dissent. So it is with what the Court has here written. The opinion does not state in terms that the Amendment of August 11, 1939, 53 Stat. 1404, to the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, has so drastically changed the limited scope of that Act to those employees of an interstate carrier who are, more or less, directly concerned with its transportation operations as to make it reach all the employees of such interstate carrier whom Congress in the exercise of its constitutional power to regulate commerce may cover. I say the Court does not explicitly hold this, but it does hold that a clerical employee is covered by the terms of the Act because a "part" of her duties is in "furtherance" of interstate commerce. The Court reads the Amendment of 1939 to the Act of 1908 in a merely lexicographical sense. "Furtherance" means anything that furthers or helps forward; the petitioner was certainly charged with tasks that furthered or helped to forward the business of the Pennsylvania Railroad Company, a carrier engaged in interstate commerce; *ergo,* the petitioner, having been injured while "employed by such carrier in such com-

merce," has a right of action under the Amendment to the Employers' Liability Act.

Were the Court to be as explicit as this, it would at least not open the door, as this decision inevitably does, to new litigation. It is not a juristic requirement that decisions be carried to their logical consequences. It is equally true that capricious distinctions should not be made. Yet they are invited when the rationale of a decision is left, if not cloudy, certainly unlimited. For myself, I do not see how the clerical employee here "furthers" the business of the Pennsylvania any more than do all the other clerical employees of the Pennsylvania, and the thousands upon thousands of clerical employees on the various railroads throughout the country, even though there may be differences in salary and hierarchical importance among such employees.

Accordingly, clerical employees and other obviously non-transportation employees of railroads will bring suits under the Federal Employers' Liability Act when recovery thereunder will, by the law of chance, appear to lawyers advising them to be more advantageous than awards obtainable under state workmen's compensation acts. Indeed, if some employees may seek to avail themselves, for one reason or another, of a state workmen's compensation act, a carrier may resist, under the doctrine of *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, by urging the exclusiveness of a remedy under the Federal Employers' Liability Act. Conversely, if suit is brought under that Act, carriers will doubtless resist, as they have in the past, on the ground that the particular clerical employee is not "furthering" its business sufficiently to constitute "furtherance" as intended by the Court in this case. It is not a silly exercise in prophecy to foretell that just as a mass, if indeed not a mess, of cases came before this Court prior to the 1939 Amendment, when the Court gave a much too constricted scope to the Act (see cases

collected in Frankfurter and Landis, The Business of the Supreme Court, pp. 207–208), so a new series of sterile litigation will be stimulated by this decision.

I part company with the Court not in its reading of English but in its assumption that the construction of the Amendment to the Federal Employers' Liability Act is merely a matter of reading English. The Act of August 11, 1939, is the last in a series of consistently developing statutes. As such, it is an organism, projected into the future out of its past. It is not merely a collection of words for abstract annotation out of the dictionary. The process of judicial construction must be mindful of the history of the legislation, of the purpose which infused it, of the difficulties which were encountered in effectuating this purpose, of the aims of those most active in relieving these difficulties. Above all, we should be mindful of the central concern of the body of enactments that constitute the Federal Employers' Liability Act throughout all the vicissitudes of the legislation. It would be redundant to detail these considerations in view of Judge Goodrich's opinion below. 227 F. 2d 810. A few additional observations are pertinent.

Of course, the Act of 1939 sought to remove hindrances that had revealed themselves in subjecting carriers to liability for injuries due to negligence. But the preoccupation of the whole course of this legislation was with protection to those who were peculiarly exposed to injuries because of the nature of their occupation, *i. e.*, the hazardous business of railroading. A very important obstacle to recovery was the doctrine of the assumption of risk as part of the general law of negligence that was made the basis of the federal right. Congress abolished assumption of risk as a defense. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54. Another great difficulty derived from this Court's construction of the Commerce

Clause whereby it confined application of the Federal Employers' Liability Act to injuries sustained by an employee if at the moment of injury his work was related to interstate transportation. This mode of approach derived from the *Employers' Liability Cases,* 207 U. S. 463, and the *Second Employers' Liability Cases,* 223 U. S. 1, and produced a series of decisions which led Judge Learned Hand to say "The cases are full of casuistry . . . ." *Central R. Co. of New Jersey* v. *Monahan,* 11 F. 2d 212, 213.

I agree with the Court in finding that the "1939 amendment was designed to obliterate fine distinctions"; but they were made by courts only in relation to employees who worked in the context of the hazardous business of transportation. The amendatory legislation was addressed to judicial distinctions affecting these transportation workers that bore no practical relation to the essential conditions of their employment; these distinctions never touched others in a totally different category of employment because the Federal Employers' Liability Act never remotely applied to them. In order to obliterate such "fine distinctions," it is not necessary to jump over the moon and wipe out the basic distinction between those whose duties are tied to transportation, whatever may have been their precise work at the moment of injury, and those employees who are exposed by way of permanent occupation to no greater or different potential hazards than are the thousands upon thousands of like workers in offices other than those of railroads whom Congress has left to remedies under state law. It was on the presupposition of this cardinal distinction between transportation and non-transportation employees of railroads that the Federal Employers' Liability Act was amended in 1939. To make it apply to clerical workers who "further," in a dictionary sense of the term, the interstate

commerce business of railroads would have as much justification, but no more, as it would have for Congress to pass a Federal Employers' Liability Act for all employees who further large enterprises in the conduct of their interstate commerce. The whole course of history of the Federal Employers' Liability Act as well as due regard for the text of the Amendment of 1939, in its entire context, calls for affirmance of the decision below.

Syllabus.

PARR *v.* UNITED STATES.

NO. 320. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued March 28, 1956.—Decided June 11, 1956.

1. Petitioner was indicted in one division of the Federal District Court for the Southern District of Texas, and that Court granted his motion to transfer the case to another division, on the ground that local prejudice would prevent a fair trial in the division where he was indicted. Subsequently, the Government obtained a new indictment in another district for the same offenses and moved in the first court for dismissal of the first indictment. This motion was granted, and petitioner appealed. *Held:* The Court of Appeals was without jurisdiction, because there was no final judgment. Pp. 514–521.

   (a) Considering the first indictment alone, an appeal from its dismissal will not lie, because petitioner has not been aggrieved, even though he is left open to further prosecution. Pp. 516–517.

   (b) Viewing the two indictments together as parts of a single prosecution, dismissal of the first indictment was not a final order but only an interlocutory step in petitioner's prosecution. Pp. 518–519.

   (c) Dismissal of the first indictment does not come within the exceptions to the rule of "finality," because lack of an appeal at this stage will not deny effective review of his claim that he was entitled to trial in the court to which his first indictment was transferred. Pp. 519–520.

2. Petitioner's motion for leave to file in this Court an original petition for writs of mandamus and prohibition to the federal district courts of both districts, to require his trial in the court to which the first indictment was transferred, is denied. Pp. 520–521.

225 F. 2d 329, affirmed.

Everett L. Looney and *Abe Fortas* argued the cause for petitioner. With them on the brief in No. 320 and the motion in No. 202, Misc., were *Thurman Arnold, Marvin K. Collie* and *Thomas E. James.*

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*Together with No. 202, Misc., *Parr* v. *Rice, U. S. District Judge, et al.*, on motion for leave to file petition for writs of mandamus and prohibition.

Gray Thoron argued the cause for the United States. With him on the brief for respondents were *Solicitor General Sobeloff, Acting Assistant Attorney General Rice, Joseph M. Howard* and *Lawrence K. Bailey.*

Opinion of the Court by MR. JUSTICE HARLAN, announced by MR. JUSTICE BURTON.

In November 1954 petitioner was indicted in the Corpus Christi Division of the United States District Court for the Southern District of Texas for willfully attempting to evade federal income taxes by filing false returns for the years 1949, 1950 and 1951.[1] In April 1955 the District Court granted petitioner's motion to transfer the case to the Laredo Division of the Southern District, finding that petitioner, a prominent political figure, could not obtain a fair trial in the Corpus Christi Division because of local prejudice against him.[2] Deeming itself without power to transfer the case elsewhere than Laredo without the defendant's consent,[3] the District Court also found against the Government's claim that it would or

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[1] Section 145 (b) of the Internal Revenue Code of 1939, 53 Stat. 62.

[2] Fed. Rules Crim. Proc., 21:

(a) "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

(c) "When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division."

[3] Petitioner's motion sought a transfer solely to Laredo. In his brief before the District Court, he stated: "We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi."

might be under "a severe handicap" in trying the petitioner in Laredo.[4]

Shortly thereafter, on May 3, 1955, the Government obtained a new indictment against petitioner in the Austin Division of the Western District of Texas for the same offenses.[5] The next day it moved in the Corpus Christi Division for leave to dismiss the first indictment.[6] This motion was granted over the vigorous opposition of the petitioner, and an order of dismissal was entered.[7]

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[4] 17 F. R. D. 512, 518–520. This opinion is illuminated by the later remarks of the same judge quoted in n. 7, *infra*.

[5] The Austin indictment differed from the Corpus Christi indictment only in its allegations as to venue. Under 18 U. S. C. § 3237, petitioner was indictable both in the Western District (where his returns were filed) and in the Southern District (where the returns were prepared and forwarded for filing).

[6] Fed. Rules Crim. Proc., 48 (a):

"The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

[7] The petitioner opposed the motion on the ground that it was an attempt to circumvent the District Court's prior order transferring the case to Laredo. It is clear that the principal purpose of the Government in obtaining the Austin indictment was to avoid a trial in Laredo, which it regarded as "the defendant's seat of political power," and that this purpose was made manifest to District Judge Kennerly who (together with Judge Allred) had acted on petitioner's earlier transfer application. In granting the motion to dismiss, Judge Kennerly stated:

"I reached the conclusion [upon petitioner's earlier motion to transfer the case to Laredo] that the case should not be tried in Corpus Christi, and that defendant's motion for change of venue should be granted.

"In reaching that conclusion, or rather in examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. . . .

"But when I came to examine the law, I found that I was without

Petitioner appealed to the Court of Appeals and, on the Government's motion, that court (one judge dissenting) dismissed the appeal upon the ground that the order appealed from was not a final order. 225 F. 2d 329. We granted certiorari, directing that the case be heard both on the merits and on the question of appealability. 350 U. S. 861. Since we conclude that the order in question was not appealable, we do not reach the merits.

1. If the Corpus Christi indictment is viewed in isolation from the Austin indictment, an appeal from its dismissal will not lie because petitioner has not been aggrieved. Only one injured by the judgment sought to be reviewed can appeal, and, regarding the Corpus

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power to transfer the case outside of the Southern District of Texas. . . . If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

"But as stated, I could not do that as I understand the law. I then discovered that I could not transfer the case to any other division of the district except Laredo. . . . [S]o the case was transferred there.

"Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District . . . .

". . . evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed.

"In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules [*sic*]. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed."

Christi proceeding as a separate prosecution, petitioner has not been injured by its termination in his favor. *Lewis* v. *United States,* 216 U. S. 611.[8] So far as petitioner's standing to appeal is concerned, it makes no difference whether the dismissal still leaves him open to further prosecution, or whether, as petitioner contends, it bars his prosecution elsewhere than in Laredo because the transfer order operated to give him a vested right to be tried only there. The testing of the effect of the dismissal order must abide petitioner's trial, and only then, if convicted, will he have been aggrieved. Cf. *Heike* v. *United States,* 217 U. S. 423.[9]

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[8] It is suggested that the defendant in *Lewis* was held not to be aggrieved only because the statute of limitations prevented his reindictment. The Court alluded to that circumstance, however, only after holding that the defendant could not be "legally aggrieved" by being released from prosecution under the indictment; the bar of the statute of limitations was noted only in connection with a concluding observation that the case was moot in any event.

[9] To support his claim of aggrievement, petitioner, by way of analogy, relies upon four lower court decisions granting appeals from judgments of nonsuit in civil cases. In three of the cases, however, the defendant was asserting a right to a judgment in his favor on the merits, claimed to have been fully established prior to the nonsuit, and was obviously aggrieved by the loss of that judgment. *Connecticut Fire Ins. Co.* v. *Manning,* 177 F. 893 (C. A. 8th Cir.); *Massachusetts Fire & Marine Ins. Co.* v. *Schmick,* 58 F. 2d 130 (C. A. 8th Cir.); *Iowa-Nebraska L. & P. Co.* v. *Daniels,* 63 F. 2d 322 (C. A. 8th Cir.). In the fourth case, *Cybur Lumber Co.* v. *Erkhart,* 247 F. 284 (C. A. 5th Cir.), the plaintiff took a nonsuit only after a previous verdict in his favor had been reversed on appeal and the case had been remanded for a new trial with directions to direct a verdict for the defendant if the evidence was the same; the defendant claimed a right to a judgment if the plaintiff did not proceed to trial on the remand. In all of the cited cases, therefore, the defendant was asserting a right to a judgment on the basis of the progress of the action prior to the nonsuit—a substantial right going to the merits of the controversy of which he had been deprived

2. If the Corpus Christi and Austin indictments be viewed together as parts of a single prosecution, petitioner fares no better. For then the order dismissing the Corpus Christi indictment would not be a final order. The considerations underlying the historic requirement of "finality" in federal appellate procedure require no elaboration at this late date. See *Cobbledick* v. *United States,* 309 U. S. 323. In general, a "judgment" or "decision" is final for the purpose of appeal only "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28. This rule applies in criminal as well as civil cases. *Berman* v. *United States,* 302 U. S. 211, 212–213.

It is argued that the order dismissing the Corpus Christi indictment was "final" because it (a) terminated the prosecution under that indictment, and (b) cannot be reviewed otherwise than upon this appeal. We think neither point well taken. "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States, supra,* at p. 212. And viewing the two indictments together as a single prosecution, the Austin indictment being as it were a superseding indictment, petitioner has not yet been tried, much less convicted and sentenced. The order dismissing the Corpus Christi indictment was but an interlocutory step in this prosecution, and its review must await the conclusion of the "whole matter litigated" between the Government and the petitioner—namely, "the right to convict the

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by the nonsuit. No such circumstances are present here. Cf. Fed. Rules Crim. Proc., 48 (a): ". . . Such a dismissal may not be filed *during the trial* without the consent of the defendant." (Emphasis added.)

accused of the crime charged in the indictment." *Heike* v. *United States, supra,* at p. 429.

Nor is there substance to the claim that the Corpus Christi dismissal will not be reviewable if petitioner is convicted under the Austin indictment. If petitioner is correct in his contention that the Laredo transfer precluded the Government from proceeding elsewhere, he could not be tried in Austin, and, if petitioner preserves the point, he will certainly be entitled to have the Corpus Christi dismissal reviewed upon an appeal from a judgment of conviction under the Austin indictment. To hold this order "final" at this stage of the prosecution would defeat the long-standing statutory policy against piecemeal appeals.

3. We also find untenable petitioner's secondary contention that, even if not final, the Corpus Christi dismissal falls within the exceptions to the rule of "finality" recognized by this Court in such cases as *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, and *Swift & Company Packers* v. *Compania Columbiana del Caribe,* 339 U. S. 684. In those cases, orders made during the course of a litigation were held appealable because they related to matters outside the stream of the main action and would not be subject to effective review as part of the final judgment in the action. Unlike the orders in those cases, this order was but a "step toward final disposition of the merits of the case" and will "be merged in the final judgment." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* at p. 546. The lack of an appeal now will not "deny effective review of a claim fairly severable from the context of a larger litigious process." *Swift & Company Packers* v. *Compania Columbiana del Caribe, supra,* at p. 689. True, the petitioner will have to hazard a trial under the Austin indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi indictment, but "bearing the

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discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States, supra,* at p. 325.

4. With his petition for certiorari, petitioner also filed a motion, Docket No. 202, Misc., for leave to file an original petition in this Court for writs of mandamus and prohibition to the Southern and Western District Courts, designed to require petitioner's trial in Laredo.[10] Although this application has stood in abeyance pending determination of the questions involved on the writ of certiorari, it is appropriate to dispose of it now, it having been fully argued in the present proceeding.

We think that extraordinary writs should not issue. Such writs may go only in aid of appellate jurisdiction. 28 U. S. C. § 1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper,* 270 U. S. 9, 29–30. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used

[10] Petitioner had also been denied writs of mandamus and prohibition in the Court of Appeals, and the writ of certiorari brought up that ruling as well as the dismissal of the appeal. The prerogative writs sought in the Court of Appeals, however, were designed solely to stay the proceedings in the Western District pending the final disposition of the appeal and not to afford permanent relief. Since the Western District Court subsequently granted the Government's motion for such a stay, that part of the case on certiorari is now moot. Thus it is only petitioner's original application to this Court in No. 202, Misc., that is before us.

to thwart the congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn., supra,* at p. 30.

We conclude that the Court of Appeals properly dismissed the appeal, and its judgment must be

Affirmed.

The motion for leave to file a petition for writs of mandamus and prohibition in No. 202, Misc., is

Denied.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK join, dissenting.

The petitioner, Parr, was indicted for income tax evasion in the United States District Court at Corpus Christi, Texas. He asked and obtained a transfer of the proceeding to Laredo, Texas, on the ground that he could not obtain a fair and impartial trial in Corpus Christi. The Government was dissatisfied with the transfer but had no right under law to ask that the case be transferred to some other district. In this situation, the Government conceived the idea of having Parr indicted at Austin, Texas, thereafter dismissing the case against him in Laredo. Parr protested on the ground that he had a right to be tried, if at all, in Laredo, the place where the District Court had already determined a fair trial could be obtained. His protest was overruled. Parr then appealed to the Court of Appeals. That court dismissed the appeal on the ground that there was no final appealable judgment under 28 U. S. C. § 1291. The Court today affirms that holding without reaching the merits of the District Court's action in dismissing the indictment. We think the judgment is appealable under § 1291 and

that it was error for the District Court to dismiss the case in Laredo.

The dismissal of the indictment, if valid, was a "final" decision of the Laredo Court in that case. This is true even if a new indictment could be obtained in the Laredo District Court or in some other court. In fact, a new indictment was obtained in the Austin District Court before the Laredo Court dismissed the indictment in this case. But this new indictment made the dismissal of the Laredo indictment against Parr no less "final." For the Laredo case, after dismissal, did not remain "open, unfinished or inconclusive"; nor was the decision dismissing it "tentative, informal or incomplete." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546. There was nothing interlocutory about the dismissal. It was not simply an indecisive step in the course of a case which might ultimately result in conviction of Parr. For if Parr is to be convicted on the charge made in the Laredo indictment, it will have to come from the institution of a new case. The time for Parr to appeal from the dismissal of this case against him in Laredo, if ever, was after its "final" disposition by the judge at Laredo. It would appear to be almost a fantastic interpretation of "finality" to hold otherwise.

The majority contend that, even if the dismissal had the requisite finality, petitioner may not appeal it because he was not aggrieved thereby, relying upon *Lewis* v. *United States,* 216 U. S. 611. But that case should not control here, since no new indictment had been returned against Lewis before or after the dismissal of the indictment he sought to have reviewed, and an applicable statute of limitations barred any further effort to indict him. Here, a new indictment was returned against petitioner before the dismissal. If he had, as we believe he had, a right to be tried in Laredo or not at all, clearly he was aggrieved by the dismissal under the circumstances.

It seems to be intimated, however, that Parr might be able to raise the question somehow after trial at Austin if he should be convicted in the new and different case brought there. This Court can write law to that effect. We do not think it should. We countenance plain harassment if we require Parr to be tried under what may turn out to be an invalid indictment at Austin before he can obtain appellate review of dismissal of the Laredo case. Should this occur, Parr would have been required to undergo two trials, one at Austin and another at Laredo. Section 1291 should not be construed so as to bring about such a result.

We think it was error for the District Court at Laredo to dismiss the case there. Rule 21 of the Federal Rules of Criminal Procedure allows defendants to obtain changes of venue in order to get fair and impartial trial. No rule or statute grants such a privilege to the United States. The Government can and probably frequently does shop around to find a court it deems most favorable to try defendants. Here, the Government selected Corpus Christi as the forum in which to prosecute Parr, although, for the last 20 years preceding, the Government had filed all tax-evasion cases arising in that district in Austin. Here, after the Government's choice for trial was found by the District Court to be unfair to the defendant, and Laredo was found to provide a fair place for trial, the Government is being allowed to frustrate the court's selection of Laredo by filing a new indictment in a new case in Austin. We think the Government should not be allowed to circumvent the court's order in that fashion. Rule 21 (c) provides that, after transfer under that rule, "the prosecution shall continue" in the place to which the case has been transferred. There is no finding of any kind that the Government will not get a fair trial at Laredo. The finding was expressly

to the contrary. The specific purpose of Rule 21 is to have trials that can be fair and impartial. The object of the Government here is to escape from a court where it has been decided after a full hearing that a fair and impartial trial will be given. There is no reason that we can see why Rule 21 should not be given its full effect by requiring trial to take place in the district court to which it has been removed in the interest of fairness. We would reverse this case.

CZAPLICKI *v.* THE HOEGH SILVERCLOUD ET AL.

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

No. 342. Argued April 24, 1956.—Decided June 11, 1956.

Petitioner, a longshoreman, was injured in 1945 while working on a ship when steps built by a contractor collapsed, causing him to fall. Shortly thereafter, he elected to accept compensation under the Longshoremen's and Harbor Workers' Compensation Act, and an award was made by a Deputy Commissioner. Payments thereunder were made by an insurer, which had insured both petitioner's employer and the contractor who had built the steps. In 1952, petitioner filed a libel against the ship, her owners, her operators and the contractor who had built the steps, claiming damages for his injuries on grounds of unseaworthiness and negligence. He also tried unsuccessfully to join the insurer as a party. *Held:*

1. An alleged procedural defect in the compensation award was not such as to prejudice petitioner or to deprive the Deputy Commissioner of jurisdiction to enter the award; and the award cannot now be set aside on that ground. Pp. 528–529.

2. Under § 33 (b) of the Compensation Act, petitioner's acceptance of the award had the effect of assigning his rights of action against third parties to his employer, to whom the insurer was subrogated; but that did not preclude petitioner from bringing the libel in the circumstances of this case, because petitioner's rights were held by the insurer—the party most likely to suffer from enforcement of those rights. Pp. 529–532.

(a) Even after the assignment, petitioner had an interest in his right of action against third parties, since any recovery must be apportioned between the employee and the assignee under § 33 (e). Pp. 530–531.

(b) Though § 33 (d) gives the assignee control over enforcement of the employee's right of action against third parties, it should not be construed to enable the assignee to defeat the employee's interest in any possible recovery, where there is such a conflict of interests as exists in this case. Pp. 531–532.

(c) If the insurer is within the court's jurisdiction, it should be made a party to petitioner's suit. P. 532.

3. Under § 33 (a), petitioner's election to accept the compensation award instead of proceeding against third parties does not bar this suit in the circumstances of this case. Pp. 532–533.

4. Though the statutes of limitations that might have been applicable had run, petitioner was not necessarily barred by laches on the present record from bringing this suit. Pp. 533–534.

(a) Laches as a defense to an admiralty suit is not to be measured by strict application of statutes of limitations; it depends on the peculiar equitable circumstances of each case. P. 533.

(b) Since the District Court did not consider the defense of laches but dismissed the libel on other grounds, and the Court of Appeals held, on a record that was incomplete on the issue of laches, that it was barred solely because the statutes of limitations had run, the present record is inadequate to justify a holding that this libel is barred by laches. Pp. 533–534.

(c) The existence of laches is a question primarily addressed to the discretion of the trial court; and the case is remanded to the District Court for further proceedings. P. 534.

223 F. 2d 189, reversed and remanded.

Bernard Chazen argued the cause for petitioner. With him on the brief was *Nathan Baker*.

James M. Estabrook argued the cause for The Hoegh Silvercloud et al., respondents. With him on the brief was *Francis X. Byrn*.

Arthur J. Phelan argued the cause for the Hamilton Marine Contracting Co., Inc., respondent. On the brief was *Raymond J. Scully*.

Opinion of the Court by MR. JUSTICE HARLAN, announced by MR. JUSTICE BURTON.

Czaplicki was injured in 1945 while working as a longshoreman on the "SS Hoegh Silvercloud," a vessel owned by the Norwegian Shipping and Trade Mission and operated by the Kerr Steamship Company. The injury occurred when some steps, constructed by the Hamilton

Marine Contracting Company, gave way, causing Czaplicki to fall about five feet. At the time, Czaplicki was employed by the Northern Dock Company, which was insured for purposes of the Longshoremen's and Harbor Workers' Compensation Act [1] by the Travelers Insurance Company. Travelers, which was also the insurer of the Hamilton Company, filed notice with the Compensation Commission that any compensation claim by Czaplicki would be controverted.[2] Three weeks after the accident, Czaplicki elected to accept compensation rather than proceed against any third parties, and, one day later, a formal compensation award was entered by a Deputy Commissioner. Payments under the award were made by Travelers.

In 1952, Czaplicki filed a libel against the vessel, her owners and operators, and the Hamilton Company, claiming damages for his injuries on grounds of unseaworthiness and negligence.[3] After various proceedings in the District Court for the Southern District of New York, the libel was dismissed as to all respondents,[4] on the ground that Czaplicki was not the proper party libelant, since his election to accept compensation under the award had

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[1] 44 Stat. 1424, as amended, 52 Stat. 1164, 33 U. S. C. § 901 *et seq.*

[2] The only reason given for controverting the claim was: "Injured is undecided whether or not to sue the 3rd party and reserves the right to controvert for such other reasons as may later appear."

[3] In 1946, petitioner sued the Kerr Company in the New Jersey state courts, but the suit was dismissed for improper service of process. He brought a second suit against the same company in the New York state courts, but that suit was subsequently discontinued in 1947 by his then attorney. Petitioner claims that the commencement and discontinuance of that suit were without his knowledge. Petitioner had retained his present attorney by October 4, 1948, but the present libel was not filed until 1952.

[4] 110 F. Supp. 933; 133 F. Supp. 358; the opinion of Judge Ryan dismissing the suit against Hamilton Company and the Norwegian Trade Mission is not officially reported.

operated, under §§ 33 (b) and 33 (i),[5] as an assignment to Northern and its insurer, Travelers, of his rights of action against third parties. The District Court also overruled Czaplicki's contention that the compensation award was invalid because of alleged procedural defects,[6] and denied his motion to add Travelers "as party libelant to sue in its behalf and as trustee for libelant," or simply to add Travelers as a party.[7] The District Court found it unnecessary, in light of this disposition of the case, to consider the defense of laches, which had been interposed by each respondent. The Court of Appeals, affirming the District Court, held the compensation award valid and the libel barred by laches; although it indicated some doubt as to the correctness of the District Court's decision on Czaplicki's right to maintain the suit, it did not pass on that question.[8] We granted certiorari, 350 U. S. 872, because of the importance of these questions in the administration of the Longshoremen's and Harbor Workers' Compensation Act.

1. Czaplicki seeks to avoid the assignment question by attacking the compensation award itself, on the ground of asserted procedural defects.[9] However, we think that

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[5] 33 U. S. C. § 933 (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."

33 U. S. C. § 933 (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."

[6] 110 F. Supp. 933.

[7] 133 F. Supp. 358.

[8] 223 F. 2d 189.

[9] Section 19 (c), 33 U. S. C. § 919 (c), provides that the Deputy Commissioner may either hold hearings on a compensation claim, or, "if no hearing is ordered within twenty days" after notice of the

the award must be treated as a valid one. In the first place, the alleged irregularity could not have prejudiced Czaplicki, since it resulted from a failure to afford his *employer* a procedural benefit which, we assume *arguendo,* the statute gives. The defect, if any, is one of which only the employer could complain; Czaplicki, who has not been in any way harmed by it, cannot use it as a vehicle for setting aside the award. Secondly, the supposed defect cannot be used to attack collaterally an otherwise valid award. The statute provides a means for contesting action by the Deputy Commissioner in compensation award cases,[10] and unless that procedure is followed, the award becomes binding. In short, the defect was not one which would deprive the Deputy Commissioner of jurisdiction to enter an award.[11]

2. Under § 33 (b) of the Compensation Act, Czaplicki's acceptance of the compensation award had the effect of assigning his rights of action against third parties to his employer, Northern. Travelers, as Northern's insurer, was in turn subrogated to all Northern's rights by § 33 (i). Travelers, therefore, was the proper party to sue on those rights of action.[12] Travelers was also the insurer of

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claim is given to the employer and other interested parties, the Deputy Commissioner can decide the claim. In this case, the award was entered only one day after the claim was filed, on the same day that notice was sent to the employer, and no hearing was ordered or held. None of the parties requested a hearing.

[10] § 21, 33 U. S. C. § 921.

[11] Czaplicki also contends that the award made by the Deputy Commissioner was "little more than a temporary or interlocutory order," and should not be considered the kind of award which operates as an assignment. But the record indicates that what the Deputy Commissioner called an "award" was in effect just that, and was sufficient to call into play the assignment provisions of the Act.

[12] *Aetna Life Ins. Co.* v. *Moses,* 287 U. S. 530, was an action at law brought under this Act, which had been made applicable as a workmen's compensation law in the District of Columbia. It was held

Hamilton, one of the third parties subject to suit. Hamilton had constructed the steps on which the accident occurred, and might be held liable if its negligence was the cause of Czaplicki's injuries; it might also be subject to a claim over by Kerr or the Norwegian Trade Mission if either of them should be held liable. Cf. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124. The result is that Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced. In these circumstances, we cannot agree that Czaplicki is precluded by the assignment of his rights of action from enforcing those rights in an action brought by himself.

Although § 33 (b) assigns to the employer "all right of the person entitled to compensation to recover damages" against third parties when there has been acceptance of compensation under an award, this does not mean that the assignee is entitled to retain all damages in the event of a recovery against a third party. Instead, § 33 (e) specifically apportions any such recovery between the assignee and the employee whose right of action it was originally, giving to the former an amount equal to the expenses incurred in enforcing the right, expenses of

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that the employer was the proper party to bring the action. Since that case was decided, § 33 (i) has been added to the Compensation Act, providing that "the insurance carrier shall be subrogated to all the rights of the employer under this section." 52 Stat. 1168, 33 U. S. C. § 933 (i). As noted in the *Moses* case, 287 U. S., at p. 542, n. 3, it has long been the admiralty rule that the insurer subrogated to the rights of the insured can sue in his own name. See, *e. g.*, *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462; *The Potomac*, 105 U. S. 630, 634. Travelers was, therefore, the proper party libelant had it chosen to sue in this case. Cf. *United States* v. *Aetna Cas. & Surety Co.*, 338 U. S. 366, 380–381. *Doleman* v. *Levine*, 295 U. S. 221, again an action at law, is not in point, since in that case, unlike the case at bar, there was no complete assignment of the employee's right of action.

medical care for the employee, and any amounts paid and payable as compensation, and to the latter any balance remaining.[13] In a very real sense, therefore, the injured employee has an interest in his right of action even after it has been assigned. Normally, this interest will not be inconsistent with that of the assignee, for presumably the assignee will want to recoup the payments made to the employee. Since the assignee's right to recoup comes before the employee's interest, and because the assignee is likely to be in a better position to prosecute any claims against a third party, control over the right of action is given to the assignee, who can either institute proceedings for the recovery of damages against a third person, "or may compromise with such third person either without or after instituting such proceeding." § 33 (d), 33 U. S. C. § 933 (d). In giving the assignee exclusive control over the right of action, however, we think that the statute presupposes that the assignee's interests will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interests, the inaction of the assignee operates to defeat the employee's interest in any possible recovery. Since an action by Travelers would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally.

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[13] 33 U. S. C. § 933 (e). The "present value" of amounts payable by the employer as future compensation and medical benefits is computed and retained by the employer "as a trust fund to pay such compensation and the cost of such benefits as they become due." § 33 (e) (D), 33 U. S. C. § 933 (e) (D).

We need not go so far as to say that by giving the employee an interest in the proceeds of a third-party action the statute places the assignee in the position of a fiduciary, cf. *United States Fidelity & Guaranty Co.* v. *United States,* 152 F. 2d 46, 48; all we hold is that, given the conflict of interests and inaction by the assignee, the employee should not be relegated to any rights he may have against the assignee, but can maintain the third-party action himself. In so holding, we recognize that one Court of Appeals has held otherwise under this same statute, see *Hunt* v. *Bank Line,* 35 F. 2d 136, as have certain state courts under similar statutes, see *Taylor* v. *New York Central R. Co.,* 294 N. Y. 397, 62 N. E. 2d 777; cf. *Whalen* v. *Athol Mfg. Co.,* 242 Mass. 547, 136 N. E. 600. We think, however, that allowing suit by the employee in these circumstances is the proper way to ensure him the rights given by the Compensation Act.

Travelers is, of course, a proper party to this suit, since any recovery must first go to reimburse it for amounts already paid out. If Travelers is subject to the court's jurisdiction [14] it should therefore be made a party, pursuant to Czaplicki's motion, assuming that there has been proper service of process.

3. Respondents contend that since Czaplicki did not, under § 33 (a), 33 U. S. C. § 933 (a), elect to proceed against third parties, but rather chose to accept compensation, he can in no event revoke this election and maintain this suit. But, as this Court has already pointed out, "election not to sue a third party and assignment of the cause of action are two sides of the same coin." *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, 455. Czaplicki can bring this suit not because there has been no assignment, but because in the peculiar facts here there is no

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[14] Cf. *Ettlinger* v. *Persian Rug & Carpet Co.,* 142 N. Y. 189, 36 N. E. 1055.

other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action. For the same reason, we hold that the election to accept compensation, as a step toward the compensation award, does not bar this suit.

4. The Court of Appeals found it unnecessary to consider whether Czaplicki could maintain this suit, because it was held barred in any event on account of laches. The only reason given for this holding was that both the New York and New Jersey statutes of limitations, the two that might be applicable, had run. It is well settled, however, that laches as a defense to an admiralty suit is not to be measured by strict application of statutes of limitations; instead, the rule is that "the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case." *The Key City,* 14 Wall. 653, 660. In cases where suit has been brought after some lapse of time, the question is whether it would be inequitable, because of the delay, to enforce the claim. *Holmberg* v. *Armbrecht,* 327 U. S. 392, 396; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488–489. "Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief." *Gardner* v. *Panama R. Co.,* 342 U. S. 29, 31. This does not mean, of course, that the state statutes of limitations are immaterial in determining whether laches is a bar, but it does mean that they are not conclusive, and that the determination should not be made without first considering all the circumstances bearing on the issue.

In this case, the District Court never passed on the defense of laches, which although properly put in issue was made irrelevant by the holding that, because of the statutory assignment of his right of action, Czaplicki could not maintain this action. Not only was there no decision on laches, but there was never an opportunity

for Czaplicki to introduce evidence to justify the delay, since the suit was dismissed after preliminary hearings and argument on the issue of Czaplicki's "standing."

When the case reached the Court of Appeals, therefore, the record was incomplete on the issue of laches. There is nothing in the record to show that Czaplicki was given any more opportunity in the Court of Appeals to explain the delay than he had been given in the District Court.[15] The only "finding" made by the Court of Appeals [16] was that the running of the statutes of limitations constituted laches, and that, as we have stated, was insufficient. From all that appears, Czaplicki may have failed to bring suit earlier because he relied on the assignee of the right of action to enforce what was presumably an interest common to both of them. The record does not disclose when Czaplicki discovered the assignee's conflicting interest, or whether there has been unjustifiable delay since that discovery. Nor has there been opportunity to prove the statement, made in an affidavit to the District Court, that the delay has in no way prejudiced the respondents. These are questions on which the parties should have been allowed to present evidence. The present record is inadequate to justify a holding that this action was barred by laches.

Since "the existence of laches is a question primarily addressed to the discretion of the trial court," *Gardner* v. *Panama R. Co., supra,* at p. 30, we remand the case to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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[15] In his petition for rehearing to the court below, Czaplicki asked for "an opportunity to prove the facts which would negative laches," although he did not attempt to set forth the facts on which he expected to rely. The petition was denied without opinion.

[16] Cf. Admiralty Rules, No. 46½.

MR. JUSTICE FRANKFURTER, concurring.

The disposition of a case is of prime importance to the parties. How a result is reached concerns the rational development of law. I agree with the Court's disposition of this case, but I would dispose of the main issue—the nature of Czaplicki's interest that survives his acceptance of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 52 Stat. 1164, 33 U. S. C. § 901 *et seq.*—on the basis of the analysis made in *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. 2d 46, 48. The reasoning of that case seems to me to carry out the scheme of the legislation with appropriate consistency.

> "So far as concerns the tortfeasor's liability to the employee beyond the amount of workmen's compensation, no agreement between the tortfeasor and the employer can prejudice the employee, because, although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest." 152 F. 2d 46, 48.

Although this suit was brought directly against the tortfeasor, the Court directs that Travelers, the subrogee insurer, should be made a party. Since I deem the proper theory on which Czaplicki may recover despite his compensation award to be Travelers' fiduciary responsibility, I would direct reconstruction of this proceeding so that it should be against Travelers, while the vessel would be retained as a party.

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COLE *v.* YOUNG ET AL.

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

No. 442. Argued March 6, 1956.—Decided June 11, 1956.

The Act of August 26, 1950, gave to the heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary "in the interest of the national security," and its provisions were extended to "all other departments and agencies of the Government" by Executive Order No. 10450. Petitioner, a preference-eligible veteran under the Veterans' Preference Act, was summarily suspended from his classified civil service position as a food and drug inspector for the Department of Health, Education and Welfare on charges of close association with alleged Communists and an allegedly subversive organization. Later, he was dismissed on the ground that his continued employment was not "clearly consistent with the interests of national security." His appeal to the Civil Service Commission under the Veterans' Preference Act was denied on the ground that that Act was inapplicable to such discharges. *Held:* His discharge was not authorized by the 1950 Act and hence it violated the Veterans' Preference Act. Pp. 538–558.

1. The 1950 Act authorizes a dismissal only upon a determination that it is "necessary or advisable in the interest of the national security." Such a determination requires an evaluation of the risk to the "national security" that the employee's retention would create, which depends not only upon the character of the employee and the likelihood of his misconducting himself but also upon the nature of the position he occupies and its relationship to the "national security." P. 542.

2. The 1950 Act is not the only, nor even the primary, source of authority to dismiss government employees, and the question in this case is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case. Pp. 543–544.

3. This depends on the meaning of the term "national security," as used in the 1950 Act. Pp. 542–544.

4. The term "national security" is not defined in that Act, but it is clear from the statute as a whole that it was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare. Pp. 544–548.

5. This conclusion is supported by the legislative history of the Act. Pp. 548–551.

6. A condition precedent to the exercise of the dismissal authority conferred by the 1950 Act is a determination by the agency head that the position occupied is one affected with the "national security," as that term is used in the Act. P. 551.

7. No determination was made that petitioner's position was one in which he could adversely affect the "national security," as that term is used in the Act. Pp. 551–558.

(a) Executive Order No. 10450 treats an adverse determination as to the loyalty of an employee as satisfying the statute, irrespective of the character of his job or the effect his continued employment might have upon the "national security." Pp. 551–556.

(b) The failure of the Executive Order to state explicitly what was meant is the fault of the Government, and any ambiguities should be resolved against the Government. P. 556.

(c) From the Secretary's determination that petitioner's employment was not "clearly consistent with the interests of national security," in the light of the Executive Order, it may be assumed only that the Secretary found the charges to be true and that they created reasonable doubt as to petitioner's loyalty. Pp. 556–557.

96 U. S. App. D. C. 379, 226 F. 2d 337, reversed and remanded.

David I. Shapiro argued the cause for petitioner. With him on the brief were *James H. Heller* and *Osmond K. Fraenkel.*

Donald B. MacGuineas argued the cause for respondents. On the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman.*

Opinion of the Court by MR. JUSTICE HARLAN, announced by MR. JUSTICE BURTON.

This case presents the question of the meaning of the term "national security" as used in the Act of August 26, 1950, giving to the heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary "in the interest of the national security of the United States." [1]

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[1] § 1. "Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U. S. C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen

Petitioner, a preference-eligible veteran under § 2 of the Veterans' Preference Act of 1944, 58 Stat. 387, as amended, 5 U. S. C. § 851, held a position in the classified civil service as a food and drug inspector for the New York

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of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further,* That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

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"SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may,

District of the Food and Drug Administration, Department of Health, Education, and Welfare. In November 1953, he was suspended without pay from his position, pending investigation to determine whether his employment should be terminated. He was given a written statement of charges alleging that he had "a close association with individuals reliably reported to be Communists" and that he had maintained a "sympathetic association" with, had contributed funds and services to, and had attended social gatherings of an allegedly subversive organization.

Although afforded an opportunity to do so, petitioner declined to answer the charges or to request a hearing, as he had the right to do. Thereafter, the Secretary of the Department of Health, Education, and Welfare, after "a study of all the documents in [petitioner's] case," determined that petitioner's continued employment was not "clearly consistent with the interests of national security" and ordered the termination of his employment. Petitioner appealed his discharge to the Civil Service Commission, which declined to accept the appeal on the ground that the Veterans' Preference Act, under which petitioner claimed the right of appeal, was inapplicable to such discharges.

Petitioner thereafter brought an action in the District Court for the District of Columbia seeking a declaratory judgment that his discharge was invalid and that the Civil Service Commission had improperly refused to entertain his appeal, and an order requiring his reinstatement in his former position. The District Court granted the respondents' motion for judgment on the pleadings and dismissed the complaint. 125 F. Supp. 284. The

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from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress." 64 Stat. 476, 5 U. S. C. §§ 22–1, 22–3.

Court of Appeals, with one judge dissenting, affirmed. 96 U. S. App. D. C. 379, 226 F. 2d 337. Because of the importance of the questions involved in the field of Government employment, we granted certiorari. 350 U. S. 900.

Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U. S. C. § 863, provides that preference eligibles may be discharged only "for such cause as will promote the efficiency of the service" and, among other procedural rights, "shall have the right to appeal to the Civil Service Commission," whose decision is made binding on the employing agency. Respondents concede that petitioner's discharge was invalid if that Act is controlling. They contend, however, as was held by the courts below, that petitioner's discharge was authorized by the Act of August 26, 1950, *supra,* which eliminates the right of appeal to the Civil Service Commission. Thus the sole question for decision is whether petitioner's discharge was authorized by the 1950 Act.

The 1950 Act provides in material part that, notwithstanding any other personnel laws, the head of any agency to which the Act applies

> "may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of [his agency] . . . . The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: . . . ."

The Act was expressly made applicable only to the Departments of State, Commerce, Justice, Defense, Army,

Navy, and Air Force, the Coast Guard, the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics. Section 3 of the Act provides, however, that the Act may be extended "to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security," and the President has extended the Act under this authority "to all other departments and agencies of the Government." [2] While the validity of this extension of the Act depends upon questions which are in many respects common to those determining the validity of the Secretary's exercise of the authority thereby extended to her,[3] we will restrict our consideration to the latter issue and assume, for purposes of this decision, that the Act has validly been extended to apply to the Department of Health, Education, and Welfare.

The Act authorizes dismissals only upon a determination by the Secretary that the dismissal is "necessary or advisable in the interest of the national security." That determination requires an evaluation of the risk of injury to the "national security" that the employee's retention would create, which in turn would seem necessarily to be a function, not only of the character of the employee and the likelihood of his misconducting himself, but also of the nature of the position he occupies and its relationship to the "national security." That is, it must be determined whether the position is one in which the employee's misconduct would affect the "national security." That, of course, would not be necessary if "national security" were

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[2] § 1, Exec. Order No. 10450, 18 Fed. Reg. 2489, set forth in the Appendix, *post*, p. 558.

[3] Secretary Folsom, the present Secretary of the Department of Health, Education, and Welfare, has been substituted as respondent for the former Secretary Hobby.

used in the Act in a sense so broad as to be involved in *all* activities of the Government, for then the relationship to the "national security" would follow from the very fact of employment. For the reasons set forth below, however, we conclude (1) that the term "national security" is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare; and (2) that no determination has been made that petitioner's position was affected with the "national security," as that term is used in the Act. It follows that his dismissal was not authorized by the 1950 Act and hence violated the Veterans' Preference Act.

I.

In interpreting the 1950 Act, it is important to note that that Act is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-LaFollette [4] and Veterans' Preference Acts [5]—authorize dismissals for "such cause as will promote the efficiency of the service," and the ground which we conclude was the basis for petitioner's discharge here—a reasonable doubt as to his loyalty—was recognized as a "cause" for dismissal under those procedures as early as 1942.[6] Indeed, the President's so-called Loyalty Program, Exec. Order No. 9835, 12 Fed. Reg. 1935, which prescribed an absolute standard of loyalty to be met by all employees regardless of position, had been established pursuant to that general authority three years prior to the 1950 Act and remained in

[4] § 6, 37 Stat. 555, as amended, 5 U. S. C. § 652.

[5] § 14, 58 Stat. 390, as amended, 5 U. S. C. § 863.

[6] Civil Service War Regulations, § 18.2 (c) (7), September 26, 1942, 5 CFR, Cum. Supp., § 18.2 (c) (7).

effect for nearly three years after its passage.[7] Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case.

As noted above, the issue turns on the meaning of "national security," as used in the Act. While that term is not defined in the Act, we think it clear from the statute as a whole that that term was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.

Virtually conclusive of this narrow meaning of "national security" is the fact that, had Congress intended the term in a sense broad enough to include all activities of the Government, it would have granted the power to terminate employment "in the interest of the national security" to all agencies of the Government. Instead, Congress specified 11 named agencies to which the Act should apply, the character of which reveals, without doubt, a purpose to single out those agencies which are directly concerned with the national defense and which have custody over information the compromise of which might endanger the country's security, the so-called "sensitive" agencies. Thus, of the 11 named agencies, 8 are concerned with military operations or weapons development, and the other 3, with international

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[7] Employees dismissed under the Loyalty Program were entitled to review by the Civil Service Commission's Loyalty Review Board, thus satisfying the requirements of § 14 of the Veterans' Preference Act. See *Kutcher* v. *Gray*, 91 U. S. App. D. C. 266, 199 F. 2d 783 (C. A. D. C. Cir.).

relations, internal security, and the stock-piling of strategic materials. Nor is this conclusion vitiated by the grant of authority to the President, in § 3 of the Act, to extend the Act to such other agencies as he "may, from time to time, deem necessary in the best interests of national security." Rather, the character of the named agencies indicates the character of the determination required to be made to effect such an extension. Aware of the difficulties of attempting an exclusive enumeration and of the undesirability of a rigid classification in the face of changing circumstances, Congress simply enumerated those agencies which it determined to be affected with the "national security" and authorized the President, by making a similar determination, to add any other agencies which were, or became, "sensitive." That it was contemplated that this power would be exercised "from time to time" confirms the purpose to allow for changing circumstances and to require a selective judgment, necessarily implying that the standard to be applied is a less than all-inclusive one.

The limitation of the Act to the enumerated agencies is particularly significant in the light of the fact that Exec. Order No. 9835, establishing the Loyalty Program, was in full effect at the time of the consideration and passage of the Act. In that Order, the President had expressed his view that it was of "vital importance" that *all* employees of the Government be of "complete and unswerving loyalty" and had prescribed a minimum loyalty standard to be applied to all employees under the normal civil service procedures. Had Congress considered the objective of insuring the "unswerving loyalty" of all employees, regardless of position, as a matter of "national security" to be effectuated by the summary procedures authorized by the Act, rather than simply a desirable personnel policy to be implemented under the normal civil service procedures, it surely would not

have limited the Act to selected agencies. Presumably, therefore, Congress meant something more by the "interest of the national security" than the general interest the Nation has in the loyalty of even "non-sensitive" employees.

We can find no justification for rejecting this implication of the limited purpose of the Act or for inferring the unlimited power contended for by the Government. Where applicable, the Act authorizes the agency head summarily to suspend an employee pending investigation and, after charges and a hearing, finally to terminate his employment, such termination not being subject to appeal. There is an obvious justification for the summary suspension power where the employee occupies a "sensitive" position in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges. Likewise, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. On the other hand, it is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in "sensitive" positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security. In the absence of an immediate threat of harm to the "national security," the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of

some overriding necessity, such as exists in the case of employees handling defense secrets.

The 1950 Act itself reflects Congress' concern for the procedural rights of employees and its desire to limit the unreviewable dismissal power to the minimum scope necessary to the purpose of protecting activities affected with the "national security." A proviso to § 1 of the Act provides that a dismissal by one agency under the power granted by the Act "shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government," if the Civil Service Commission determines that the employee is eligible for such other employment. That is, the unreviewable dismissal power was to be used only for the limited purpose of removing the employee from the position in which his presence had been determined to endanger the "national security"; it could affect his right to employment in other agencies only if the Civil Service Commission, after review, refused to clear him for such employment. This effort to preserve the employee's procedural rights to the maximum extent possible hardly seems consistent with an intent to define the scope of the dismissal power in terms of the indefinite and virtually unlimited meaning for which the respondents contend.

Moreover, if Congress intended the term to have such a broad meaning that all positions in the Government could be said to be affected with the "national security," the result would be that the 1950 Act, though in form but an exception to the general personnel laws, could be utilized effectively to supersede those laws. For why could it not be said that national security in that sense requires not merely loyal and trustworthy employees but also those that are industrious and efficient? The relationship of the job to the national security being the same, its demonstrated inadequate performance because

of inefficiency or incompetence would seem to present a surer threat to national security, in the sense of the general welfare, than a mere doubt as to the employee's loyalty.

Finally, the conclusion we draw from the face of the Act that "national security" was used in a limited and definite sense is amply supported by the legislative history of the Act.

In the first place, it was constantly emphasized that the bill, first introduced as S. 1561 in the 80th Congress and passed as H. R. 7439 in the 81st Congress, was intended to apply, or to be extended, only to "sensitive" agencies, a term used to imply a close and immediate concern with the defense of the Nation.[8] Thus the Senate Committee on Armed Services, in reporting out S. 1561, stated:

> "This bill provides authority to terminate employment of indiscreet or disloyal employees who are employed in areas of the Government which are sensitive from the standpoint of national security.
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> . . . . . .
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> "[Section 3 will permit] the President to determine additional sensitive areas and include such

[8] Congress' reluctance to extend such powers to all agencies of the Government is also indicated by the prior legislation. At various times since 1942, similar summary dismissal statutes, of limited duration, had been enacted, but these had been limited to the obviously "sensitive" military departments, 56 Stat. 1053, 63 Stat. 1023, and the State Department, 60 Stat. 458. The 1950 Act, introduced at the request of the Department of Defense, was designed to make the authority permanent, include several other "sensitive" agencies, and afford greater flexibility by permitting the President to extend the Act to other agencies which became "sensitive." H. R. Rep. No. 2330, 81st Cong., 2d Sess., p. 3; S. Rep. No. 1155, 80th Cong., 2d Sess., p. 4.

areas in the scope of the authorities contained in this bill.

. . . . . .

"Insofar as the [addition of § 3] is concerned, it was recognized by all witnesses that there were other sensitive areas within the various departments of the Government which are now, or might in the future become, deeply involved in national security. . . . In view . . . of the fact that there are now and will be in the future other sensitive areas of equal importance to the national security, it is believed that the President should have authority to make a finding concerning such areas and by Executive action place those areas under the authorities contained in this act." [9]

The House Committee on Post Office and Civil Service reported that "The provisions of the bill extend only to departments and agencies which are concerned with vital matters affecting the national security of our Nation." [10] The committee reports on H. R. 7439 in the next Congress similarly referred to the bill as granting the dismissal power only to the heads of the "sensitive" agencies.[11] While these references relate primarily to the agencies to be covered by the Act, rather than to the exercise of the power within an agency, the standard for both is the same—in the "interests of the national security"—and the statements thus clearly indicate the restricted sense in which "national security" was used. In short, "national security" is affected only by "sensitive" activities.

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[9] S. Rep. No. 1155, 80th Cong., 2d Sess., pp. 2–4.

[10] H. R. Rep. No. 2264, 80th Cong., 2d Sess., p. 2.

[11] H. R. Rep. No. 2330, 81st Cong., 2d Sess., pp. 2–5; S. Rep. No. 2158, 81st Cong., 2d Sess., p. 2.

Secondly, the history makes clear that the Act was intended to authorize the suspension and dismissal only of persons in sensitive positions. Throughout the hearings, committee reports, and debates, the bill was described as being designed to provide for the dismissal of "security risks." [12] In turn, the examples given of what might be a "security risk" always entailed employees having access to classified materials; they were security risks because of the risk they posed of intentional or inadvertent disclosure of confidential information.[13] Mr. Larkin, a representative of the Department of Defense, which Department had requested and drafted the bill, made this consideration more explicit:

> "They are security risks because of their access to confidential and classified material. . . . But if they do not have classified material, why, there is no notion that they are security risks to the United States. They are security risks to the extent of having access to classified material." [14]
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> "A person is accused of being disloyal, but is cleared by the loyalty board, because there is not

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[12] *E. g.*, S. Rep. No. 2158, 81st Cong., 2d Sess., p. 2: "The purpose of the bill is to increase the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks . . . ."

[13] For example, Mr. Murray, the Chairman of the Committee on Post Office and Civil Service, which had reported the bill, gave the following illustration of the purpose of the bill in opening the debate in the House: "For instance, an employee who is working in some highly sensitive agency doing very confidential, secret defense work and who goes out and gets too much liquor may unintentionally or unwittingly, because of his condition, confide to someone who may be a subversive, secret military information about the character of work he is doing in that department. He is, by his conduct, a bad security risk and should be discharged." 96 Cong. Rec. 10017.

[14] Hearings, House Committee on Post Office and Civil Service, on H. R. 7439, 81st Cong., 2d Sess., p. 67.

> enough evidence against him. If that person is not in a sensitive job, it is not of any further concern to us. We are willing to take the view, that while we might have misgivings about his loyalty, he cannot prejudice our security because he does not have access to any of the classified or top secret material." [15]

It is clear, therefore, both from the face of the Act and the legislative history, that "national security" was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of "sensitive" activities. It follows that an employee can be dismissed "in the interest of the national security" under the Act only if he occupies a "sensitive" position, and thus that a condition precedent to the exercise of the dismissal authority is a determination by the agency head that the position occupied is one affected with the "national security." We now turn to an examination of the Secretary's action to show that no such determination was made as to the position occupied by petitioner.

II.

The Secretary's action in dismissing the petitioner was expressly taken pursuant to Exec. Order No. 10450, 18 Fed. Reg. 2489,[16] promulgated in April 1953 to provide uniform standards and procedures for the exercise by agency heads of the suspension and dismissal powers under the 1950 Act. That Order prescribes as the standard for dismissal, and the dismissal notice given to petitioner contained, a determination by the Secretary that the employee's retention in employment "is not clearly consistent with the interests of national secu-

[15] *Id.*, at p. 72.

[16] The relevant portions of the Executive Order, as it stood at the time of petitioner's suspension and discharge, are printed in the Appendix, *post*, p. 558.

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rity." [17] Despite this verbal formula, however, it is our view that the Executive Order does not in fact require the agency head to make any determination whatever on the relationship of the employee's retention to the "national security" if the charges against him are within the categories of the charges against petitioner—that is, charges which reflect on the employee's loyalty. Rather, as we read the Order, it enjoins upon the agency heads the duty of discharging any employee of doubtful loyalty, *irrespective* of the character of his job and its relationship to the "national security." That is, the Executive Order deems an adverse determination as to loyalty to satisfy the requirements of the statute without more.

The opening preamble to the Order recites, among other things, that "the interests of the national security require" that "all" Government employees be persons "of complete and unswerving loyalty." It would seem to follow that an employee's retention cannot be "clearly consistent" with the "interests of the national security" as thus defined unless he is "clearly" loyal—that is, unless there is no doubt as to his loyalty. And § 8 (a) indicates that that is in fact what was intended by the Order. That section provides that the investigation of an employee pursuant to the Order shall be designed to develop information "as to whether . . . [his employment] is

[17] Section 6 of the Order, which formally prescribes the standards for "termination," in terms adopts the very language of the statute, "necessary or advisable in the interests of the national security." Section 7, however, provides that a suspended employee "shall not be reinstated" unless the agency head determines that reinstatement is "clearly consistent with the interests of the national security." Since nonreinstatement of a suspended employee is equivalent to the termination of his employment, it is apparent that the "clearly consistent" standard of § 7 is the controlling one. See also §§ 2, 8, and 3 (a). In the view we take of the case, we need not determine whether the "clearly consistent" standard is, as petitioner contends, a more onerous one than the "necessary or advisable" standard.

clearly consistent with the interests of the national security," and prescribes certain categories of facts to which "such" information shall relate. The first category, § 8 (a)(1), includes nonloyalty-oriented facts which, in general, might reflect upon the employee's reliability, trustworthiness, or susceptibility to coercion, such as dishonesty, drunkenness, sexual perversion, mental defects, or other reasons to believe that he is subject to influence or coercion. Section 8 (a)(1) expressly provides, however, that such facts are relevant only "depending on the relation of the Government employment to the national security." The remaining categories include facts which, in general, reflect upon the employee's "loyalty," such as acts of espionage, advocacy of violent overthrow of the Government, sympathetic association with persons who so advocate, or sympathetic association with subversive organizations. § 8 (a)(2)–(8). Significantly, there is wholly absent from these categories—under which the charges against petitioner were expressly framed—any qualification making their relevance dependent upon the relationship of the employee's position to the national security. The inference we draw is that in such cases the relationship to the national security is irrelevant, and that an adverse "loyalty" determination is sufficient *ex proprio vigore* to require discharge.

Arguably, this inference can be avoided on the ground that § 8 (a) relates only to the scope of information to be developed in the investigation and not to the evaluation of it by the agency head. That is, while loyalty information is to be developed in all cases regardless of the nature of the employment, that does not mean that the agency head should not consider the nature of the employment in determining whether the derogatory information is sufficient to make the employee's continued employment not "clearly consistent" with the "national security." No doubt that is true to the extent

that the greater the sensitivity of the position the smaller may be the doubts that would justify termination; the Order undoubtedly leaves it open to an agency head to apply a stricter standard in some cases than in others, depending on the nature of the employment. On the other hand, by making loyalty information relevant in *all* cases, regardless of the nature of the job, § 8 (a) seems strongly to imply that there is a minimum standard of loyalty that must be met by all employees. It would follow that the agency head may terminate employment in cases where that minimum standard is not met without making *any* independent determination of the potential impact of the person's employment on the national security.

Other provisions of the Order confirm the inferences that may be drawn from § 8 (a). Thus § 3 (b) directs each agency head to designate as "sensitive" those positions in his agency "the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." By definition, therefore, some employees are admittedly not in a position to bring about such an effect. Nevertheless, the Order makes this distinction relevant only for purposes of determining the scope of the investigation to be conducted, not for purposes of limiting the dismissal power to such "sensitive" positions. Section 3 (a) is more explicit. That provides that the appointment of all employees shall be made subject to an investigation the *scope* of which shall depend upon the degree of adverse effect on the national security the occupant of the position could bring about, but which "in no event" is to be less than a prescribed minimum. But the sole purpose of such an investigation is to provide a basis for a "clearly consistent" determination. Thus the requirement of a minimum investigation of all persons appointed implies

that an adverse "clearly consistent" determination may be made as to any such employee, regardless of the potential adverse effect he could cause to the national security. Finally, the second "Whereas" clause of the preamble recites as a justification for the Order that "all persons . . . privileged to be employed . . . [by the Government should] be adjudged by mutually consistent and no less than minimum standards," thus implying that the Order prescribes minimum standards that all employees must meet irrespective of the character of the positions held, one of which is the "complete and unswerving loyalty" standard recited in the first "Whereas" clause of the preamble.

Confirmation of this reading of the Order is found in its history. Exec. Order No. 9835, *supra*, as amended by Exec. Order No. 10241, 16 Fed. Reg. 3690, had established the Loyalty Program under which all employees, regardless of their positions, were made subject to discharge if there was a "reasonable doubt" as to their loyalty. That Order was expressly revoked by § 12 of the present Executive Order. There is no indication, however, that it was intended thereby to limit the scope of the persons subject to a loyalty standard. And any such implication is negatived by the remarkable similarity in the preambles to the two Orders and in the kinds of information considered to be relevant to the ultimate determinations.[18] In short, *all* employees were still to be subject to at least a minimum loyalty standard, though under

[18] Executive Order No. 9835 recited that it was "of vital importance" that all employees be of "complete and unswerving loyalty"; Exec. Order No. 10450 recites that "the interests of the national security require" that all employees be of "complete and unswerving loyalty." Executive Order No. 9835 listed six factors to be considered "in connection with the determination of disloyalty" (Pt. V, § 2); these are repeated in substantially identical form in §§ 8 (a) (2),

new procedures which do not afford a right to appeal to the Civil Service Commission.

We therefore interpret the Executive Order as meaning that, when "loyalty" charges are involved, an employee may be dismissed regardless of the character of his position in the Government service, and that the agency head need make no evaluation as to the effect which continuance of his employment might have upon the "national security." We recognize that this interpretation of the Order rests upon a chain of inferences drawn from less than explicit provisions. But the Order was promulgated to guide the agency heads in the exercise of the dismissal power, and its failure to state explicitly what determinations are required leaves no choice to the agency heads but to follow the most reasonable inferences to be drawn. Moreover, whatever the practical reasons that may have dictated the awkward form of the Order, its failure to state explicitly what was meant is the fault of the Government. Any ambiguities should therefore be resolved against the Government, and we will not burden the employee with the assumption that an agency head, in stating no more than the formal conclusion that retention of the employee is not "clearly consistent with the interests of national security," has made any subsidiary determinations not clearly required by the Executive Order.

From the Secretary's determination that petitioner's employment was not "clearly consistent with the interests of national security," therefore, it may be assumed only that the Secretary found the charges to be true and that they created a reasonable doubt as to petitioner's loyalty. No other subsidiary finding may be inferred, however, for, under the Executive Order as we have interpreted it, no

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(4), (5), (6), and (7) of Exec. Order No. 10450 as "information as to whether . . . [the employee's retention] is clearly consistent with the interests of the national security."

other finding was required to support the Secretary's action.[19]

From our holdings (1) that not all positions in the Government are affected with the "national security" as that term is used in the 1950 Act, and (2) that no determination has been made that petitioner's position was one in which he could adversely affect the "national security," it necessarily follows that petitioner's discharge was not authorized by the 1950 Act. In reaching this conclusion, we are not confronted with the problem of reviewing the Secretary's exercise of discretion, since the basis for our decision is simply that the standard prescribed by the Executive Order and applied by the Secretary is not in conformity with the Act.[20] Since petitioner's discharge

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[19] That the Secretary similarly interpreted the Executive Order and did not in fact determine that petitioner's job was a "sensitive" one is confirmed by the respondents' concession that petitioner "did not have access to Government secrets or classified material and was not in a position to influence policy against the interests of the Government." Respondents' Brief, pp. 3–4; Record, p. 40.

[20] No contention is made that the Executive Order might be sustained under the President's executive power even though in violation of the Veterans' Preference Act. There is no basis for such an argument in any event, for it is clear from the face of the Executive Order that the President did not intend to override statutory limitations on the dismissal of employees, and promulgated the Order solely as an implementation of the 1950 Act. Thus § 6 of the Order purports to authorize dismissals only "in accordance with the said Act of August 26, 1950," and similar references are made in §§ 4, 5, and 7. This explicit limitation in the substantive provisions of the Order is of course not weakened by the inclusion of the "Constitution," as well as the 1950 and other Acts, in the omnibus list of authorities recited in the Preamble to the Order; it is from the Constitution that the President derives any authority to implement the 1950 Act at all. When the President expressly confines his action to the limits of statutory authority, the validity of the action must be determined solely by the congressional limitations which the President sought to respect, whatever might be the result were the President ever to assert his independent power against that of Congress.

was not authorized by the 1950 Act and hence violated the Veterans' Preference Act, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[For dissenting opinion of MR. JUSTICE CLARK, joined by MR. JUSTICE REED and MR. JUSTICE MINTON, see *post*, p. 565.]

APPENDIX TO OPINION OF THE COURT.

EXECUTIVE ORDER 10450.

(18 Fed. Reg. 2489, as amended by Exec. Order No. 10491, Oct. 13, 1953, 18 Fed. Reg. 6583.)

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the

United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided,* that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less

investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided,* that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further,* that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

Sec. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has

been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of de-

partments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided,* that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.*

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization,

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*After the date of petitioner's discharge, this paragraph was amended, by Exec. Order No. 10548, Aug. 2, 1954, 19 Fed. Reg. 4871, to read:

"(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case."

association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

. . . . . .

Sec. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

Sec. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. . . .

Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date

of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

. . . . . .

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,
April 27, 1953.

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

Believing that the Court should not strike down the President's Executive Order on employee security by an interpretation that admittedly "rests upon a chain of inferences," we cannot agree to the judgment of reversal. In our opinion, the clear purpose of the Congress in enacting the Summary Suspension Act, 64 Stat. 476, is frustrated, and the Court's opinion raises a serious question of presidential power under Article II of the Constitution which it leaves entirely undecided.

Petitioner, a food and drug inspector employed in the Department of Health, Education and Welfare, was charged with having "established and . . . continued a close association with individuals reliably reported to be Communists." It was further charged that he had "maintained a continued and sympathetic association with the Nature Friends of America, which organization" is on the Attorney General's list; and "by [his] own admission, donated funds" to that group, contributed services to it and attended social gatherings of the same. Petitioner did not answer the charges but replied that they constituted an invasion of his private rights of associa-

tion. Although advised that he could have a hearing, he requested none, and was thereafter dismissed. The Secretary made a formal determination that petitioner's continued employment was not "clearly consistent with the interests of the national security," a determination entrusted to her by the Suspension Act. Although "such determination by the agency head concerned shall be conclusive and final" under the Act, the Court, by its interpretation, finds "that not all positions in the Government are affected with the 'national security' as that term is used . . . and that no determination has been made that petitioner's position was one in which he could adversely affect the 'national security.'" It, therefore, strikes down the President's Executive Order because "the standard prescribed by [it] and applied by the Secretary is not in conformity with the Act." This compels the restoration of the petitioner to Government service. We cannot agree.

We have read the Act over and over again, but find no ground on which to infer such an interpretation. It flies directly in the face of the language of the Act and the legislative history. The plain words of § 1 make the Act applicable to "any civilian officer or employee," not, as the majority would have it, "any civilian officer or employee *in a sensitive position.*" The Court would require not only a finding that a particular person is subversive, but also that he occupies a sensitive job. Obviously this might leave the Government honeycombed with subversive employees.

Although the Court assumes the validity of the President's action under § 3 extending the coverage of the Act to all Government agencies, the reasoning of the opinion makes that extension *a fortiori* unauthorized. The limitation the Court imposes deprives the extension of any force, despite the fact that § 3 has no limiting words whatever. And this is done in the face of legislative history

showing that Congress clearly contemplated that the coverage might be extended without limitation "to such other departments and agencies of the Government" that the President thought advisable. Senator Byrd commented, "Section 3 gives the President the right to classify every agency as a sensitive agency . . . . He could take the whole Government." And Senator Chapman remarked, "I do not see why the whole Government is not sensitive as far as that is concerned." Hearings before the Senate Committee on Armed Services, 81st Cong., 2d Sess., on H. R. 7439, pp. 15–16. Also, Congressman Holifield, during debates in the House, stated that the Act "applies potentially to every executive agency, not only the sensitive ones. . . . There is no distinction made in the bill between so-called sensitive employees, that is, employees who have access to confidential and secret information, and the regular employees." 96 Cong. Rec. 10023–10024.

The President believed that the national security required the extension of the coverage of the Act to all employees. That was his judgment, not ours. He was given that power, not us. By this action the Court so interprets the Act as to intrude itself into presidential policy making. The Court should not do this, especially where Congress has ratified the President's action. As required by the Act, the Executive Order was reported to the Congress and soon thereafter it came up for discussion and action in both the House and the Senate. It was the sense of the Congress at that time that the Order properly carried out the standards of the Act and was in all respects an expression of the congressional will. 99 Cong. Rec. 4511–4543, 5818–5990. In addition, Congress has made appropriations each subsequent year for investigations, etc., under its provisions. This in itself "stands as confirmation and ratification of the action of the Chief

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Executive." *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

The President having extended the coverage of the Act to the Department of Health, Education, and Welfare, it became the duty of the Secretary to dismiss any employee whenever she deemed it "necessary or advisable in the interests of national security." She made such a finding. It is implicit in her order of dismissal. Her "evaluation as to the effect which continuance of [petitioner's] employment might have upon the 'national security' " has been made. She decided that he should be dismissed. Under the Act this determination is "conclusive and final."

There is still another reason why we should sustain the President's Executive Order. By striking it down, the Court raises a question as to the constitutional power of the President to authorize dismissal of executive employees whose further employment he believes to be inconsistent with national security. This power might arise from the grant of executive power in Article II of the Constitution, and not from the Congress. The opinion of the majority avoids this important point which must be faced by any decision holding an Executive Order inoperative.* It is the policy of the Court to avoid constitu-

*The majority excuses its failure to pass on this question by saying that no contention was made that the President's Order might be sustained under his executive powers. We cannot agree. The Government specifically asserted that "if Congress had meant to prohibit the President from acting in this respect under [the Act] a serious question as to the validity of that enactment would arise." It devoted eight pages of its brief to this point. Furthermore, the Court of Appeals noted that if it "thought the President's Order inconsistent with the act . . . [it] would have to decide the constitutional question thus presented." 96 U. S. App. D. C. 379, 382, 226 F. 2d 337, 340. As further justification, the majority contends that the President acted here only under the directions of the Act. In answer, we need quote only the enacting clause of the Presi-

tional questions where possible, *Peters* v. *Hobby,* 349 U. S. 331, 338, not to create them.

We believe the Court's order has stricken down the most effective weapon against subversive activity available to the Government. It is not realistic to say that the Government can be protected merely by applying the Act to sensitive jobs. One never knows just which job is sensitive. The janitor might prove to be in as important a spot security-wise as the top employee in the building. The Congress decided that the most effective way to protect the Government was through the procedures laid down in the Act. The President implemented its purposes by requiring that Government employment be "clearly consistent" with the national security. The President's standard is "complete and unswerving loyalty" not only in sensitive places but throughout the Government. The President requires, and every employee should give, no less. This is all that the Act and the Order require. They should not be subverted by the technical interpretation the majority places on them today. We would affirm.

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dent's Order: "Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States . . . and as President of the United States." Executive Order No. 10450, 18 Fed. Reg. 2489. In issuing the Order, the President invoked all of his powers, and since his Order is voided by the majority as not being in conformity with the Act, the question of the scope of his other constitutional or statutory powers is presented.

DE SYLVA *v.* BALLENTINE, GUARDIAN.

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

No. 529. Argued April 25–26, 1956.—Decided June 11, 1956.

The Copyright Act grants to the author, "or the widow, widower, or children of the author, if the author be not living," the right of renewal of a copyright for a further 28-year term after the expiration of the original 28-year term. *Held:*

1. After the author's death, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright. Pp. 573–580.

2. In the instant case, an illegitimate child of the author, who under the applicable state law would be an heir of the author, is within the term "children." Pp. 580–582.

(a) While the scope of a federal right is a federal question, its content may yet be determined by state rather than federal law, especially where the law of domestic relations is concerned. P. 580.

(b) Whether an illegitimate child is within the term "children," as used in this provision of the Act, is to be determined by whether, under state law, the child would be an heir of the author. Pp. 580–581.

(c) In the instant case, the only State concerned is California, and the question is to be determined with reference to the law of that State. P. 581.

(d) Under § 255 of the California Probate Code, an illegitimate child who is acknowledged by his father, by a writing signed in the presence of a witness, is entitled to inherit his father's estate as well as his mother's (although he may not be legitimate for all purposes), and that is sufficient for the purposes of the copyright Act. Pp. 581–582.

226 F. 2d 623, affirmed.

Theodore Kiendl argued the cause for petitioner. With him on the brief was *Pat A. McCormick* and *John H. Cleary, Jr.*

Max Fink argued the cause for respondent. With him on the brief was *Milton A. Rudin.*

Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, Paul A. Sweeney, Herman Marcuse and *Abraham L. Kaminstein* filed a brief for the Register of Copyrights, as *amicus curiae.*

Briefs of *amici curiae* urging reversal were filed by *Sidney Wm. Wattenberg* for the Music Publishers' Protective Association, Inc., *Herman Finkelstein* for the American Society of Composers, Authors and Publishers, and *Morris Ebenstein,* with whom *Sidney A. Schreiber* was on the motion for leave to file the brief, for the Motion Picture Association of America, Inc.

John Schulman filed a brief for the Songwriters' Protective Association, as *amicus curiae,* and *Solomon A. Klein* was with him on the motion for leave to file this brief.

Opinion of the Court by MR. JUSTICE HARLAN, announced by MR. JUSTICE BURTON.

The present Copyright Act [1] provides for a second 28-year copyright after the expiration of the original 28-year term, if application for renewal is made within one year before the expiration of the original term. This right to renew the copyright appears in § 24 of the Act:

> "*And provided further,* That in the case of any other copyrighted work, . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application

[1] 61 Stat. 652, 17 U. S. C. § 1 *et seq.*

> for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright . . . ."

In this case, an author who secured original copyrights on numerous musical compositions died before the time to apply for renewals arose. He was survived by his widow and one illegitimate child, who are both still living. The question this case presents is whether that child is entitled to share in the copyrights which come up for renewal during the widow's lifetime.

Respondent, the child's mother, brought this action on the child's behalf against the widow, who is the petitioner here, seeking a declaratory judgment that the child has an interest in the copyrights already renewed by the widow and those that will become renewable during her lifetime, and for an accounting of profits from such copyrights as have been already renewed. The District Court, holding that the child was within the meaning of the term "children" as used in the statute but that the renewal rights belonged *exclusively* to the widow, gave judgment for the widow. Agreeing with the District Court on the first point, the Court of Appeals reversed, holding that on the author's death *both* widow and child shared in the renewal copyrights. 226 F. 2d 623. Because of the great importance of these questions in the administration of the Copyright Act, we granted certiorari, 350 U. S. 931.

The controversy centers around the words "or the widow, widower, or children of the author, if the author be not living." Two questions are involved: (1) do the widow and children take as a class, or in order of enumeration, and (2) if they take as a class, does "children" include an illegitimate child. Strangely enough, these

questions have never before been decided, although the statutory provisions involved have been part of the Act in their present form since 1870.

I.

The widow first contends that, after the death of the author, she alone is entitled to renew copyrights during her lifetime, exclusive of any interest in "children" of the author. That is, she interprets the clause as providing for the passing of the renewal rights, on the death of the author, first to the widow, and then only after her death to the "children" of the author. If the word "or" which follows "widower" is to be read in its normal disjunctive sense, this is not an unreasonable interpretation of the statute, which might then well be read to mean that "children" are to renew only if there is no "widow" or "widower." The statute is hardly unambiguous, however, and presents problems of interpretation not solved by literal application of words as they are "normally" used. The statute must be read as a whole, and putting each word in its proper context we are unable to say, as the widow contends we should, that the clear purport of the clause in question is the same as if it read "or the widow, or widower, if the author be not living, or the children of the author, if the author, and widow or widower, be not living."

We start with the proposition that the word "or" is often used as a careless substitute for the word "and"; that is, it is often used in phrases where "and" would express the thought with greater clarity. That trouble with the word has been with us for a long time: see, *e. g.*, *United States* v. *Fisk*, 3 Wall. 445. In this instance, we need look no further than the very next clause in this same section of the Copyright Act for an example of this careless usage: ". . . or if such author, widow, widower

or children be not living, then the author's executors . . . ." If the italicized "or" in that clause is read disjunctively, then the author's executors would be entitled to renew the copyright if any *one* of the persons named "be not living." It is clear, however, that the executors do not succeed to the renewal interest unless *all* of the named persons are dead, since from the preceding clause it is at least made explicit that the "widow, widower, or children of the author" all come before the executors, after the author's death. The clause would be more accurate, therefore, were it to read "author, widow or widower, *and* children." It is argued with some force, then, that if in the succeeding clause the "or" is to be read as meaning "and" in the same word grouping as is involved in the clause in question, it should be read that way in this clause as well. If this is done, it is then an easy step to read "widow" *and* "children" as succeeding to the renewal interest as a class, as the Court of Appeals held they did.

This Court has already traced the development of the renewal term in the several copyright statutes enacted in this country. See *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643, where it was held that the author, during his lifetime, could make a binding assignment of the expectancy in his future rights of renewal. The first federal statute, the Act of May 31, 1790, 1 Stat. 124, did not allow renewal by anyone except the author. In 1831, however, a new Act was passed, which for the first time gave to the author's family the right to renew after his death. Act of February 3, 1831, 4 Stat. 436. Section 2 of that Act provided:

> "That if, at the expiration of the aforesaid term of years, such author . . . be still living, and a citizen . . . of the United States, or resident therein, or being dead, shall have left a widow, or child, or

> children, either or all then living, the same exclusive right shall be continued to such author . . . , or, if dead, then to such widow *and* child, or children, for the further term of fourteen years . . . ." (Italics supplied.)

It is significant that this statute, which instituted the present scheme of allowing a copyright to be renewed after the author's death, provided for the renewal interest in the "widow *and* child, or children," rather than in the widow or children separately. Petitioner concedes that under this statute the widow and children took as a class. This statute marked a major development in this phase of copyright legislation and created a system which, in its basic form, has been continued even to the present statute.

Section 88 of the Act of July 8, 1870, 16 Stat. 212, in consolidating the language of § 2 of the 1831 Act, made one important change in the language of the renewal section: the right of renewal was given to the author's widow *or* children, rather than to the widow *and* children. The section read as follows:

> "That the author, . . . if he be still living and a citizen of the United States or resident therein, or his widow *or* children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years . . . ." (Italics supplied.)

This section became § 4954 of the Revised Statutes, and was amended in 1891, 26 Stat. 1107, by deleting the requirement that the author be a citizen or resident of the United States. The section was otherwise left intact. The present renewal provision appeared first as § 23 of the Copyright Act of March 4, 1909, 35 Stat. 1080, and was continued without change in 17 U. S. C. § 24.

Knowing, as we do, that "or" can be ambiguous when used in such a context as this, it is difficult to say that

the change made in the 1870 Copyright Act had the effect of changing, as petitioner contends it did, the children's interest from an interest shared with the widow to one which became effective only after her death. There is no legislative history, either when the 1870 Act was passed or in the subsequent sessions of Congress, to indicate that Congress in fact intended to change in this respect the existing scheme of distribution of the renewal rights. Rather, what scant material there is indicates that no substantial changes in the Act were intended.[2] It would not seem unlikely that the framers of the 1870 statute, interested in compressing the somewhat cumbersome phrasing of the prior Copyright Act, simply deleted the words "and child" with the thought that the remaining phrase "or children" expressed precisely the same result, leaving unaffected the rights of the author's children which had been the same for almost forty years.

We then come to the 1909 Copyright Act. By § 23 of that Act, now 17 U. S. C. § 24, there were added to those entitled to renewal rights after the author's death—the widow or children—the author's executors, or, in the absence of a will, his next of kin. Each of these named classes is separated in the statute by a condition precedent to the passing of the renewal rights, namely, that the persons named in the preceding class be deceased. As already noted, it is at least clear that, if the author and his widow have both died, survived by a child, that child is entitled to renew copyrights maturing during his lifetime. But if this interest were to take effect only *after* the death of the widow, it might be expected that the drafters of the Act would have separated "widow or widower" from "children" with the same condition precedent used in defining the succession of the other classes to the renewal rights, since it would in effect be placing the children

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[2] See Cong. Globe, 41st Cong., 2d Sess. 2680, 2854 (1870).

in a class lower than that occupied by the widow or widower. Granting that the absence of this structure might simply have been due to carelessness in adding the new class to the prior renewal section, we think it may nevertheless be taken as some indication that the widow and children are to take the right to renew at the same time.

The Solicitor General has filed a helpful brief on behalf of the Register of Copyrights, as *amicus curiae,* in which the administrative practice of the Copyright Office is discussed. It appears that the Regulations issued under the 1909 Act, in force until 1948 (when new Regulations, not touching on this point, were issued), allowed the children of the author to apply for copyright renewals after the author's death along with the widow or widower—that is, the children were not treated as being entitled to renewal only after the death of the widow or widower.[3] The practice of the Copyright Office has been to register renewal claims by children during the lifetime of an author's widow or widower, although this practice, it is frankly admitted, is more the result of a decision that there is substantial doubt over the question, rather than the result of a confident interpretation of the statute as treating widows, widowers, and children as members of one class. Although we would ordinarily give weight to the inter-

[3] 37 CFR, 1938, § 201.24 (a): "Application for the renewal of a subsisting copyright may be filed within 1 year prior to the expiration of the existing term by:

"(1) The author of the work if still living;

"(2) The widow, widower, or children of the author if the author is not living;

"(3) The author's executor, if such author, widow, widower, or children be not living;

"(4) If the author, widow, widower, and children are all dead, and the author left no will, then the next of kin."

See § 48, Copyright Office Bulletin No. 15 (1913); § 46, Copyright Office Bulletin No. 15 (1910).

pretation of an ambiguous statute by the agency charged with its administration, cf. *Mazer* v. *Stein*, 347 U. S. 201, 211–213, we think the Copyright Office's explanation of its practice deprives the practice of any force as an interpretation of the statute, and we therefore do not rely on it in this instance.

Petitioner and several of the associations which have filed *amicus* briefs point out that the "universal" interpretation of § 24 has been that children are entitled to renewal only *after* the death of the widow or widower. In light of the Copyright Office practice alone, that is obviously an overstatement. Nevertheless, had there been a long-standing consistent attitude by the specialists in this field of law, and a more adequate basis for it than exists here, we might hesitate to overturn what had come to be a generally accepted view of a statute having such important consequences. But we cannot escape the conclusion that, in this instance, any such reliance on that interpretation of the Act was misplaced: the statute is far from clear, the Copyright Office has recognized its ambiguity, renewal applications have for many years been filed by children before the death of the widow or widower, and more than one qualified commentator has either expressed doubt on the question or has concluded that the widow or widower and children take as a class.[4]

Nor is it possible for us to say, as petitioner suggests, that the only way to satisfy the congressional purpose is to hold that, during her lifetime, the widow has exclusive renewal rights. Petitioner argues that the statute, contemplating the normal situation of a widow taking care

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[4] See, *e. g.*, Chafee, Reflections on the Law of Copyright, 45 Col. L. Rev. 503, 527; Kupferman, Renewal of Copyright—Section 23 of the Copyright Act of 1909, 44 Col. L. Rev. 712, 717; Tannenbaum, Practical Problems in Copyright, 7 Copyright Problems Analyzed (CCH) 7, 12 (1952). But see, *e. g.*, Nicholson, A Manual of Copyright Practice, 195, 196; De Wolf, An Outline of Copyright Law, 66.

of her children, gives the widow exclusive control of the copyright on the author's death, since she is presumably more capable of dealing with it and will more likely be in need of the copyright income. This branch of the argument, however, becomes very much diluted when it is observed that, if the deceased author be a woman, the statute disposes of the renewal rights in the same manner as if the author were a male. It is further argued that since the value of the copyright depends to an appreciable extent on the ability to convey clear publication rights, the statute should not be construed to diminish the value of the copyright by scattering its ownership, which might make it difficult to transfer clear title. One difficulty with this argument is that it ignores the 1831 statute, which, as petitioner recognizes, divided the ownership of the renewal rights between the surviving spouse of the author and his children. What we are asked to do is to avoid, on policy grounds, an interpretation of the successor statute which embodies the policy of the earlier Act, a policy which Congress saw fit to effectuate at least until 1870, and which, if changed then, was changed without any discernible display of dissatisfaction with that policy. This is not the type of case where we can use, as a guide to statutory interpretation, an unwillingness to attribute to Congress results which on their face are harsh, or present constitutional difficulties, or which are so extraordinary that clear, unambiguous wording is required. Cf. *United States* v. *Minker,* 350 U. S. 179. In view of this explicit prior legislation, this Court should not transfuse the successor statute with a gloss of its own choosing, especially where the choice between the alternative policies is as close as this one.[5]

[5] Petitioner also argues that since the statute does not specifically provide for an allocation, as between the widow or widower and children, of their respective interests in the renewal copyrights, it should not be read as providing for their succeeding to the renewal

While the matter is far from clear, we think, on balance, the more likely meaning of the statute to be that adopted by the Court of Appeals, and we hold that, on the death of the author, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright.

II.

We come, then, to the question of whether an illegitimate child is included within the term "children" as used in § 24. The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. Cf. *Reconstruction Finance Corp.* v. *Beaver County,* 328 U. S. 204; *Board of County Commissioners* v. *United States,* 308 U. S. 343, 351–352. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

If we look at the other persons who, under this section of the Copyright Act, are entitled to renew the copyright after the author's death, it is apparent that this is the general scheme of the statute. To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships. The word "children," although it to some extent describes a purely physical relationship, also describes a legal status not unlike the others. To determine whether a child has been legally adopted, for example, requires a reference to state law. We think it proper, therefore, to

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rights as a class. But neither did the 1831 Act provide for a division of the copyright between widow and child or children; nor does the present Act allocate the renewal rights as between those included in the term "next of kin." The absence of such a provision, therefore, is not persuasive as an aid to interpretation of the statute.

draw on the ready-made body of state law to define the word "children" in § 24. This does not mean that a State would be entitled to use the word "children" in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of "children" we deem state law controlling. Cf. *Seaboard Air Line Railway* v. *Kenney,* 240 U. S. 489.[6]

This raises two questions: first, to what State do we look, and second, given a particular State, what part of that State's law defines the relationship. The answer to the first question, in this case, is not difficult, since it appears from the record that the only State concerned is California, and both parties have argued the case on that assumption. The second question, however, is less clear. An illegitimate child who is acknowledged by his father, by a writing signed in the presence of a witness, is entitled under § 255 of the California Probate Code [7] to inherit his father's estate as well as his mother's. The District Court found that the child here was within the

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[6] Petitioner relies on *McCool* v. *Smith,* 1 Black 459, for the proposition that a general statutory reference to "children" means only legitimate children. The actual decision in that case, decided in 1862, concerned only the interpretation of a state statute, and we do not consider it controlling here. Cf. *Hutchinson Investment Co.* v. *Caldwell,* 152 U. S. 65, 70.

[7] "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral."

terms of that section. Under California law the child is not legitimate for all purposes, however; compliance with § 230 of the Civil Code [8] is necessary for full legitimation, and there are no allegations in the complaint sufficient to bring the child within that section. Hence, we may take it that the child is not "adopted" in the sense that he is to be regarded as a legitimate child of the author.

Considering the purposes of § 24 of the Copyright Act, we think it sufficient that the status of the child is that described by § 255 of the California Probate Code. The evident purpose of § 24 is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons. This is really a question of the descent of property, and we think the controlling question under state law should be whether the child would be an heir of the author. It is clear that under § 255 the child is, at least to that extent, included within the term "children."

Finally, there remains the question of what are the respective rights of the widow and child in the copyright renewals, once it is accepted that they both succeed to the renewals as members of the same class. Since the parties have not argued this point, and neither court below has passed on it, we think it should not be decided at this time.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

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[8] "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption."

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

The meaning of the word "children" as used in § 24 of the Copyright Act is a federal question. Congress could of course give the word the meaning it has under the laws of the several States. See *Hutchinson Investment Co.* v. *Caldwell,* 152 U. S. 65, 68–69; *Poff* v. *Pennsylvania R. Co.,* 327 U. S. 399, 401. But I would think the statutory policy of protecting dependents would be better served by uniformity, rather than by the diversity which would flow from incorporating into the Act the laws of forty-eight States. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367; *National Metropolitan Bank* v. *United States,* 323 U. S. 454, 456; *Heiser* v. *Woodruff,* 327 U. S. 726, 732; *United States* v. *Standard Oil Co.,* 332 U. S. 301, 307.

An illegitimate child was given the benefits of the Federal Death Act by *Middleton* v. *Luckenbach S. S. Co.,* 70 F. 2d 326, 329–330, where the Court of Appeals for the Second Circuit said:

> "There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for

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> society's welfare in making provision for the support of those who might otherwise become dependent. The rule that a bastard is nullius filius applies only in cases of inheritance. Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood."

I would take the same approach here and, regardless of state law, hold that illegitimate children were "children" within the meaning of § 24 of the Copyright Act, whether or not state law would allow them dependency benefits.

With this exception, I join in the opinion of the Court.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 584 and 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM APRIL 18 THROUGH JUNE 11, 1956.

April 18, 1956.

Case Dismissed Under Rule 60.

No. 775. United Electrical, Radio and Machine Workers of America (UE) et al. *v.* Goodman Manufacturing Co. et al. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *David Scribner* and *Basil R. Pollitt* for petitioners. *Solicitor General Sobeloff* for the National Labor Relations Board, respondent. Reported below: 227 F. 2d 465.

April 23, 1956.

Decisions Per Curiam.

No. 511. South Carolina Electric & Gas Co. *v.* Flemming. Appeal from the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The appeal is dismissed. *Slaker* v. *O'Connor,* 278 U. S. 188. *W. C. McLain, Frank B. Gary* and *Arthur M. Williams* for appellant. *Robert L. Carter, Thurgood Marshall* and *Philip Wittenberg* for appellee. Briefs of *amici curiae* supporting appellant were filed by *T. C. Callison,* Attorney General, and *William A. Dallis,* Assistant Attorney General, for the State of South Carolina, and by City Attorneys for the City of Columbia, South Carolina. Reported below: 224 F. 2d 752.

No. 707. New York, Chicago & St. Louis Railroad Co. *v.* Skiba, Administratrix. Appeal from the Court

of Appeals of Cuyahoga County, Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. *Edwin Knachel* and *Donald E. Ryan* for appellant. *George J. McMonagle* and *Richard E. McMonagle* for appellee.

No. 751. Amere Gas Utilities Co. *v.* Public Service Commission of West Virginia. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Charles C. Wise, Jr.* and *Tilford A. Jones* for appellant.

No. 277, Misc. Jakalski *v.* Carrick, Clerk. *Per Curiam:* The motions for leave to proceed *in forma pauperis* and for leave to file petition for writ of mandamus are granted. The petition for writ of mandamus is granted and the Clerk of the United States Court of Appeals for the Seventh Circuit is directed to docket petitioner's appeal. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Gray Thoron, Beatrice Rosenberg* and *Julia P. Cooper* for respondent.

No. 371, Misc. Noto *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed and the case is remanded to the District Court for the entry of an order enlarging petitioner upon bail, pending trial, in the sum of $10,000. *Charles J. McDonough* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 226 F. 2d 953.

No. 390, Misc. PETERS *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Miscellaneous Orders.

No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL. Appeal from the Supreme Court of Nebraska. The motion to continue this case to the next term is denied.

No. 545. IN RE GROBAN ET AL. Appeal from the Supreme Court of Ohio. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Rule 16 (4). The parties are requested to discuss in their briefs and oral arguments this Court's jurisdiction to consider any questions raised by the possible applicability of *In re Murchison,* 349 U. S. 133, and *In re Oliver,* 333 U. S. 257, to the proceedings involved in this case. *Ernest B. Graham* for appellants. *Malcom M. Prine* for Paul, Sheriff, appellee. Reported below: 164 Ohio St. 26, 128 N. E. 2d 106.

No. 692. ALLEGHANY CORPORATION ET AL. *v.* BRESWICK & CO. ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. The motions of Adelaide Neuwirth and Joseph S. Gruss et al. for leave to join in the jurisdictional statement of the Alleghany Corporation are granted. The motions to advance are denied. *David Hartfield, Jr., Edward K. Wheeler, Orison S. Marden, William L. Williams* and *Robert G. Seaks* for the Alleghany Corporation, *Harold H. Levin* for Gruss et al., and

Alexander Kahan for Neuwirth et al., appellants. *George Brussel, Jr.* for Breswick & Co. et al., appellees.

No. 72. COSTELLO *v.* UNITED STATES, 350 U. S. 359. The motion for leave to file petition for enlargement of the scope of review in the order granting certiorari (350 U. S. 819) is denied. The petition for rehearing is also denied. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of these applications.

No. 744. UNITED STATES *v.* INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW–CIO). Appeal from the United States District Court for the Eastern District of Michigan. Probable jurisdiction noted. The motion to advance is denied. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Harold A. Cranefield* and *Joseph L. Rauh, Jr.* for appellee. Reported below: 138 F. Supp. 53.

No. 608, Misc. KAMPMEYER *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. *Jack R. Miller* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: See 227 F. 2d 313.

No. 620, Misc. DAVIS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. *A. Jerome Hoffmann* and *John W. Graff* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: See 229 F. 2d 181.

No. 626, Misc. GONZALEZ *v.* MCGEE ET AL.; and
No. 627, Misc. HALL *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted. (*See Nos. 692 and 744, supra.*)

Certiorari Granted. (*See also No. 371, Misc., supra.*)

No. 743. BROWNELL, ATTORNEY GENERAL, *v.* TOM WE SHUNG. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for petitioner. *Jack Wasserman* for respondent. Reported below: 97 U. S. App. D. C. 25, 227 F. 2d 40.

No. 723. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari granted. *Harold I. Cammer* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Robert G. Johnson* for the National Labor Relations Board, and *Cecil Sims* for the Lannom Manufacturing Co., respondents. Reported below: 226 F. 2d 194.

No. 741. WEBB *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 7th Cir. Certiorari granted. *Carl L. Yaeger* for petitioner. *Herbert J. Deany* and *Joseph H. Wright* for respondent. Reported below: 228 F. 2d 257.

No. 745. RAYONIER INCORPORATED *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Lowell P. Mickelwait* and *Chester Rohrlich* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Alan S. Rosenthal* for the United States. Reported below: 225 F. 2d 642.

No. 747. HERDMAN *v.* PENNSYLVANIA RAILROAD CO. C. A. 6th Cir. Certiorari granted. *J. Paul McNamara* for petitioner. *Robert L. Barton* and *John Eckler* for respondent. Reported below: 228 F. 2d 902.

No. 749. ARNHOLD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Donald McL. Davidson* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Alan S. Rosenthal* for the United States. Reported below: 225 F. 2d 649, 650.

No. 6, Misc. BREITHAUPT *v.* ABRAM, WARDEN. Supreme Court of New Mexico. Certiorari granted. *J. O. Seth* for petitioner. Reported below: 58 N. M. 385, 271 P. 2d 827.

Certiorari Denied. (*See also Misc. Nos. 390, 608 and 620, supra.*)

No. 662. NATIONAL DRYER MANUFACTURING CORP. ET AL. *v.* NATIONAL DRYING MACHINERY CO.; and

No. 729. NATIONAL DRYING MACHINERY CO. *v.* NATIONAL DRYER MANUFACTURING CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Daniel Mungall, Jr.* and *James E. Gallagher, Jr.* for the National Dryer Mfg. Corp. et al. *Louis Necho* for the National Drying Machinery Co. Reported below: 228 F. 2d 349.

No. 716. WINER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert N. Gorman, Harry Kasfir, John C. Crawford, Jr.* and *James M. Meek* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 228 F. 2d 944.

No. 706. COOPER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert A. Scardino* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 227 F. 2d 814.

No. 724. TEXAS *v.* RECONSTRUCTION FINANCE CORP. ET AL. C. A. 5th Cir. Certiorari denied. *John Ben Shepperd,* Attorney General of Texas, and *W. V. Geppert* and *L. P. Lollar,* Assistant Attorneys General, for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for respondents. Reported below: 229 F. 2d 9.

No. 733. WESTERN MARYLAND RAILWAY CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William C. Purnell* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, Harry Baum* and *Philip R. Miller* for the United States. Reported below: 227 F. 2d 576.

No. 734. TATINCLOUX ET AL. *v.* COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *John L. Seymour* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, John R. Benney* and *Melvin Richter* for respondent. Reported below: 43 C. C. P. A. (Pat.) 722, 228 F. 2d 238.

No. 735. DAVIS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Frederick A. Ballard* and *Joseph W. Wyatt* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 228 F. 2d 280.

No. 738. Brooks *v.* Jack's Cookie Co. C. A. 4th Cir. Certiorari denied. *John K. Pickens* for petitioner. *William K. Van Allen* for respondent. Reported below: 227 F. 2d 935.

No. 742. Kansas City Southern Railway Co. *v.* Cagle. C. A. 10th Cir. Certiorari denied. *Kelly Brown* and *John M. Wheeler* for petitioner. *William H. DeParcq* and *Pat Malloy* for respondent. Reported below: 229 F. 2d 12.

No. 746. Nickola et al. *v.* United States Government Post Office Department et al. C. A. 6th Cir. Certiorari denied. *Andrew J. Transue* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for respondents. Reported below: 229 F. 2d 737.

No. 753. Duluth Steamship Co. *v.* Allied Chemical & Dye Corp.—Semet Solvay Division. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. *John M. Aherne* for petitioner. *Harold J. Adams* for respondent. Reported below: 286 App. Div. 947, 143 N. Y. S. 2d 664.

No. 762. Dally et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Clifford Hoof* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Rice, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 227 F. 2d 724.

No. 767. Easter *v.* Eisenhower, President of the United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attor-*

ney General Burger and *Melvin Richter* filed a brief for the Attorney General of the United States, as *amicus curiae,* in opposition to the petition.

No. 695. CONSOLIDATED EDISON CO. OF NEW YORK, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *James K. Polk, Robert E. Coulson* and *Harold F. Noneman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Hilbert P. Zarky* for the United States. *Ralph W. Brown* and *A. Chauncey Newlin* filed a brief for the New York Telephone Co., as *amicus curiae,* in support of the petition. Reported below: 133 Ct. Cl. 376, 135 F. Supp. 881.

No. 755. ALLENDALE COMPANY 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. *Stuart N. Scott, William J. Kridel, C. Roger Nelson* and *Franklin M. Schultz* 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, and *Arthur J. Goldberg, David E. Feller* and *Benjamin Wyle* for the Textile Workers Union of America, respondents.

No. 719. RICHFIELD OIL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Gregory A. Harrison, Moses Lasky, Marion B. Plant, Alvin J. Rockwell* and *David Guntert* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David*

P. Findling and *Dominick L. Manoli* for respondent. Briefs of *amici curiae* in support of the petition were filed by *Milton C. Denbo* and *Thomas E. Shroyer* for the American Retail Federation, and by *Lambert H. Miller* and *Fred B. Haught* for the National Association of Manufacturers of the United States of America. Reported below: 97 U. S. App. D. C. 383, 231 F. 2d 717.

No. 727. PRIEST *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Charles W. Tessmer* for petitioner. Reported below: 262 Tex. Cr. R. —, 286 S. W. 2d 164.

No. 368, Misc. NELSON *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 petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 97 U. S. App. D. C. 6, 227 F. 2d 21.

No. 548, Misc. RATCLIFF *v.* LARSON, JUDGE. Supreme Court of Iowa. Certiorari denied.

No. 564, Misc. BURNS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 229 F. 2d 87.

No. 582, Misc. WILHELM *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 209 Md. 624, 120 A. 2d 195.

No. 605, Misc. JONES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Grover N. McCormick* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 230 F. 2d 485.

No. 618, Misc. LEWIS *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 209 Md. 625, 120 A. 2d 194.

No. 116, Misc. WADE *v.* CUMMINGS, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied. Petitioner *pro se*. *Lorin W. Willis* for respondent.

No. 201, Misc. NAVARRETTE-NAVARRETTE *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Fred Okrand* and *A. L. Wirin* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for respondent. Reported below: 223 F. 2d 234.

No. 342, Misc. JONES *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

No. 366, Misc. WELLS *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 224 F. 2d 577.

No. 386, Misc. WARNER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *William B. Murrish* for petitioner. Reported below: 134 Cal. App. 2d 829, 286 P. 2d 560.

No. 460, Misc. BIGGS, ADMINISTRATRIX, *v.* SMITH. C. A. 4th Cir. Certiorari denied. *William S. Sandifer* and *H. C. Bean* for petitioner. *L. W. Perrin, Jr.* and *Edward P. Perrin* for respondent. Reported below: 223 F. 2d 839.

No. 494, Misc. ERICKSON, ADMINISTRATRIX, *v.* MEDINA. C. A. 9th Cir. Certiorari denied. *David A. Fall* and *Silas Blake Axtell* for petitioner. *Ferdinand T. Fletcher* for respondent. Reported below: 226 F. 2d 475.

No. 510, Misc. DAVIS *v.* UNITED STATES. C. A. 8th 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 834.

No. 517, Misc. O'HARA *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 523, Misc. ATKINS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. C. A. 5th Cir. Certiorari denied. Reported below: 227 F. 2d 161.

No. 534, Misc. DI PALERMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 228 F. 2d 901.

No. 554, Misc. PRUITT *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 290 P. 2d 424.

No. 556, Misc. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 229 F. 2d 178.

No. 560, Misc. SPEARS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 566, Misc. NEAL *v.* ILLINOIS ET AL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 568, Misc. PAQUA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 570, Misc. YOUNG ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 228 F. 2d 693.

No. 575, Misc. BENTLEY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 576, Misc. IN RE OAKLEY. Supreme Court of California. Certiorari denied.

No. 580, Misc. TURNER *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 583, Misc. PENNSYLVANIA EX REL. MOORE *v.* TEES, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

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No. 584, Misc. MEEKS *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 586, Misc. MARNIN *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 588, Misc. PENNSYLVANIA EX REL. DION *v.* TEES, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 593, Misc. RATCLIFF *v.* IOWA ET AL. Supreme Court of Iowa. Certiorari denied.

No. 595, Misc. MORGAN *v.* NULL 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. Hirschowitz, Philip Watson* and *Daniel M. Cohen*, Assistant Attorneys General, for Null, and *Peter Campbell Brown, Seymour B. Quel* and *John A. Murray* for Sharp et al., respondents. Reported below: 228 F. 2d 411.

No. 601, Misc. MCDONALD *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 625, Misc. JOHNSON *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 628, Misc. CRONIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 629, Misc. RANDALL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 630, Misc. CARRINGTON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 633, Misc. SPEARS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 637, Misc. HICKOX *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 639, Misc. BANKS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 7 Ill. 2d 119, 129 N. E. 2d 759.

No. 288, Misc. STEINMETZ *v.* CALIFORNIA STATE BOARD OF EDUCATION ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. L. Wirin* and *Fred Okrand* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Richard L. Mayers,* Deputy Attorney General, for respondents. Reported below: 44 Cal. 2d 816, 285 P. 2d 617.

Rehearing Denied. (*See also No. 72, ante, p. 904.*)

No. 343. UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), LOCAL 1113, *v.* NATIONAL LABOR RELATIONS BOARD, 350 U. S. 981;

No. 557. DAVIS *v.* UNITED STATES, 350 U. S. 965;

No. 581. OHIO TRANSPORT, INC. *v.* PUBLIC UTILITIES COMMISSION OF OHIO, 350 U. S. 982;

No. 624. FLORIDA EX REL. HAWKINS *v.* BOARD OF CONTROL OF FLORIDA ET AL., 350 U. S. 413; and

No. 633. SEARS, ROEBUCK & CO. *v.* RY-LOCK CO., LTD., 350 U. S. 987. Petitions for rehearing denied.

No. 609. KELLEY, GLOVER & VALE, INC., TRUSTEE, *v.* COFFING, TRUSTEE, ET AL., 350 U. S. 968; and

No. 472, Misc. KLUBNIKIN *v.* UNITED STATES, 350 U. S. 975. Motions for leave to file petitions for rehearing denied.

APRIL 30, 1956.

Decisions Per Curiam.

No. 555. SUGDEN ET UX. *v.* UNITED STATES. Certiorari, 350 U. S. 952, to the United States Court of Appeals for the Ninth Circuit. Argued April 25, 1956. Decided April 30, 1956. *Per Curiam:* The judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS dissent. *Mark Wilmer* argued the cause for petitioners. With him on the brief was *Frank L. Snell*. *John F. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay*. Reported below: 226 F. 2d 281.

No. 757. ANTONIO ET UX. *v.* MASSACHUSETTS; and

No. 758. MASSACHUSETTS CHIROPRACTIC LAYMEN'S ASSOCIATION, INC., ET AL. *v.* FINGOLD, ATTORNEY GENERAL, ET AL. Appeals from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Samuel Silbiger* for appellants. Reported below: 333 Mass. 175, 179, 129 N. E. 2d 914, 130 N. E. 2d 101.

No. 731. LONG BEACH FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* FEDERAL HOME LOAN BANK OF SAN FRANCISCO ET AL. Appeal from the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.[*] *Charles K. Chapman* for the Long Beach Federal Savings & Loan Assn. et al., and *F. Henry NeCasek* for the Home Investment Co., appellants. *Solicitor General Sobeloff, Assistant Attorney*

*[As amended, *post*, p. 922.]

General Burger, Samuel D. Slade and *Donald B. MacGuineas* for McAllister et al., and *Sylvester Hoffmann* for the Federal Home Loan Bank of San Francisco, appellees. *Edmund G. Brown,* Attorney General of California, and *Everett W. Mattoon,* Assistant Attorney General, filed a brief on behalf of the citizens of California, as *amici curiae,* in support of appellants. Reported below: 225 F. 2d 349.

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 prohibition is denied. *Louis R. Milio* for petitioner.

No. 748. TANKPORT TERMINALS, INC. *v.* WILLS LINES, INC. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Certiorari denied. The motion for leave to file petition for writ of mandamus is also denied. Reported below: 227 F. 2d 509.

Certiorari Granted.

No. 760. SORIANO *v.* UNITED STATES. Court of Claims. Certiorari granted. *Prew Savoy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 133 Ct. Cl. 971.

No. 752. UNITED STATES FOR THE BENEFIT OF SHERMAN ET AL., TRUSTEES, *v.* CARTER ET AL., DOING BUSINESS AS CARTER CONSTRUCTION CO., ET AL. C. A. 9th Cir. Certiorari granted. *Gardiner Johnson* and *Charles P. Scully* for petitioners. *John Walton Dinkelspiel* for the Hartford Accident & Indemnity Co., respondent. Reported below: 229 F. 2d 645.

Certiorari Denied. (*See also No. 748, supra.*)

No. 754. ARMSTRONG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Charles M. Trammell* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 228 F. 2d 764.

No. 759. MCMULLANS ET AL. *v.* KANSAS, OKLAHOMA & GULF RAILWAY CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. *C. A. Summers* for petitioners. *R. M. Mountcastle* for the Kansas, Oklahoma & Gulf Railway Co., Inc., and *Harold R. Shoemake* and *Harold C. Heiss* for Local No. 488, Brotherhood of Locomotive Firemen & Enginemen, et al., respondents. Reported below: 229 F. 2d 50.

No. 764. REGINELLI *v.* UNITED STATES. Supreme Court of New Jersey. Certiorari denied. *Jack Wasserman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 20 N. J. 266, 119 A. 2d 454.

No. 766. MILWAUKEE ELECTRIC TOOL CORP. *v.* JOHANN. Supreme Court of Wisconsin. Certiorari denied. *Suel O. Arnold* and *Robert Sheriffs Moss* for petitioner. *Edward S. Grodin* for respondent. Reported below: 270 Wis. 573, 72 N. W. 2d 401.

No. 778. POTISHMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Dan Moody, John Minor Wisdom* and *Saul Stone* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 230 F. 2d 271.

No. 776. WAGNER, DOING BUSINESS AS WAGNER TRANSPORTATION CO., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Willis C. Moffatt* 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 200.

No. 787. MCPEAK *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *W. H. Holdenness* for petitioner. *William B. Rodman, Jr.*, Attorney General of North Carolina, and *Harry W. McGalliard,* Assistant Attorney General, for respondent. Reported below: 243 N. C. 243, 90 S. E. 2d 501.

No. 799. MURCHISON ET AL. *v.* DOTTENHEIM. C. A. 5th Cir. Certiorari denied. *Franklin E. Spafford* for petitioners. *Harold Barefoot Sanders, Jr.* for respondent. Reported below: 227 F. 2d 737.

No. 765. CITY AND COUNTY OF SAN FRANCISCO ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Dion R. Holm, Thomas M. O'Connor* and *Frank J. Needles* for the City and County of San Francisco, petitioner. *Loyd Wright, Eugene M. Prince, Francis R. Kirkham* and *Noel Dyer* for respondent. Reported below: 228 F. 2d 473.

No. 750. BEHRENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry L. Kanter* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Robert N. Anderson* for the United States. Reported below: 230 F. 2d 504.

No. 770. BEAUMONT BROADCASTING CORP. *v.* ENTERPRISE COMPANY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George S. Smith, Edwin S. Nail, Paul M. Segal* and *Philip J. Hennessey, Jr.* for petitioner. *Leonard H. Marks* and *Paul Dobin* for the Enterprise Company, respondent. Reported below: 97 U. S. App. D. C. 374, 231 F. 2d 708.

No. 658. NORTH AMERICAN AIRCOACH SYSTEMS, INC., ET AL. *v.* NORTH AMERICAN AVIATION, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Walter J. Derenberg* and *Hardy K. Maclay* for petitioners. *Charles Pickett, Edward L. Compton* and *Arch R. Tuthill* for respondent. Reported below: 231 F. 2d 205.

No. 571, Misc. RAMBERG *v.* WARDEN OF MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 209 Md. 631, 120 A. 2d 201.

No. 606, Misc. BELL *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Reported below: 247 Iowa 505, 74 N. W. 2d 592.

No. 612, Misc. FRENCH *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 538, Misc. KINNIE, ALIAS WATTS, *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Releford McGriff* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent. Reported below: 83 So. 2d 114.

Rehearing Denied.

No. 611. MALLONEE ET AL., SHAREHOLDERS' PROTECTIVE COMMITTEE, ET AL., *v.* FEDERAL HOME LOAN BANK OF SAN FRANCISCO ET AL., 350 U. S. 968;

No. 69, Misc. NORMAN *v.* NEW YORK, 350 U. S. 970;

No. 329, Misc. LAWRENCE *v.* CALIFORNIA, 350 U. S. 997; and

No. 557, Misc. COLLINS *v.* HEINZE, WARDEN, 350 U. S. 1004. Petitions for rehearing denied.

MAY 2, 1956.

Dismissal Under Rule 60.

No. 858. FEDERAL TRADE COMMISSION *v.* NATIONAL LEAD CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The Anaconda Copper Mining Co. and the International Smelting & Refining Co. are dismissed as parties respondent herein per stipulation pursuant to Rule 60 of the Rules of this Court. *Solicitor General Sobeloff* for petitioner. *Harlan L. Hackbert* for the Anaconda Copper Mining Co. and the International Smelting & Refining Co., respondents.

MAY 7, 1956.

Decisions Per Curiam.

No. 721. SOUTHERN KANSAS GREYHOUND LINES, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Jack R. Turney, Jr.* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *J. Wm. Townsend* and *George F. Short* for Kansas Trails, Inc., appellees. Reported below: 134 F. Supp. 502.

No. 732. Board of the Black River Regulating District *v.* Adirondack League Club. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed on the ground that the judgment rests on an adequate non-federal basis. Rule 16 (b) of the Rules of this Court. *Arthur E. Sutherland* for appellant. *Charles H. Tuttle* for appellee. *Paul E. Brown* filed a brief for the City of Watertown, New York, as *amicus curiae,* supporting appellant. Reported below: 309 N. Y. 798, 130 N. E. 2d 599.

No. 779. Reiss *v.* New York. Appeal from the County Court of Nassau County, New York. *Per Curiam:* The appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas would note probable jurisdiction. *Osmond K. Fraenkel* for appellant.

Miscellaneous Orders.

The Clerk is authorized to transfer to the National Archives the manuscript records and miscellaneous papers filed in cases docketed in this Court up to the year 1832.

No. 731. Long Beach Federal Savings & Loan Association et al. *v.* Federal Home Loan Bank of San Francisco et al. Appeal from the United States Court of Appeals for the Ninth Circuit. The order entered in this case on April 30, 1956, *ante,* p. 916, is amended to read as follows: "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction."

Certiorari Granted.

No. 728. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL, et al. *v.* Fairlawn Meats, Inc. Supreme Court of Ohio.

Certiorari granted. The Solicitor General is invited to file a brief in this case on behalf of the National Labor Relations Board. *Joseph M. Jacobs, Mozart G. Ratner* and *Mortimer Riemer* for petitioners. *Stanley Denlinger* for respondent. Reported below: 164 Ohio St. 285, 130 N. E. 2d 237.

No. 785. San Diego Building Trades Council et al. *v.* Garmon et al. Supreme Court of California. Certiorari granted. The Solicitor General is invited to file a brief in this case on behalf of the National Labor Relations Board. *Charles P. Scully, Mathew Tobriner* and *John C. Stevenson* for petitioners. *J. Sterling Hutcheson* for respondents. Reported below: 45 Cal. 2d 657, 291 P. 2d 1.

Certiorari Denied.

No. 492. National Labor Relations Board *v.* Monsanto Chemical Co. C. A. 9th Cir. Certiorari denied. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Margaret M. Farmer* for petitioner. *Alfred J. Schweppe* and *Elton L. French* for respondent. Reported below: 225 F. 2d 16.

No. 722. Coffman *v.* Ohio. Supreme Court of Ohio. Certiorari denied. *Melvin Edward Schaengold* for petitioner. *C. Watson Hover* for respondent. Reported below: 164 Ohio St. 461, 132 N. E. 2d 107.

No. 769. Wayne Hugh Easley Trust et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Clyde C. Sherwood* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 228 F. 2d 810.

No. 768. LIAKAS *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Eugene D. O'Sullivan* for petitioner. Reported below: 161 Neb. 130, 72 N. W. 2d 677.

No. 777. BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE ET AL. *v.* TUREAUD. C. A. 5th Cir. Certiorari denied. *Fred S. LeBlanc,* Attorney General of Louisiana, *W. C. Perrault,* First Assistant Attorney General, *J. Clyde Pearce,* Assistant Attorney General, *W. Scott Wilkinson, Leander H. Perez, L. W. Brooks, C. V. Porter, Grove Stafford, Oliver Stockwell, Wood H. Thompson, J. H. Tucker, Jr., Fred Blanche, Arthur O'Quin* and *Victor A. Sachse* for petitioners. *Robert L. Carter* for respondent. Reported below: 228 F. 2d 895.

No. 780. KLAPHOLZ ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph N. Friedman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. Reported below: 230 F. 2d 494.

No. 781. SARNER ET AL. *v.* MASON, COMMISSIONER OF FEDERAL HOUSING ADMINISTRATION, ET AL. C. A. 3d Cir. Certiorari denied. *Walter D. Van Riper* for petitioners. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, John R. Benney* and *Samuel D. Slade* for respondents. Reported below: 228 F. 2d 176.

No. 783. HERMANSEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William E. Ladin* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 228 F. 2d 495, 230 F. 2d 173.

No. 784. CORRADO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Jack Wasserman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 227 F. 2d 780.

No. 786. WOODLOCK ET AL. *v.* CITY OF ABILENE. Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. Certiorari denied. *Dallas Scarborough* for petitioners. Reported below: 282 S. W. 2d 736.

No. 788. SIGFRED *v.* PAN AMERICAN WORLD AIRWAYS, INC. C. A. 5th Cir. Certiorari denied. *Laurence A. Schroeder* for petitioner. *David W. Dyer* and *Douglas D. Batchelor* for respondent. Reported below: 230 F. 2d 13.

No. 789. PENNSYLVANIA RAILROAD CO. *v.* KELLY. C. A. 3d Cir. Certiorari denied. *Philip Price* for petitioner. *B. Nathaniel Richter* for respondent. Reported below: 228 F. 2d 727.

No. 796. BRASIER ET VIR *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Rice, Lee A. Jackson* and *Joseph F. Goetten* for respondents. Reported below: 229 F. 2d 176.

No. 803. BYRD *v.* NAPOLEON AVENUE FERRY CO., INC. C. A. 5th Cir. Certiorari denied. *Moses C. Scharff* for petitioner. *John W. Sims* for respondent. Reported below: 227 F. 2d 958.

No. 810. THURNAU, ADMINISTRATRIX, *v.* ALCOA STEAMSHIP CO., INC. C. A. 2d Cir. Certiorari denied. *Henry Fogler* for petitioner. *J. Ward O'Neill* and *David P. H. Watson* for respondent. Reported below: 229 F. 2d 73.

No. 805. DULIEN STEEL PRODUCTS, INC. *v.* CONNELL. Supreme Court of Louisiana. Certiorari denied. *Irwin Geiger, Paul R. Harmel* and *Michael A. Schuchat* for petitioner. *Philip H. Mecom* for respondent. Reported below: 228 La. 1093, 85 So. 2d 3.

No. 825. PHILCO TELEVISION BROADCASTING CORP. ET AL. *v.* ETTORE. C. A. 3d Cir. Certiorari denied. *Oscar Brown* for petitioners. *Murray L. Schwartz* for respondent. Reported below: 229 F. 2d 481.

No. 839. BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS, *v.* WILLIAM J. HOWARD, INC. C. A. 10th Cir. Certiorari denied. *J. E. Schroeder* and *Harold H. Harding* for petitioner. *Eugene P. Kealy* and *Francis L. Brinkman* for respondent. Reported below: 230 F. 2d 561.

No. 782. ROYALTY ET AL. *v.* CHUCALES ET AL., DOING BUSINESS AS THE STATE BAR & GRILL. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *J. W. Brown* for petitioners. *Homer John Micklethwaite* for respondents. Reported below: 164 Ohio St. 214, 129 N. E. 2d 823.

No. 720. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* SUMMERFIELD, POSTMASTER GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *J. Carter Fort, Gregory S. Prince, Francis M. Shea, Philip F. Welsh* and *Lawrence J. Latto* for petitioners. *M. L. Countryman, Jr.* for the Northern Pacific Railway Co., and *Stanfield B. Johnson* and *Robert J. McLean* for the Southern Pacific Co., petitioners. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, Paul A. Sweeney, Edward H.*

Hickey, Morton Hollander, Abe McGregor Goff and *Eugene J. Brahm* for respondent. Reported below: 97 U. S. App. D. C. 203, 229 F. 2d 777.

No. 763. BROPHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Allan K. Perry* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rankin* and *William H. Veeder* for the United States. Reported below: 231 F. 2d 437.

No. 792. UNION PRODUCING CO. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas Fletcher, Ralph M. Carson, C. Huffman Lewis* and *Theodore Kiendl* for petitioner. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, Melvin Richter, William W. Ross, Willard W. Gatchell, William J. Grove* and *Robert L. Russell* for respondents. Reported below: 97 U. S. App. D. C. 223, 230 F. 2d 36.

No. 496. NATIONAL LAWYERS GUILD *v.* BROWNELL, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Osmond K. Fraenkel, Robert W. Kenny, Earl B. Dickerson* and *Joseph Forer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondent. Reported below: 96 U. S. App. D. C. 252, 225 F. 2d 552.

No. 552, Misc. SIMMONS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 230 F. 2d 73.

No. 664, Misc. BROGAN *v.* MARTIN, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 674, Misc. BRADEN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

Rehearing Denied.

No. 201. HYUN *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 350 U. S. 990. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 505. MALOY *v.* CITY OF MULBERRY, 350 U. S. 933. The motion for leave to file a second petition for rehearing is denied.

No. 58. ULLMANN *v.* UNITED STATES, 350 U. S. 422;

No. 316. RAYMOND BAG CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO, 350 U. S. 1003;

No. 523. COLLINS ET AL. *v.* AMERICAN BUSLINES, INC., ET AL., 350 U. S. 528;

No. 672. BALIAN ICE CREAM CO., INC., ET AL. *v.* ARDEN FARMS CO. ET AL., 350 U. S. 991;

No. 683. MOFFETT, EXECUTRIX, *v.* COMMERCE TRUST CO., 350 U. S. 996;

No. 12, Misc. BINDRIM *v.* RAGEN, WARDEN, 350 U. S. 1004;

No. 400, Misc. LEVY *v.* HAYWARD ET AL., 350 U. S. 998;

No. 431, Misc. SHOTKIN *v.* BOARD OF EDUCATION OF FLORIDA, 350 U. S. 1004;

No. 550, Misc. DI SILVESTRO *v.* UNITED STATES VETERANS ADMINISTRATION ET AL., 350 U. S. 1009;

No. 602, Misc. BRINKLEY *v.* TEXAS, 350 U. S. 992; and

No. 624, Misc. DONNELL *v.* RAGEN, WARDEN, 350 U. S. 1012. Petitions for rehearing denied.

No. 248. MacKay *v.* Boyd, District Director, Immigration and Naturalization Service, et al., 350 U. S. 840. The motion for leave to file petition for rehearing is denied.

May 14, 1956.

Decisions Per Curiam.

No. 802. Union Oil Co. of California *v.* California. Appeal from the Appellate Department, Superior Court of California, Los Angeles County. *Per Curiam:* The motion for leave to file brief of Air Pollution Control Association, as *amicus curiae,* is denied. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Alexander Macdonald* and *A. Andrew Hauk* for appellant. *Roger Arnebergh* and *Philip E. Grey* for appellee. Reported below: 137 Cal. App. 2d 859, 291 P. 2d 587.

No. 599, Misc. Whitley *v.* Warden of Maryland House of Correction. Appeal from and petition for writ of certiorari to the Court of Appeals of Maryland. *Per Curiam:* The appeal is dismissed and the petition for writ of certiorari is denied. Reported below: 209 Md. 629, 120 A. 2d 200.

Miscellaneous Orders.

No. 558, Misc. Solsona *v.* Looney, Warden;
No. 572, Misc. Alvarez *v.* Steiner, Warden;
No. 581, Misc. Anderson *v.* California; and
No. 649, Misc. Jordan *v.* Commissioners of New York State Parole Board et al. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se. C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent in No. 572, Misc.

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No. 48. COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD, *ante*, p. 115. The motion of the respondent to issue the mandate forthwith is granted. *John J. Abt* and *Joseph Forer* for petitioner. *Solicitor General Sobeloff* for respondent.

Probable Jurisdiction Noted.

No. 636. NELSON ET AL., SUCCESSOR TRUSTEES, ET AL. *v.* CITY OF NEW YORK. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *William P. Jones* for appellants. *Peter Campbell Brown, Harry E. O'Donnell, Benjamin Offner* and *Joseph Brandwen* for appellee. Reported below: 309 N. Y. 801, 130 N. E. 2d 602.

Certiorari Granted.

No. 821. PENNSYLVANIA RAILROAD CO. ET AL. *v.* RYCHLIK. C. A. 2d Cir. Certiorari granted. The Solicitor General is invited to file a brief, as *amicus curiae*. *John B. Prizer* and *Richard N. Clattenburg* for the Pennsylvania Railroad Co., and *Henry Kaiser, Eugene Gressman* and *Wayland K. Sullivan* for the Brotherhood of Railroad Trainmen, petitioners. *Meyer Fix* for respondent. Reported below: 229 F. 2d 171.

Certiorari Denied. (*See also No. 599, Misc., supra.*)

No. 772. NEVADA-PACIFIC DEVELOPMENT CORP. ET AL. *v.* GUSTIN. C. A. 9th Cir. Certiorari denied. *Ernest S. Brown* for petitioners. *Richard R. Hanna* for respondent. Reported below: 226 F. 2d 286.

No. 806. ROWTON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hayden C. Covington* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 229 F. 2d 421.

No. 797. SHAFER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Wilson K. Barnes* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell* for the United States. Reported below: 229 F. 2d 124.

No. 798. STONE ET AL. *v.* HUFFSTUTLER, REFEREE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Ward R. Burke* for petitioners. Reported below: 227 F. 2d 217.

No. 812. SINCERBEAUX *v.* HANLON, COMMISSIONER OF PUBLIC SAFETY OF WHITE PLAINS, NEW YORK. Court of Appeals of New York. Certiorari denied. *Charles D. Lewis* and *Frederick J. Ludwig* for petitioner. *William McKinley* and *Vincent Del Tufo* for respondent. Reported below: 306 N. Y. 986, 309 N. Y. 1034, 119 N. E. 2d 610, 131 N. E. 2d 739.

No. 814. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Henry Hammer* and *Henry H. Edens* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 230 F. 2d 521.

No. 892. ADAMS *v.* LUCY ET AL. C. A. 5th Cir. Certiorari denied. *Frontis H. Moore* and *Andrew J. Thomas* for petitioner. *Thurgood Marshall, Constance Baker Motley* and *Arthur D. Shores* for respondents. Reported below: 228 F. 2d 619.

No. 691. UNITED STATES *v.* ANASTASIO, ALIAS ANASTASIA. C. A. 3d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle*

R. Cappello for the United States. *Samuel Paige* and *Norma Z. Paige* for respondent. Reported below: 226 F. 2d 912.

No. 811. WHITSELL *v.* ALEXANDER ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *John J. Yowell* for petitioner. *Albert E. Jenner, Jr.* for Alexander et al., and *John T. Chadwell* and *Richard M. Keck* for the American Optical Co., respondents. Reported below: 229 F. 2d 47.

No. 466, Misc. HOOKS *v.* HARDWICK, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 226 F. 2d 407.

No. 578, Misc. KONETZKE *v.* ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 591, Misc. FRIESEN *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Everett A. Corten* for the Industrial Accident Commission, respondent.

No. 603, Misc. SKINNER *v.* RANDOLPH, WARDEN. Circuit Court of Lee County, Illinois. Certiorari denied.

No. 614, Misc. BOYKIN *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 807. CARE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Charles Hill Johns* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 231 F. 2d 22.

No. 632, Misc. ROOSA, ALIAS JONES, *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 654, Misc. TROIANI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 658, Misc. ILLINOIS EX REL. BANGHART *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 813. JUSTHEIM ET AL. *v.* MCKAY, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Clair M. Senior* and *Melville Ehrlich* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *George S. Swarth* for the Secretary of the Interior, and *Louis W. Myers, William W. Clary, Warren M. Christopher, Hugh Fullerton* and *Albert Noble McCartney* for the Signal Oil & Gas Co. et al., respondents. Reported below: 97 U. S. App. D. C. 146, 229 F. 2d 29.

No. 815. BARNES, TRUSTEE, *v.* UNITED STATES. Court of Claims. Certiorari denied. *T. Justin Moore, George D. Gibson* and *John W. Riely* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, Lee A. Jackson* and *Elizabeth B. Davis* for the United States. Reported below: 133 Ct. Cl. 546, 137 F. Supp. 716.

No. 823. RYAN CONSOLIDATED PETROLEUM CORP. *v.* PICKENS ET AL. Supreme Court of Texas. Certorari denied. *A. W. Walker, Jr.* for petitioner. *J. B. Robertson* and *Dan Moody* for respondents. Reported below: 155 Tex. —, 285 S. W. 2d 201.

No. 609, Misc. BLAKENEY *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *William W. Pierce* for petitioner. Reported below: —— Miss. ——, 82 So. 2d 714.

Rehearing Denied.

No. 682. COVINGTON MILLS ET AL. *v.* MITCHELL, SECRETARY OF LABOR, ET AL., 350 U. S. 1002. Rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application.

No. 10. PENNSYLVANIA *v.* NELSON, 350 U. S. 497;

No. 278. MITCHELL, SECRETARY OF LABOR, *v.* BUDD ET AL., 350 U. S. 473;

No. 637. MYERS *v.* HOLLISTER, DIRECTOR, INTERNATIONAL COOPERATION ADMINISTRATION, ET AL., 350 U. S. 987;

No 667. TRACTOR TRAINING SERVICE ET AL. *v.* FEDERAL TRADE COMMISSION, 350 U. S. 1005;

No. 697. GRANT ET AL. *v.* BENSON, SECRETARY OF AGRICULTURE, ET AL., 350 U. S. 1015; and

No. 459, Misc. SESSIONS *v.* MANNING, SUPERINTENDENT, SOUTH CAROLINA PENITENTIARY, 350 U. S. 1008. Petitions for rehearing denied.

MAY 15, 1956.

Case Dismissed Under Rule 60.

No. 904. BOROUGH OF FORT LEE ET AL. *v.* BOARD OF LIQUIDATION OF THE BOROUGH OF FORT LEE. 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. *William V. Breslin* for petitioners. *James D. Carpenter* for respondent. Reported below: 230 F. 2d 200.

May 18, 1956.

Case Dismissed Under Rule 60.

No. 818. Tishler et al. *v.* Englander Co., Inc. On petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, Second Department. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Victor Rabinowitz* for petitioners. *James P. Durante* for respondent.

May 21, 1956.

Decisions Per Curiam.

No. 693. Kraus *v.* City of Cleveland et al. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion for leave to file brief of the Christian Science Board of Directors, as *amicus curiae,* is denied. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Appellant *pro se. Joseph H. Crowley* for appellees. Reported below: 163 Ohio St. 559, 127 N. E. 2d 609.

No. 694. Saxony Construction Co. *v.* Board of Supervisors of Marple Township. Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Bruce H. Greenfield* for appellant. *Joseph D. Calhoun* for appellee.

No. 207, Misc. Chick *v.* Texas. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The appeal is dismissed and the motion for leave to file petition for writ of habeas corpus is denied. Petitioner *pro se. John A. Wild,* Assistant Attorney General of Texas, for respondent. Reported below: 161 Tex. Cr. R. 450, 278 S. W. 2d 140.

Miscellaneous Orders.

No. 513, Misc. SHOTKIN *v.* BLACK ET AL. Petition for appeal denied.

No. 671, Misc. MEEKS *v.* LAINSON, WARDEN;
No. 677, Misc. CAMPIGLIA *v.* FAY, WARDEN;
No. 693, Misc. MACGREGOR *v.* FLORIDA ET AL.; and
No. 695, Misc. DEVORSE *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 827. ROVIARO *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Maurice J. Walsh* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 229 F. 2d 812.

No. 831. FERGUSON *v.* MOORE-MCCORMACK LINES, INC. C. A. 2d Cir. Certiorari granted. *George J. Engelman* for petitioner. *Wilbur E. Dow, Jr.* and *Frederick Fish* for respondent. Reported below: 228 F. 2d 891.

No. 244. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. Petition for writ of certiorari to the Supreme Court of California granted. In addition to the merits, counsel are invited to consider, in their briefs and upon oral argument, the following questions relating to the jurisdiction of this Court:

(1) Were petitioner's claims under the United States Constitution duly raised before the Supreme Court of California?

(2) Was the Supreme Court of California's denial of a petition for a writ of review merely a refusal by that court to exercise its discretionary jurisdiction or is it to

be deemed a disposition, "in the nature of a review," *Salot* v. *State Bar,* 3 Cal. 2d 615, 617 [45 P. 2d 203], and as such a final judgment within the meaning of 28 U. S. C. § 1257?

(3) Assuming the latter, was the determination of the Supreme Court of California based upon a rejection of claims arising under the Fourteenth Amendment of the Constitution of the United States, and more particularly, upon an evaluation of the constitutional significance of the evidence summarized under "1" on page 5 through the top of page 8 of the brief filed by the respondents on December 8, 1955, in opposition to the petition for the writ of certiorari herein?

Edward Mosk and *Samuel Rosenwein* for petitioner. *Frank B. Belcher* for respondents.

Certiorari Denied.

No. 761. Olin Mathieson Chemical Corp. *v.* Western States Cutlery & Manufacturing Co. et al. C. A. 10th Cir. Certiorari denied. *John H. Sutherland* and *Philip B. Polster* for petitioner. *Melvin C. Goss* for respondents. Reported below: 227 F. 2d 728.

No. 819. Knudsen Creamery Co. of California *v.* Oosten. Supreme Court of California. Certiorari denied. *Thomas G. Baggot* for petitioner. *Russell E. Parsons* for respondent. Reported below: 45 Cal. 2d 784, 291 P. 2d 17.

No. 820. Robinson, Administratrix, *v.* Northeastern Steamship Corp. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Walter X. Connor* and *Matthew L. Danahar* for respondent. Reported below: 228 F. 2d 679.

No. 817. DIXON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Morton Witkin* for petitioner. *James N. Lafferty* for respondent. Reported below: 383 Pa. 474, 119 A. 2d 261.

No. 822. 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. *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.

No. 828. FANNIN, ADMINISTRATRIX, *v.* JONES, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *Elmer I. Schwartz* for petitioner. *Howard F. Burns* for respondent. Reported below: 229 F. 2d 368.

No. 829. BERKIHISER *v.* JONES, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *Elmer I. Schwartz* for petitioner. *George H. P. Lacey* for respondent. Reported below: 229 F. 2d 959.

No. 830. BOYNTON *v.* PEDRICK, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *Horace M. Gray* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, Hilbert P. Zarky* and *Grant W. Wiprud* for respondent. Reported below: 228 F. 2d 745.

No. 834. FLOYD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *I. Harvey Levinson* and *Frank J. McAdams, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. Reported below: 228 F. 2d 913.

No. 833. JONES, TRUSTEE, *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Harry Gillig, Jr.* for petitioner. *Solicitor General Sobeloff, Samuel D. Slade* and *William W. Ross* for the United States. Reported below: 229 F. 2d 84.

No. 841. WHITE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Thomas V. Koykka* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Rice, Lee A. Jackson* and *Marvin W. Weinstein* for respondent. Reported below: 227 F. 2d 779.

No. 846. CITY CHEVROLET CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Frederic D. Dassori* and *Dee R. Bramwell* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, A. F. Prescott* and *C. Guy Tadlock* for respondent. Reported below: 228 F. 2d 894.

No. 847. AMSHOFF ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *H. Templeton Brown* and *Robert L. Stern* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell* for the United States and the Secretary of Agriculture, respondents. Reported below: 228 F. 2d 261.

No. 848. UNITED STATES *v.* UNITED STATES VANADIUM CORP. ET AL.; and

No. 849. ELECTRO METALLURGICAL SALES CORP. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States. *Morrison Shafroth* and *John F. Shafroth* for petitioner in No. 849 and respondents in No. 848. Reported below: 230 F. 2d 646.

No. 862. COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA *v.* SCHUTT, ADMINISTRATOR, ET AL. C. A. 2d Cir. Certiorari denied. *Moses G. Hubbard* for petitioner. *Thomas S. Kernan* for respondents. Reported below: 229 F. 2d 158.

No. 866. HERNANDEZ ET AL. *v.* ETHYL CORPORATION ET AL. Court of Appeal of Louisiana, First Circuit. Certiorari denied. *DeVan D. Daggett* for petitioners. *John H. Tucker, Jr., Charles Vernon Porter* and *Laurence W. Brooks* for the Ethyl Corporation, respondent. Reported below: 83 So. 2d 150.

No. 880. BUCH EXPRESS, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Samuel W. Earnshaw* for petitioner. *Solicitor General Sobeloff, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 132 Ct. Cl. 772, 132 F. Supp. 473.

No. 600, Misc. CASTRO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Conrad J. Lynn* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 228 F. 2d 807.

No. 615, Misc. ROBERTS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 622, Misc. IN RE HOWARD. Supreme Court of California. Certiorari denied.

No. 623, Misc. ODDO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 1 App. Div. 2d 660, 147 N. Y. S. 2d 683.

No. 635, Misc. ENGLING *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 178 Kan. 564, 290 P. 2d 1009.

No. 641, Misc. DENTO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 647, Misc. PENNENGA *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 652, Misc. MCCOLLUM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 660, Misc. BALES *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 661, Misc. KENNEDY *v.* GOUGH, WARDEN. Supreme Court of Rhode Island. Certiorari denied.

No. 663, Misc. RODRIGUEZ *v.* COSMOS FOOTWEAR CORP. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 667, Misc. TURNER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 668, Misc. JOHNSON *v.* OHIO ET AL. Franklin County Court of Appeals of Ohio. Certiorari denied.

No. 673, Misc. HANSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 679, Misc. MORSE *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 686, Misc. MUSSER *v.* MYERS, ACTING WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 688, Misc. CUOMO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 690, Misc. KRUPNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 707, Misc. KEAGLE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 7 Ill. 2d 408, 131 N. E. 2d 74.

No. 11, Misc. REICHELDERFER *v.* DAY, WARDEN. Superior Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Reported below: 176 Pa. Super. 215, 107 A. 2d 578.

No. 579, Misc. RECK *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. *Edmund Hatfield* for petitioner. *Latham Castle,* Attorney General of Illinois, *John L. Davidson, Jr.,* First Assistant Attorney General, and *Fred G. Leach* and *Edwin A. Strugala,* Assistant Attorneys General, for respondent. Reported below: 7 Ill. 2d 261, 130 N. E. 2d 200.

No. 613, Misc. UNITED STATES EX REL. CLARK *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 832. STEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John Abt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 231 F. 2d 109.

No. 824. WILCOXSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Pearce C. Rodey* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 231 F. 2d 384.

No. 899. ELWARD ET AL. *v.* FRIEDMAN ET AL. C. A. 7th Cir. Certiorari denied. *Edward S. Macie* for petitioners. *Henry F. Tenney* and *Philip B. Kurland* for Friedman et al., respondents. Reported below: 230 F. 2d 364.

No. 565, Misc. CLINTON *v.* GREYHOUND CORPORATION. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas J. Hanify* for respondent.

Rehearing Denied.

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., 350 U. S. 984. Rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE REED took no part in the consideration or decision of this application.

No. 38. ARMSTRONG *v.* ARMSTRONG ET AL., 350 U. S. 568; and

No. 547, Misc. MAS ET AL. *v.* OWENS-ILLINOIS GLASS CO., 350 U. S. 1016. Petitions for rehearing denied.

MAY 28, 1956.

Decisions Per Curiam.

No. 794. SOUTH CAROLINA EX REL. SOUTH CAROLINA PUBLIC SERVICE COMMISSION *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of South Carolina. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *T. C. Callison,* Attorney General of South Carolina, and *Irvine F. Belser* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Robert W. Ginnane* and *Leo H. Pou* for the United States and the Interstate Commerce Commission, *James B. McDonough, Jr., Richard B. Gwathmey, James A. Bistline* and *Charles P. Reynolds* for the Seaboard Air Line Railroad Co. et al., appellees. Reported below: 136 F. Supp. 897.

No. 650, Misc. NAUMO *v.* NEW YORK. Appeal from the Appellate Division of the Supreme Court of New York, First Judicial Department. *Per Curiam:* The appeal is dismissed.

No. 23. SLOCHOWER *v.* BOARD OF HIGHER EDUCATION OF NEW YORK CITY. On petition for rehearing. *Per Curiam:* The petition for rehearing is denied. The petition calls our attention to the following comment in our opinion: "It appears that neither the Subcommittee nor Slochower was aware that his claim of privilege would *ipso facto* result in his discharge, and would bar him permanently from holding any position either in the city colleges or in the city government." 350 U. S. 551, 554, lines 13–18. This observation was based on the printed record then before us. The Board now presents for the

first time additional portions of the official transcript of the proceedings before the United States Senate Internal Security Subcommittee which cast doubt on its accuracy. Since the comment was in no wise controlling of our decision, we believe its deletion from the opinion would serve the interests of accuracy. It is so ordered.[*]

Peter Campbell Brown and *Seymour B. Quel* for appellee-petitioner. Joinders of *amici curiae* in the petition for rehearing were filed for the States of Florida, by *Richard W. Ervin,* Attorney General, *Ralph E. Odum,* Assistant Attorney General, and *John J. Blair,* Special Assistant Attorney General; Maine, by *Frank F. Harding,* Attorney General, *James G. Frost,* Deputy Attorney General, and *Roger A. Putnam,* Assistant Attorney General; New Mexico, by *Richard H. Robinson,* Attorney General; Texas, by *John Ben Shepperd,* Attorney General, and *Philip Sanders,* Assistant Attorney General; Utah, by *E. R. Callister,* Attorney General; Washington, by *Don Eastvold,* Attorney General, and *Andy G. Engebretsen* and *E. P. Donnelly,* Assistant Attorneys General; and the Territory of Hawaii, by *Edward N. Sylva,* Attorney General. Joinders of *amici curiae,* adopting the joinder filed for the State of Texas in support of the petition for rehearing, were filed for the States of Georgia, by *Eugene Cook,* Attorney General, and *Robert H. Hall* and *E. Freeman Leverett,* Assistant Attorneys General; Kentucky, by *Jo M. Ferguson,* Attorney General, and *M. B. Holifield,* Assistant Attorney General; Maine, by *Mr. Harding, Mr. Frost* and *Mr. Putnam;* New Mexico, by *Mr. Robinson;* South Carolina, by *T. C. Callison,* Attorney General; and Utah, by *Mr. Callister.*

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*[NOTE: The opinion is reported as so amended in the bound volume of 350 U. S.]

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Miscellaneous Orders.

No. 15, Original. UNITED STATES *v.* LOUISIANA. The State of Louisiana is given until June 4, 1956, to reply to the motion of the United States for an injunction. In the meantime, the parties are invited to express their views as to maintenance of the status quo pending final disposition of the cause here. THE CHIEF JUSTICE took no part in the consideration or decision of this question. *Attorney General Brownell, Solicitor General Sobeloff, Assistant Attorney General Rankin, Oscar H. Davis* and *John F. Davis* for the United States.

No. 51. FEDERAL POWER COMMISSION *v.* SIERRA PACIFIC POWER CO.; and

No. 53. PACIFIC GAS & ELECTRIC CO. *v.* SIERRA PACIFIC POWER CO. The respondent's motion to amend the opinion in this case [350 U. S. 348] is denied without prejudice to the future determination of any issues that may arise as to the right of Sierra to restitution of the excess payments made pursuant to the Commission's invalid order. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would grant the motion. *Solicitor General Sobeloff* and *Willard W. Gatchell* for petitioner in No. 51. *F. T. Searls, Robert E. May* and *John C. Morrissey* for petitioner in No. 53. *William C. Chanler* for respondent.

No. 808. WICKS ET AL. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ET AL. C. A. 9th Cir. Certiorari denied. The motion for leave to file petition for writ of mandamus is also denied. *Carl M. Gould* for petitioners. *Lester P. Schoene, Milton Kramer, Clarence Mulholland, Edward J. Hickey, Jr., Irl D. Brett* and *James L. Crawford* for the Brotherhood of Maintenance of Way Employees et al., respondents. Reported below: 231 F. 2d 130.

No. 657, Misc. ARCIERI *v.* ALVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 720, Misc. PRICE ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Motion for a stay denied. Certiorari also denied. *Henry Lincoln Johnson* and *Curtis P. Mitchell* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 643, Misc. BARNES *v.* MENDEZ; and

No. 735, Misc. SHANE *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of certiorari denied.

No. 655, Misc. HILLIARD *v.* WILKINSON, WARDEN;

No. 689, Misc. IN RE REGENT OF CALIFORNIA;

No. 699, Misc. ROBINSON *v.* BANNAN, WARDEN;

No. 723, Misc. IN RE MEDLIN;

No. 725, Misc. CAIN *v.* MAYO, PRISON CUSTODIAN;

No. 727, Misc. IN RE PARKER;

No. 731, Misc. PRITCHARD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION;

No. 742, Misc. CARROLL *v.* PEPERSACK, WARDEN;

No. 744, Misc. VAN NEWKIRK *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL;

No. 749, Misc. CARR *v.* ROBBINS, WARDEN; and

No. 755, Misc. HOCKADAY *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 754, Misc. IN RE HILL. Motions for leave to file petitions for writs of habeas corpus and mandamus denied.

No. 672, Misc. ORLEANS PARISH SCHOOL BOARD ET AL. *v.* BUSH ET AL. Motion for leave to file petition for writ of mandamus denied. *Gerard A. Rault* and *W. Scott Wilkinson* for petitioners. *Thurgood Marshall, Robert L. Carter* and *A. P. Tureaud* for respondents.

No. 692, Misc. BOOKER ET AL. *v.* TENNESSEE BOARD OF EDUCATION ET AL. Motion for leave to file petition for writ of mandamus denied. *Z. Alexander Looby, Robert L. Carter, Thurgood Marshall* and *Jack Greenberg* for petitioners. *George F. McCanless,* Attorney General of Tennessee, *Allison B. Humphreys, Jr.,* Solicitor General, and *Nat Tipton,* Advocate General, for respondents.

No. 681, Misc. LAWLOR ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied. *Francis T. Anderson* for petitioners. *Wm. A. Schnader, Bernard G. Segal* and *Edward W. Mullinix* for Columbia Pictures Corporation et al., and *Louis J. Goffman* for Warner Bros. Pictures Distributing Corporation, respondents.

Probable Jurisdiction Noted.

No. 793. LESLIE MILLER, INC. *v.* ARKANSAS. Appeal from the Supreme Court of Arkansas. Probable jurisdiction noted. *Leffel Gentry* for appellant. *Tom Gentry,* Attorney General of Arkansas, *Thorp Thomas,* Assistant Attorney General, and *William J. Smith* for appellee. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard, Paul A. Sweeney* and *Lionel Kestenbaum* filed a memorandum for the United States, as *amicius curiae,* urging that probable jurisdiction be noted. Reported below: 225 Ark. 285, 281 S. W. 2d 946.

Certiorari Granted.

No. 826. LEEDOM ET AL., MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *v.* INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS. 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 *Norton J. Come* for petitioners. *Nathan Witt, Joseph Forer* and *David Rein* for respondent. Reported below: 96 U. S. App. D. C. 416, 226 F. 2d 780.

No. 845. JAFFKE *v.* DUNHAM, TRUSTEE. C. A. 7th Cir. Certiorari granted. *Chauncey P. Carter, Jr.* and *Herbert J. Miller, Jr.* for petitioner. *G. W. Horsley* for respondent. Reported below: 229 F. 2d 232.

No. 853. SENKO *v.* LACROSSE DREDGING CORP. Appellate Court of Illinois, Fourth District. Certiorari granted. *Stanley M. Rosenblum* and *George J. Moran* for petitioner. *Henry Driemeyer* and *Stuart B. Bradley* for respondent. Reported below: 7 Ill. App. 2d 307, 129 N. E. 2d 454.

Certiorari Denied. (*See also No. 808 and Misc. Nos. 643, 657, 720 and 735, supra.*)

No. 517. HUDSON ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. ET AL. Supreme Court of North Carolina. Certiorari denied. *Thornton H. Brooks* and *R. S. McClelland* for petitioners. *M. V. Barnhill, Jr.* for the Atlantic Coast Line Railroad Co., and *Milton Kramer* and *Lester P. Schoene* for the International Association of Machinists et al., respondents. Reported below: 242 N. C. 650, 89 S. E. 2d 441.

No. 573. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* DEPARTMENT OF REVENUE OF ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Nelson Trottman* and *Lowell Hastings* for petitioner. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 6 Ill. 2d 278, 128 N. E. 2d 722.

No. 835. VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John D. Cofer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 229 F. 2d 288.

No. 836. AETNA FREIGHT LINES, INC., *v.* CLAYTON. C. A. 2d Cir. Certiorari denied. *Edward D. Flaherty* for petitioner. *Richard Lipsitz* for respondent. Reported below: 228 F. 2d 384.

No. 840. DAVIS ET AL. *v.* BUCK-JACKSON CORPORATION ET AL. C. A. 4th Cir. Certiorari denied. *J. Preston Swecker* for petitioners. *John H. Lewis, Jr.* for respondents. Reported below: 230 F. 2d 655.

No. 842. NICHOLS *v.* UNITED STATES STEEL CORP. C. A. 6th Cir. Certiorari denied. *Jacob Levin* for petitioner. *James C. Davis, Laurence E. Oliphant, Jr.* and *John J. Adams* for respondent. Reported below: 229 F. 2d 396.

No. 843. BETHLEHEM STEEL CO. *v.* CARDILLO, DEPUTY COMMISSIONER, SECOND COMPENSATION DISTRICT. C. A. 2d Cir. Certiorari denied. *Albert R. Connelly* for petitioner. *Solicitor General Sobeloff* and *Paul A. Sweeney* for respondent. Reported below: 229 F. 2d 735.

No. 844. WILLIAMS ET AL. *v.* PACIFIC ROYALTY CO. C. A. 10th Cir. Certiorari denied. *Bruce Bromley, Angus G. Wynne* and *John D. Calhoun* for petitioners. *J. D. Atwood, Ross L. Malone, Charles S. Rhyne* and *Eugene F. Mullin, Jr.* for respondent. Reported below: 227 F. 2d 49.

No. 850. AURIANNE ET AL. *v.* BOARD OF LEVEE COMMISSIONERS, ORLEANS LEVEE DISTRICT. Supreme Court of Louisiana. Certiorari denied. *Oliver S. Delery* for petitioners. Reported below: 229 La. 83, 85 So. 2d 42.

No. 855. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* CERESTE. C. A. 2d Cir. Certiorari denied. *Robert M. Peet* for petitioner. *Jacob D. Fuchsberg* for respondent. Reported below: 231 F. 2d 50.

No. 856. DAUGHERTY ET AL. *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Charles H. Tuttle* and *Francis X. Ward* for petitioners. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *C. F. Hicks*, Assistant Attorney General, for respondent.

No. 857. LIDGERWOOD MANUFACTURING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Fred R. Tansill* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Hilbert P. Zarky* for respondent. Reported below: 229 F. 2d 241.

No. 860. IN RE MILLER. Supreme Court of Illinois. Certiorari denied. *Theodore W. Miller, pro se. Charles Leviton, amicus curiae,* for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, in opposition. Reported below: 7 Ill. 2d 443, 131 N. E. 2d 91.

No. 864. MORGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Sobeloff, Paul A. Sweeney* and *Lester S. Jayson* for the United States. Reported below: 229 F. 2d 291.

No. 867. LOUISIANA & ARKANSAS RAILWAY CO. *v.* MOORE. C. A. 5th Cir. Certiorari denied. *T. W. Holloman* and *Joseph R. Brown* for petitioner. Reported below: 229 F. 2d 1.

No. 870. CONFORTI *v.* NEW YORK. County Court of Putnam County, New York. Certiorari denied. *Wolfango Edward Cribari* for petitioner.

No. 871. ANGELET ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Anthony A. Calandra* and *Abraham Solomon* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 231 F. 2d 190.

No. 879. PACIFIC INTERMOUNTAIN EXPRESS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *Harry L. Browne* for petitioner. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 228 F. 2d 170.

No. 881. ROGERS *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. *Thomas R. Robinson* for petitioner. *Abraham S. Ullman* and *Arthur T. Gorman* for respondent. Reported below: 143 Conn. 167, 120 A. 2d 409.

No. 900. GOODIN *v.* CLINCHFIELD RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. *John D. Goodin* for petitioner. *Herbert S. Thatcher* for the Blue Ridge Lodge No. 816, Brotherhood of Railroad Trainmen, et al., respondents. Reported below: 229 F. 2d 578.

No. 914. BARNETT *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. C. A. 8th Cir. Certiorari denied. *Raymond Forder Buckley* for petitioner. *Richard Wayne Ely* and *John L. Davidson, Jr.* for respondent. Reported below: 228 F. 2d 756.

No. 795. PURSSELLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Quintin Whelan* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 229 F. 2d 745.

No. 851. HADZIMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harold P. Lasher* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 229 F. 2d 745.

No. 854. LOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Frank W. Oliver* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 230 F. 2d 915.

No. 380, Misc. UCKELE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 868. SCHERING CORPORATION *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 3d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *John Milton, Raoul Berger* and *Irving H. Jurow* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill* and *George B. Searls* for respondent. Reported below: 228 F. 2d 624.

No. 384, Misc. MCCORKLE *v.* MARTIN, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se. James N. Lafferty* and *Victor H. Blanc* for respondent.

No. 458, Misc. JACKSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 526, Misc. MILLS *v.* KEARNEY, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff* for respondent. Reported below: 228 F. 2d 101.

No. 563, Misc. GOODMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 597, Misc. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 616, Misc. PARSONS *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 617, Misc. NORWOOD *v.* PARENTEAU ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Daniel K. Loucks* for respondents. Reported below: 228 F. 2d 148.

No. 619, Misc. SANDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 2d 127.

No. 621, Misc. HOLLAND *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 636, Misc. HALL *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 640, Misc. AGUILAR *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *David Shapiro* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 226 F. 2d 414.

No. 642, Misc. ALVAREZ *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 644, Misc. VEAL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 645, Misc. ROCKWELL *v.* NEW YORK, Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 662, Misc. KOLLEN *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 665, Misc. JOHNSON *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 675, Misc. PENNSYLVANIA EX REL. YOUNG *v.* MYERS, ACTING WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 684, Misc. HEIRMAN *v.* FIDELITY & CASUALTY CO. OF NEW YORK ET AL. C. A. 8th Cir. Certiorari denied.

No. 687, Misc. LEMASTERS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 691, Misc. HALL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 694, Misc. BARRICK *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 698, Misc. NOLAN *v.* MISSOURI ET AL. Supreme Court of Missouri. Certiorari denied.

No. 700, Misc. STRASSMAN *v.* NEW YORK. Onondaga County Court of New York. Certiorari denied.

No. 701, Misc. WILLIAMS *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 704, Misc. NEWSTEAD *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 705, Misc. NEWSTEAD *v.* UNITED STATES. Court of Claims. Certiorari denied.

No. 708, Misc. KENDALL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 7 Ill. 2d 570, 131 N. E. 2d 519.

No. 709, Misc. WOOD *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. 710, Misc. JOHNSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 711, Misc. NEW YORK EX REL. KING *v.* MCNEILL, DIRECTOR, MATTEAWAN STATE HOSPITAL. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 712, Misc. SIEG *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 717, Misc. IN RE THOMPSON. Wyoming County Court of Warsaw, New York. Certiorari denied.

No. 718, Misc. JOHN *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 719, Misc. GARRETT *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 734, Misc. WEAVER *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *John A. McNiff* for petitioner. Reported below: —— Mass. ——, 133 N. E. 2d 226.

No. 634, Misc. GOODCHILD *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. Reported below: 272 Wis. 181, 74 N. W. 2d 624.

No. 651, Misc. GIORDANO *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 164 Ohio St. 509, 132 N. E. 2d 211.

No. 669, Misc. TENNESSEE EX REL. JOHNSON *v.* LLEWELLYN, WARDEN. Supreme Court of Tennessee. Certiorari denied. *Hugh C. Simpson* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Nat Tipton* for respondent. Reported below: 199 Tenn. ——, 286 S. W. 2d 590.

No. 678, Misc. HENDERSON *v.* THOMPSON, PRESIDING JUDGE, BOONE COUNTY CIRCUIT COURT. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 131 N. E. 2d 326.

No. 685, Misc. ECKERT *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 295 P. 2d 814.

Rehearing Denied. (*See also No. 23, ante, p. 944.*)

No. 312. UNITED STATES *v.* OHIO POWER CO., 350 U. S. 862. The motion for leave to file a second petition for rehearing is denied.

No. 95. GRIFFIN ET AL. *v.* ILLINOIS, *ante,* p. 12;

No. 679. PALMER ET UX. *v.* UNITED STATES, 350 U. S. 996;

No. 699. UNITED STATES *v.* WHITE BEAR BREWING CO., INC., ET AL., 350 U. S. 1010; and

No. 564, Misc. BURNS *v.* UNITED STATES, *ante,* p. 910. Petitions for rehearing denied.

MAY 31, 1956.

Case Dismissed Under Rule 60.

No. 913. WARNER MANUFACTURING CORP. *v.* SHANE ET AL., TRADING AS B. & F. DOOR MFG. CO. 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. *George H. Rosenstein* for petitioner. *David S. Malis* was on the stipulation for respondents. With him on a brief in opposition to the petition were *Howard Wallner* and *Robert H. Malis.* Reported below: 229 F. 2d 207.

JUNE 4, 1956.

Decisions Per Curiam.

No. 565. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., ET AL. *v.* ANDERSON, DISTRICT JUDGE, ET AL. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The judgment is affirmed. *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Wisconsin Employment Relations Board, ante,* p. 266, decided this day. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Harold A. Cranefield* and *Kurt L. Hanslowe* for appellants. *Leland W. Scott* for McQuay, Inc., appellee. Reported below: 245 Minn. 274, 72 N. W. 2d 81.

No. 859. SEARS, TRUSTEE, ET AL. *v.* COUNTY OF CALAVERAS, CALIFORNIA, ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles O. Bruce* for appellants. *Edmund G. Brown,* Attorney General, *E. G. Benard, Irving H. Perluss,* Assistant Attorneys General,

and *Edward P. Hollingshead,* Deputy Attorney General, for the State of California, appellee. Reported below: 45 Cal. 2d 518, 289 P. 2d 425.

No. 869. MONTGOMERY *v.* WEST BASIN MUNICIPAL WATER DISTRICT ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *A. Andrew Hauk* for appellant. *James H. Howard, Charles C. Cooper, Jr.* and *John M. Davenport* for the Metropolitan Water District of Southern California, appellee.

No. 885. CALHOUN *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *John W. Preston* and *Charles H. Carr* for appellant. *Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Assistant Attorney General, for appellees. Reported below: 46 Cal. 2d 18, 291 P. 2d 474.

No. 724, Misc. PRIESTER *v.* FAY, WARDEN, ET AL. Appeal from and petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, Second Judicial Department. *Per Curiam:* The appeal is dismissed and the petition for writ of certiorari is denied.

No. 774, Misc. BOYDEN *v.* HERITAGE, WARDEN, ET AL. Appeal from the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The appeal is dismissed.

Miscellaneous Orders.

No. 501, Misc. SHELTON *v.* WRIGHT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Sobeloff* for respondent.

No. 760, Misc. SMITH *v.* CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA, ET AL.; and

No. 781, Misc. EX PARTE DURKIN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 858. FEDERAL TRADE COMMISSION *v.* NATIONAL LEAD CO. ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles H. Weston, Earl W. Kintner* and *Robert B. Dawkins* for petitioner. *John B. Henrich, Jr.* for the National Lead Co., *Robert A. Sturges* for the Sherwin-Williams Co., *Richard Serviss* for the Eagle-Picher Co. et al., respondents; and *Thomas J. McDowell* and *Nathan S. Blumberg* were of counsel. Reported below: 227 F. 2d 825.

No. 863. LIBSON SHOPS, INC. *v.* KOEHLER, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari granted. *Henry C. Lowenhaupt* and *Abraham Lowenhaupt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, Hilbert P. Zarky* and *Harry Baum* for respondent. Reported below: 229 F. 2d 220.

No. 893. THEARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Petitioner *pro se*. *Solicitor General Sobeloff* and *Melvin Richter* for the United States. Reported below: 228 F. 2d 617.

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No. 656, Misc. PRINCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 230 F. 2d 568.

Certiorari Denied. (*See also No. 724, Misc., supra.*)

No. 499. FORT DIX APARTMENTS CORP. ET AL. *v.* BOROUGH OF WRIGHTSTOWN ET AL. C. A. 3d Cir. Certiorari denied. *Josiah E. DuBois, Jr.* and *Madison S. DuBois* for the Fort Dix Apartments Corporation, and *Alexander Feinberg* for Sheridanville, Inc., petitioners. *Albert McCay* for the Borough of Wrightstown et al., and *Martin L. Haines* for the Township of Springfield et al., respondents. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky, Erwin A. Goldstein* and *Lyle M. Turner* filed a memorandum for the United States, as *amicus curiae*, in support of the petition. Reported below: 225 F. 2d 473.

No. 635. ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS, AFL, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *David I. Ashe* for petitioners. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 226 F. 2d 900.

No. 791. NATIONAL LABOR RELATIONS BOARD *v.* BUSINESS MACHINE AND OFFICE APPLIANCE MECHANICS CONFERENCE BOARD, LOCAL 459, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, CIO. C. A. 2d Cir. Certiorari denied. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Benjamin C. Sigal* for respondent. Reported below: 228 F. 2d 553.

No. 771. TALIAFERRO *v.* PRETTNER ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 135 Cal. App. 2d 157, 286 P. 2d 977.

No. 773. JOLLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *L. E. Gwinn* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 229 F. 2d 180.

No. 837. HAWAIIAN PINEAPPLE CO., LTD., *v.* ADEN ET AL.; and

No. 838. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. *v.* HAWAIIAN PINEAPPLE CO., LTD. C. A. 9th Cir. Certiorari denied. *Donald C. Walker* for the Hawaiian Pineapple Co., Ltd. *Norman Leonard* for petitioners in No. 838. Reported below: 226 F. 2d 875.

No. 872. UNITED STATES EX REL. DURANTE *v.* HOLTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Salvatore E. Oddo* and *Joseph Mioduski* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for respondent. Reported below: 228 F. 2d 827.

No. 874. OPTICAL WORKERS' UNION LOCAL 24859 ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *J. Albert Woll, Thomas E. Harris* and *L. N. D. Wells* for petitioners. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 227 F. 2d 687, 229 F. 2d 170.

No. 876. DALEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Reuben Goodman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 231 F. 2d 123.

No. 877. NATIONAL LEAD CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *John B. Henrich, Jr.* for the National Lead Co., *Robert A. Sturges* for the Sherwin-Williams Co., *Richard Serviss* for the Eagle-Picher Co. et al., petitioners; and *Thomas J. McDowell* and *Nathan S. Blumberg* were also of counsel. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles H. Weston, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 227 F. 2d 825.

No. 882. LAYCOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Norman L. Easley* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 230 F. 2d 848.

No. 883. IN RE NORDA ESSENTIAL OIL & CHEMICAL CO., INC., *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Ash* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, Hilbert P. Zarky* and *Meyer Rothwacks* for the United States. Reported below: 230 F. 2d 764.

No. 884. ISBRANDTSEN CO., INC., *v.* NORTUNA SHIPPING CO. C. A. 2d Cir. Certiorari denied. *Woodson D. Scott* for petitioner. Reported below: 231 F. 2d 528.

No. 887. Evarts et al. *v.* Jones et al. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *George R. Johnson* for respondents. Reported below: 228 F. 2d 105.

No. 890. Louisiana Land & Exploration Co. *v.* State Mineral Board. C. A. 5th Cir. Certiorari denied. *Roberts C. Milling* and *Eugene D. Saunders* for petitioner. Reported below: 229 F. 2d 5.

No. 891. Fisher, Executrix, *v.* Pierce. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioner. *Walter J. Cummings, Jr.* for respondent. Reported below: 228 F. 2d 603.

No. 894. Edward E. Morgan Co., Inc., et al. *v.* United States for the use of Pelphrey. C. A. 5th Cir. Certiorari denied. *William Harold Cox* for petitioners. *Robert F. Ritchie* for respondent. Reported below: 230 F. 2d 896.

No. 895. In re McBride. Supreme Court of Ohio. Certiorari denied. *John J. Chester* for petitioner. Reported below: 164 Ohio St. 419, 132 N. E. 2d 113.

No. 903. Lewis *v.* Bokser et ux. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Roland J. Christy* for petitioner. Reported below: 383 Pa. 507, 119 A. 2d 67.

No. 905. Shafitz *v.* United States. C. A. 6th Cir. Certiorari denied. *G. Leslie Field* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 230 F. 2d 606.

No. 916. Dairy Products Co. *v.* Sleeth, Health Officer of Monongalia County, West Virginia. C. A. 4th Cir. Certiorari denied. *Glenn Hunter* and *Charles McCamic* for petitioner. *John G. Fox,* Attorney General of West Virginia, and *Albert M. Morgan* for respondent. Reported below: 228 F. 2d 165.

No. 941. American Steamship Owners Mutual Protection & Indemnity Association, Inc., *v.* Trinidad Corporation. C. A. 2d Cir. Certiorari denied. *Ira A. Campbell* and *Elmer C. Maddy* for petitioner. *Leonard J. Matteson* for respondent. Reported below: 229 F. 2d 57.

No. 774. Landeros *v.* New Jersey. Petition for writ of certiorari to the Supreme Court of New Jersey denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. *Morton Stavis* for petitioner. *Hyman Isaac* for respondent. Reported below: 20 N. J. 76, 118 A. 2d 524.

No. 809. Sawyer *v.* Barczak, Sheriff. C. A. 7th Cir. The motion to strike respondent's brief is denied. Certiorari also denied. *Alfons B. Landa, Delmar W. Holloman, Warren E. Magee, Carl R. Becker* and *Arthur J. Cerra* for petitioner. *Vernon W. Thomson,* Attorney General of Wisconsin, *William A. Platz,* Assistant Attorney General, and *William J. McCauley* for respondent. Reported below: 229 F. 2d 805.

No. 896. McHugh *v.* United States. C. A. 1st Cir. Certiorari denied. Mr. Justice Black is of the opinion certiorari should be granted. *Reuben Goodman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman* for the United States. Reported below: 230 F. 2d 252.

No. 889. BRIGGS ET AL. *v.* BRESWICK & CO. ET AL. C. A. 2d Cir. Certiorari denied. *Thomas F. Daly* for Briggs et al., and *James F. Dwyer* for Murchison et al., petitioners. *George Brussel, Jr.* for respondents.

No. 13, Misc. TENSLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent. Reported below: 3 Ill. 2d 615, 122 N. E. 2d 155.

No. 286, Misc. TOMPKINS *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. John M. Dalton,* Attorney General of Missouri, and *Samuel M. Watson,* Assistant Attorney General, for respondent.

No. 446, Misc. SCRANTON *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. *Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 542, Misc. SIPLE *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. 569, Misc. MCMORROW *v.* ALVIS, WARDEN. Court of Appeals of Ohio. Certiorari denied. Petitioner *pro se. C. William O'Neill,* Attorney General of Ohio, and *John W. Shoemaker,* Assistant Attorney General, for respondent.

No. 590, Misc. HENDERSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Ernest Goodman* for petitioner. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor

General, and *Daniel J. O'Hara*, Assistant Attorney General, for respondent. *G. Leslie Field* filed a brief for the American Civil Liberties Union, Metropolitan Detroit Branch, as *amicus curiae,* urging that the petition be granted. Reported below: 343 Mich. 465, 72 N. W. 2d 177.

No. 596, Misc. SALMOND *v.* ISBRANDTSEN CO., INC., ET AL. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. *Gilbert Rosenthal* for petitioner. *Vernon Sims Jones* and *James B. Magnor* for the Isbrandtsen Co., Inc., and *Frank A. Bull* for the Bethlehem Steel Co., respondents. Reported below: 286 App. Div. 1015, 144 N. Y. S. 2d 578.

No. 610, Misc. JOHNSON, ALIAS MARCIAL, *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *Edward S. Silver* and *William I. Siegel* for respondent.

No. 659, Misc. ILLINOIS EX REL. STEVENS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 666, Misc. RAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Acting Assistant Attorney General Leonard* and *Paul A. Sweeney* for the United States. Reported below: 228 F. 2d 574.

No. 703, Misc. MCKINNEY *v.* CALIFORNIA. Superior Court of California for Los Angeles County, Appellate Department. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 680, Misc. YARBROUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 230 F. 2d 56.

No. 714, Misc. LAMBERTSON *v.* NEW YORK ET AL. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 715, Misc. PENNSYLVANIA EX REL. PAYLOR *v.* JOHNSTON, WARDEN. Superior Court of Pennsylvania. Certiorari denied. Reported below: 180 Pa. Super. 228, 119 A. 2d 562.

No. 716, Misc. CARROLL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 721, Misc. LAZAROWITZ ET AL. *v.* VITALE ET AL. Court of Appeals of New York. Certiorari denied.

No. 726, Misc. BINDER *v.* UNITED STATES. C. A. 6th 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: 231 F. 2d 314.

No. 729, Misc. NEW YORK EX REL. DELLAQUILA *v.* MARTIN, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 736, Misc. WHITMORE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 730, Misc. GRAEBER *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 732, Misc. SIMEONE *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 737, Misc. JOHNSON *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 738, Misc. PULLEY *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 743, Misc. ROGERS *v.* MARTIN, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 750, Misc. MARSHALL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 752, Misc. TURNER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. *Solicitor General Sobeloff* for the United States et al., respondents. Reported below: 229 F. 2d 944.

No. 757, Misc. MORRIS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 758, Misc. HORN *v.* PASCOE ET AL. C. A. 6th Cir. Certiorari denied.

No. 759, Misc. MANARO *v.* ROSENBERG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 231 F. 2d 305.

No. 762, Misc. CAPANO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 764, Misc. Pratt *v.* Department of the Army et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 765, Misc. Hill *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 766, Misc. Severa *v.* Salvation Army, Inc. C. A. 3d Cir. Certiorari denied.

No. 768, Misc. In re Application of Morgan. Supreme Court of California. Certiorari denied.

No. 773, Misc. Byrd *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 775, Misc. Kurtz *v.* McNeill, Superintendent, Matteawan State Hospital. C. A. 2d Cir. Certiorari denied.

No. 776, Misc. Jones, alias Lucas, *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 778, Misc. Kelley *v.* Ellis, General Manager, Texas Prison System, et al. Court of Criminal Appeals of Texas. Certiorari denied.

No. 783, Misc. Dinwiddie et al. *v.* Brown et al. C. A. 5th Cir. Certiorari denied. *I. H. Spears* for petitioners. Reported below: 230 F. 2d 465.

No. 790, Misc. United States ex rel. Cordts *v.* Ragen, Warden. C. A. 7th Cir. Certiorari denied.

No. 794, Misc. Yost *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 229 F. 2d 75.

No. 713, Misc. WELLS *v.* KING, SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Charles R. Garry* and *Aubrey Grossman* for petitioner.

No. 937. CONTINENTAL CAN CO., INC., *v.* MAGIDA ET AL. C. A. 2d Cir. Certiorari denied. *Mark F. Hughes* for petitioner. *Morris J. Levy* for Magida, respondent. Reported below: 231 F. 2d 843.

No. 745, Misc. MORNEAU *v.* UNITED STATES BOARD OF PAROLE. C. A. 8th Cir. Certiorari denied. Reported below: 231 F. 2d 829.

No. 751, Misc. MCNALLY *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied. Reported below: 46 Cal. 2d 307, 293 P. 2d 777.

No. 793, Misc. CARITATIVO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *George T. Davis* for petitioner. Reported below: 46 Cal. 2d 68, 292 P. 2d 513.

No. 790. NATIONAL LABOR RELATIONS BOARD *v.* SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Herbert S. Thatcher* and *David Previant* for respondent. Reported below: 97 U. S. App. D. C. 173, 229 F. 2d 514.

No. 873. LEE *v.* AETNA CASUALTY & SURETY CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Albert Brick, Patricia Warren* and *Samuel Intrater* for petitioner. *Albert F. Beasley* for the Aetna Casualty & Surety Co. et al., and *W. Cameron Burton* for Miller, respondents. Reported below: 97 U. S. App. D. C. 213, 229 F. 2d 787.

No. 875. SUN OIL CO. *v.* ESSO STANDARD OIL CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward B. Beale* for petitioner. *Francis C. Browne, Thomas L. Mead, Jr., William E. Schuyler, Jr., Andrew B. Beveridge, Cyril D. Pearson* and *Francis X. Clair* for respondent. Reported below: 97 U. S. App. D. C. 154, 229 F. 2d 37.

No. 888. GULF OIL CORP. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Archie D. Gray, Merle E. Minks* and *Jesse P. Luton, Jr.* for petitioners. *Solicitor General Sobeloff, Melvin Richter, William W. Ross, Willard W. Gatchell, William J. Grove* and *Robert L. Russell* for respondents. Reported below: 97 U. S. App. D. C. 227, 230 F. 2d 40.

No. 901. SCHER *v.* WEEKS, SECRETARY OF COMMERCE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Josiah Lyman* for petitioner. *Solicitor General Sobeloff, Samuel D. Slade* and *B. Jenkins Middleton* for respondent. Reported below: 97 U. S. App. D. C. 335, 231 F. 2d 494.

No. 594, Misc. IN RE FLASPHALER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Homer Brooks* for petitioner. *Solici-*

tor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney and *William W. Ross* filed a brief for the Judges of the United States District Court for the District of Columbia, opposing the petition. Reported below: 97 U. S. App. D. C. 82, 228 F. 2d 53.

No. 909. UNITED STATES *v.* BOND. Court of Claims. Certiorari denied. *Solicitor General Sobeloff, Paul A. Sweeney* and *Herman Marcuse* for the United States. *Augustin M. Prentiss* for respondent. Reported below: 133 Ct. Cl. 204, 135 F. Supp. 433.

No. 653, Misc. LABONTE *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. Supreme Judicial Court of Massachusetts. Certiorari denied. *Samuel Perman* for petitioner. *Noel W. Deering* for respondent. Reported below: 333 Mass. 420, 131 N. E. 2d 203.

No. 682, Misc. COOK *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: —— Miss. ——, 83 So. 2d 632.

No. 683, Misc. REDD *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: —— Miss. ——, 84 So. 2d 425.

No. 722, Misc. LEBRON ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ben Paul Noble* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. Reported below: 97 U. S. App. D. C. 133, 229 F. 2d 16.

No. 739, Misc. WILLIAMS *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 209 Md. 641, 120 A. 2d 919.

No. 733, Misc. MAUPIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 232 F. 2d 838.

No. 756, Misc. ATTERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 2d 837.

No. 763, Misc. RICHTER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 21 N. J. 421, 122 A. 2d 502.

No. 784, Misc. BURDIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 231 F. 2d 893.

No. 787, Misc. SORBER *v.* WIGGINS, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. Supreme Court of Mississippi. Certiorari denied. *R. D. Everitt* for petitioner. Reported below: —— Miss. ——, 85 So. 2d 479.

No. 791, Misc. HOUSTON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Preston Pope Reynolds* for petitioner. Reported below: —— Tex. Cr. R. ——, 287 S. W. 2d 643.

Rehearing Denied.

No. 227. UNITED MINE WORKERS OF AMERICA ET AL. *v.* ARKANSAS OAK FLOORING CO., *ante*, p. 62. Rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application.

JUNE 11, 1956.

Decisions Per Curiam.

No. 861. SWORD LINE, INC., *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* Certiorari is granted, limited to the question whether admiralty had jurisdiction over the controversy stated in the libel, and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a maritime contract. *Archawski* v. *Hanioti,* 350 U. S. 532. *Affirmed. Theodore J. Breitwieser* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 228 F. 2d 344, 230 F. 2d 75.

No. 915. TROCK *v.* UNITED STATES. 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. *Hoffman* v. *United States,* 341 U. S. 479. *Harry Krauss* and *Albert Schlefer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 232 F. 2d 839.

No. 697, Misc. MONGE *v.* SMYTH, COLLECTOR OF INTERNAL REVENUE. Appeal from and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The appeal is dismissed for want of jurisdiction. The petition for writ of certiorari is denied. *Wareham C. Seaman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Hilbert P. Zarky* for respondent. Reported below: 229 F. 2d 361.

No. 780, Misc. GROSS *v.* CALIFORNIA. Appeal from and petition for writ of certiorari to the Supreme Court of California. *Per Curiam:* The appeal is dismissed. The petition for writ of certiorari is denied.

Orders Appointing Clerk and Deputy Clerk.

IT IS ORDERED that John T. Fey be appointed Clerk of this Court to succeed Harold B. Willey effective at the close of business June 30, 1956, and that he take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

IT IS ORDERED that Crombie J. D. Garrett be appointed a Deputy Clerk of this Court effective at the close of business June 30, 1956.

Miscellaneous Orders.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. It is ordered by this Court that the compensation of George I. Haight as Special Master for services rendered by him in his lifetime pursuant to the order entered in this cause on June 1, 1954, be and the same is hereby fixed in the sum of $35,000; and that said sum shall be paid by the parties to Kathleen Haight, Executrix of the Estate of George I. Haight, deceased, in the following proportions: Arizona 25%, California 25%, United States 25%, Nevada 20%, New Mexico 2½%, Utah 2½%. THE CHIEF JUSTICE took no part in the consideration or decision of this question.

No. ——, Original. ARKANSAS *v.* TEXAS ET AL. It appearing that the controversy between the parties has been settled and that the State of Arkansas wishes to withdraw its Motion for Leave to File Complaint, the

request is granted and the proceeding is dismissed as moot. *Tom Gentry,* Attorney General, and *E. J. Ball* for the State of Arkansas, complainant. *John Ben Shepperd,* Attorney General, and *William H. Holloway* and *Marietta McGregor Creel,* Assistant Attorneys General, for the State of Texas et al., defendants.

No. 15, Original. UNITED STATES *v.* LOUISIANA.

Upon consideration of the motion of the United States for an injunction or other interlocutory relief in cases involving the controversy pending before this Court in the case of *United States of America* v. *State of Louisiana,*

IT IS ORDERED that the Attorney General of the State of Louisiana and others named and others acting with them are enjoined from further prosecuting or taking any proceedings in a certain cause now pending in the Fourteenth Judicial District Court in and for the Parish of Calcasieu, State of Louisiana, entitled *State of Louisiana* v. *Anderson-Prichard Oil Corporation et al.,* Number 38780 on the docket of said court, and from prosecuting any other case or cases involving the controversy before this Court until further order of the Court, and

IT IS FURTHER ORDERED that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed tidelands area pending further order of this Court unless by agreement of the parties filed here.

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 and *John F. Davis* for the United States, plaintiff. *Jack P. F. Gremillion,* Attorney General, *Edward M. Carmouche, John L. Madden,* Special Assistant Attorneys General, *W. Scott Wilkinson* and *Bailey Walsh* for the State of Louisiana, defendant.

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, 350 U. S. 815.) The motion to schedule this case for argument in December is denied. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Solicitor General Sobeloff* and *Assistant Attorney General Barnes* for the United States. *John Lord O'Brian, Hugh B. Cox* and *Charles A. Horsky* for the E. I. du Pont de Nemours & Co., appellee; and *Robert L. Stern* and *Henry M. Hogan* for the General Motors Corporation, appellee-movant. Reported below: 126 F. Supp. 235.

No. 241. NATIONAL LABOR RELATIONS BOARD *v.* LION OIL CO. Certiorari, 350 U. S. 986, to the United States Court of Appeals for the Eighth Circuit. The joint motion to join Monsanto Chemical Co. as a party respondent is granted. *Solicitor General Sobeloff* for petitioner. *Jeff Davis* for the Lion Oil Co. and Monsanto Chemical Co., respondents. Reported below: 221 F. 2d 231.

No. 451. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL., *ante*, p. 225. The motion to stay the mandate is denied. *Lester P. Schoene* and *Milton Kramer* for appellants. *Edson Smith* for Hanson et al., appellees-movants.

No. 5, Misc. MERKIE *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, for respondent.

No. 929. GINSBURG *v.* GREGG ET AL. C. A. 3d Cir. Certiorari denied. The alternative motion for leave to file petition for writ of mandamus is also denied. *Paul Ginsburg* for petitioner. Reported below: 228 F. 2d 881.

No. 470. UNITED STATES *v.* SHOTWELL MANUFACTURING CO. ET AL.; and

No. 471. SHOTWELL MANUFACTURING CO. ET AL. *v.* UNITED STATES. On petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit. The motion of the Solicitor General to defer consideration of the petitions for writs of certiorari is granted. *Solicitor General Sobeloff* for the United States, movant. *Harold A. Smith* and *Howard Ellis* for petitioners in No. 471 and respondents in No. 470. Reported below: 225 F. 2d 394.

No. 19. MASTRO PLASTICS CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 350 U. S. 270. Petition for rehearing denied. The motion for correction of the opinion is also denied.

No. 312. UNITED STATES *v.* OHIO POWER CO. The order of December 5, 1955, 350 U. S. 919, denying the petition for rehearing, is vacated and the petition for rehearing is continued.

No. 740, Misc. HORN *v.* MELLOTT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 788, Misc. CLARK *v.* UNITED STATES. Application denied.

Probable Jurisdiction Noted.

No. 800. UNITED STATES *v.* HOWARD, TRADING AS STOKES FISH CO. Appeal from the United States District Court for the Southern District of Florida. Probable jurisdiction noted. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. *Clarence L. Thacker* for appellee.

Certiorari Granted. (*See also Nos. 861 and 915, supra.*)

No. 923. UNITED STATES *v.* ALLEN-BRADLEY CO. Court of Claims. Certiorari granted. *Solicitor General Sobeloff, Assistant Attorney General Rice* and *Hilbert P. Zarky* for the United States. *Harvey W. Peters* for respondent. Reported below: 134 Ct. Cl. 800.

No. 907. CEBALLOS (Y ARBOLEDA) *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Blanch Freedman* and *Gloria Agrin* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 229 F. 2d 592.

No. 922. GUNACA *v.* NATIONAL LABOR RELATIONS BOARD EX REL. KOHLER COMPANY. C. A. 7th Cir. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the National Labor Relations Board. *Joseph L. Rauh, Jr., John Silard* and *Harold A. Cranefield* for petitioner. *John C. Gall, Wm. F. Howe, Jerome Powell* and *Lyman C. Conger* for respondent. Reported below: 230 F. 2d 542.

No. 917. UNITED STATES *v.* SCHNEER'S ATLANTA, INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Sobeloff* and *Samuel D. Slade* for the United States. *M. Hardeman Blackshear, Jr.* for respondent. Reported below: 229 F. 2d 612.

No. 988. NATIONAL LEAD CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted. *Lawrence S. Lesser* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 230 F. 2d 161.

Certiorari Denied. (*See also No. 929 and Misc. Nos. 697 and 780, supra.*)

No. 510. BROWN ET AL. *v.* PIZER ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Ben Margolis* for petitioners. *Robert R. Rissman, Fred Okrand* and *Arthur J. Goldberg* for respondents. Reported below: 133 Cal. App. 2d 367, 283 P. 2d 1055.

No. 912. STOUT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Paul Reed Taylor* for petitioners. *Solicitor General Sobeloff, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 229 F. 2d 918.

No. 918. MULLINS *v.* CLINCHFIELD COAL CORP. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Wm. A. Stuart* for respondent. Reported below: 227 F. 2d 881.

No. 920. MARSHALL *v.* MAGINNIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 229 F. 2d 347.

No. 921. LEE, ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Richard Steel* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Rice, Hilbert P. Zarky* and *Carolyn R. Just* for respondent. Reported below: 227 F. 2d 181.

No. 924. HUDSON & MANHATTAN RAILROAD CO. *v.* HARDING ET AL. C. A. 2d Cir. Certiorari denied. *Julius Hallheimer* and *Otis Mark Waters* for petitioner. *Solicitor General Sobeloff, Thomas G. Meeker* and *David Ferber* for the Securities & Exchange Commission, *Edward M. Garlock* and *David Vorhaus* for Harding et al., and *William W. Golub* and *Myron S. Isaacs* for Stichman, respondents. Reported below: 229 F. 2d 616.

No. 926. Otten *v.* Staten Island Rapid Transit Railway Co. et al. C. A. 2d Cir. Certiorari denied. *Leone Pecoraro* for petitioner. *Edwin H. Burgess* and *Sydney R. Prince, Jr.* for the Staten Island Rapid Transit Railway Co., and *Milton Kramer* and *Lester P. Schoene* for the International Brotherhood of Electrical Workers, respondents. Reported below: 229 F. 2d 919.

No. 931. Baltimore & Ohio Railroad Co. *v.* Connell, U. S. District Judge. C. A. 6th Cir. Certiorari denied. *E. H. Burgess* and *Kenneth H. Ekin* for petitioner. *George Henry Lavan* for respondent. Reported below: 230 F. 2d 948.

No. 933. Alvado et al. *v.* General Motors Corp. C. A. 2d Cir. Certiorari denied. *Sheldon E. Bernstein* for petitioners. *Henry M. Hogan* for respondent. Reported below: 229 F. 2d 408.

No. 934. American Eastern Corp. *v.* United States. C. A. 2d Cir. Certiorari denied. *J. Franklin Fort, John Cunningham* and *Israel Convisser* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 231 F. 2d 664.

No. 942. Lenz *v.* Cobo, Mayor of Detroit. Supreme Court of Michigan. Certiorari denied. *Craig Thompson* for petitioner. *G. Edwin Slater* for respondent. Reported below: 343 Mich. 599, 73 N. W. 2d 285.

No. 943. Caywood *v.* United States. C. A. 9th Cir. Certiorari denied. *John P. Frank* and *Edwin Beauchamp* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 232 F. 2d 220.

No. 945. BURNETT ET AL. *v.* GRAVES ET AL. C. A. 5th Cir. Certiorari denied. *Joseph T. Enright* for petitioners. *Charles L. Black* for respondents. Reported below: 230 F. 2d 49.

No. 946. HARDY *v.* BANKERS LIFE & CASUALTY CO. ET AL. C. A. 7th Cir. Certiorari denied. *Irving Breakstone* and *John O'C. Fitzgerald* for petitioner. *Charles F. Short, Jr.* for respondents. Reported below: 232 F. 2d 205.

No. 962. ROSEBUD COUNTY, MONTANA, *v.* BENTLEY ET AL. C. A. 9th Cir. Certiorari denied. *Lyman Brewster* for petitioner. *Sterling M. Wood* for respondents. Reported below: 230 F. 2d 1.

No. 965. CARTER, ALIAS PONTO, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. O. Cooper, Jr.* for petitioners. *Solicitor General Sobeloff* for the United States. Reported below: 231 F. 2d 232.

No. 967. PENNSYLVANIA GREYHOUND LINES, INC., *v.* ROWE ET AL. C. A. 2d Cir. Certiorari denied. *Livingston Platt* and *Clarence E. Mellen* for petitioner. *Seymour J. Wilner* for respondents. Reported below: 231 F. 2d 922.

No. 984. TEXAS & PACIFIC RAILWAY CO. *v.* BUCKLES ET AL. C. A. 5th Cir. Certiorari denied. *Charles D. Egan* for petitioner. *L. L. Lockard* for Stanley, respondent. Reported below: 232 F. 2d 257.

No. 2, Misc. GIARRATANO *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, for respondent.

No. 994. GIRARD LODGE No. 100 ET AL. *v.* GRAND LODGE, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *George Morris Fay, Lawrence J. Richette* and *John P. Burke* for petitioners. *Allen S. Olmsted, 2nd,* and *Walter Biddle Saul* for respondent. Reported below: 384 Pa. 248, 120 A. 2d 523.

No. 4, Misc. HOPKINS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 75, Misc. SIMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 174, Misc. CROCKARD *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. 218, Misc. DUPONT *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 439, Misc. STANTON *v.* CASTLE, ATTORNEY GENERAL. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 509, Misc. ROCK *v.* WEBB, WARDEN. Supreme Court of California. Certiorari denied. 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.

No. 515, Misc. WILLIAMS *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. 549, Misc. WILLIAMS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. *R. Arthur Jett* and *Harry H. Kanter* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for respondents. Reported below: 228 F. 2d 129.

No. 573, Misc. HARTFIELD *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle,* Attorney General of Illinois, for respondent.

No. 670, Misc. TAYLOR *v.* UNITED STATES. C. A. 8th 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: 229 F. 2d 826.

No. 676, Misc. DAVIS *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: 230 F. 2d 869.

No. 696, Misc. BROWN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 228 F. 2d 286.

No. 728, Misc. SANSONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *David du Vivier* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 231 F. 2d 887.

No. 769, Misc. STOKES *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 770, Misc. RICHARDSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 789, Misc. DAVIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 792, Misc. STELLOH *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 796, Misc. LEGG *v.* UNITED BENEFIT LIFE INSURANCE CO. Supreme Court of California. Certiorari denied.

No. 797, Misc. TUNE *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. *Edward J. Gilhooly* and *Charles Danzig* for petitioner. Reported below: 230 F. 2d 883.

No. 799, Misc. CORBIN *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Paul James Maxwell* for petitioner. Reported below: 212 Ga. 231, 91 S. E. 2d 764.

No. 741, Misc. CLOSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 232 F. 2d 889.

No. 739. FRENCH *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Charles E. Heidingsfelder, Jr.* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *John A. Wild,* Assistant Attorney General, for respondent. Reported below: 162 Tex. Cr. R. —, 284 S. W. 2d 359.

No. 898. SMITH-JOHNSON STEAMSHIP CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Arthur M. Becker* and *George Bronz* for petitioner. *Solicitor General Sobeloff, Paul A. Sweeney, Leavenworth Colby* and *Herman Marcuse* for the United States. Reported below: — Ct. Cl. —, 139 F. Supp. 298.

No. 906. AMERICAN FLINT GLASS WORKERS' UNION OF NORTH AMERICA, AFL-CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph A. Robie* and *Edward J. Hickey, Jr.* for petitioners. *Solicitor General Sobeloff, Theophil C. Kammholz, David P. Findling, Dominick L. Manoli* and *Fannie M. Boyls* for respondent. Reported below: 97 U. S. App. D. C. 244, 230 F. 2d 212.

No. 928. OFFUTT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren E. Magee* and *Charlotte Maskey* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 98 U. S. App. D. C. —, 232 F. 2d 69.

No. 952. SKLAROFF ET UX. *v.* SKEADAS ET UX. Supreme Court of Rhode Island. Certiorari denied. *Frederick Bernays Wiener* and *Irving Brodsky* for petitioners. *Nicholas J. Chase* for respondents. Reported below: — R. I. —, 122 A. 2d 444.

No. 950. GICHNER IRON WORKS, INC., *v.* HANNA ET VIR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard W. Galiher* and *William E. Stewart, Jr.* for petitioner. *Paul R. Connolly* for respondents. Reported below: 97 U. S. App. D. C. 310, 231 F. 2d 469.

No. 607, Misc. WOOLRIDGE *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* and *Beatrice Rosenberg* for the United States. Reported below: 97 U. S. App. D. C. 67, 228 F. 2d 38.

No. 631, Misc. ASKINS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George E. C. Hayes* for petitioner. Reported below: 97 U. S. App. D. C. 407, 231 F. 2d 741.

No. 702, Misc. TILLOTSON *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 petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 97 U. S. App. D. C. 402, 231 F. 2d 736.

No. 772, Misc. BRAMBLE *v.* HEINZE, WARDEN, ET AL. Petition for writ of certiorari to the Supreme Court of California denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

Rehearing Denied. (*See also Nos. 19 and 312, ante, p. 980.*)

No. 222. PREFERRED INSURANCE CO. ET AL. *v.* UNITED STATES, 350 U. S. 837. The motion for leave to file a petition for rehearing is denied.

No. 383. GENERAL BOX CO. *v.* UNITED STATES, *ante*, p. 159;

No. 496. NATIONAL LAWYERS GUILD *v.* BROWNELL, ATTORNEY GENERAL, *ante*, p. 927;

No. 761. OLIN MATHIESON CHEMICAL CORP. *v.* WESTERN STATES CUTLERY & MANUFACTURING CO. ET AL., *ante*, p. 937;

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No. 802. UNION OIL CO. OF CALIFORNIA *v.* CALIFORNIA, *ante*, p. 929;

No. 830. BOYNTON *v.* PEDRICK, ADMINISTRATRIX, *ante*, p. 938; and

No. 834. FLOYD *v.* UNITED STATES, *ante*, p. 938. Petitions for rehearing denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1953, 1954, AND 1955

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1953	1954	1955	1953	1954	1955	1953	1954	1955	1953	1954	1955
Number of cases on dockets	11	11	15	815	843	1,020	637	712	821	1,463	1,566	1,856
Number disposed of during terms	0	0	4	694	721	865	609	640	768	1,303	1,361	1,637
Number remaining on dockets	11	11	11	121	122	155	28	72	53	160	205	219

	TERMS		
	1953	1954	1955
Distribution of cases disposed of during terms:			
Original cases	0	0	4
Appellate cases on merits	172	189	222
Petitions for certiorari	522	532	643
Miscellaneous docket applications	609	640	768

	TERMS		
	1953	1954	1955
Distribution of cases remaining on dockets:			
Original cases	11	11	11
Appellate cases on merits	52	67	79
Petitions for certiorari	69	55	76
Miscellaneous docket applications	28	72	53

JUNE 12, 1956.

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