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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1956

OCTOBER 1, 1956, THROUGH MARCH 11, 1957

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ERRATA.

280 U. S. 103, line 19: "affirmed" should be "reversed."

351 U. S. 930, No. 636: Citations should be "309 N. Y. 94, 801, 127 N. E. 2d 827, 130 N. E. 2d 602."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.[1]
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.[2]
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.[3]

HERBERT BROWNELL, Jr., Attorney General
J. LEE RANKIN, Solicitor General.[4]
JOHN T. FEY, Clerk.[5]
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

Notes on p. IV.

NOTES.

[1] MR. JUSTICE REED retired effective February 25, 1957. See *post*, p. XIII.

[2] MR. JUSTICE MINTON retired effective October 15, 1956. See *post*, p. VII.

[3] The Honorable William J. Brennan, Jr., formerly an Associate Justice of the Supreme Court of New Jersey, was appointed an Associate Justice of this Court by President Eisenhower, a recess appointment, on October 15, 1956. He took the oaths and his seat on October 16, 1956. See *post*, p. IX. He was nominated by President Eisenhower on January 14, 1957; the nomination was confirmed by the Senate on March 19, 1957; he was given a new commission on March 21, 1957; and he again took the oaths on March 22, 1957.

[4] Solicitor General Sobeloff resigned effective July 19, 1956, to accept appointment as a Judge of the United States Court of Appeals for the Fourth Circuit. Mr. J. Lee Rankin was appointed Solicitor General by President Eisenhower, a recess appointment, on August 14, 1956, and he took the oath on the following day. He was nominated by President Eisenhower on January 14, 1957; the nomination was confirmed by the Senate on May 28, 1957; and he was recommissioned on May 29, 1957.

[5] Mr. John T. Fey was appointed Clerk of the Court to succeed Harold B. Willey, effective at the close of business June 30, 1956. Mr. Fey took his oath on that day. See 351 U. S., pp. V, 977.

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, WILLIAM J. BRENNAN, JR., 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, HAROLD H. BURTON, Associate Justice.

For the Eighth Circuit, TOM C. CLARK, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, TOM C. CLARK, Associate Justice.

October 16, 1956.

(For next previous allotment, see 351 U. S., p. IV.)

*By order of March 4, 1957, the Court temporarily assigned MR. JUSTICE BURTON to the Sixth Circuit. See *post*, p. 1021.

RETIREMENT OF MR. JUSTICE MINTON AND APPOINTMENT OF MR. JUSTICE BRENNAN.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, OCTOBER 16, 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 HARLAN.

THE CHIEF JUSTICE said:

With the concurrence of all my colleagues, I announce with regret the retirement from this Court of Mr. Justice Minton. He has been more than our associate. He has been our companion. We are reconciled to his departure only because it is in the interests of his health. We all wish for him in his retirement a restoration of his vigor and the satisfaction to which his distinguished services to his country so justly entitle him. Our appreciation of his services and our personal regard for him are more adequately expressed in a letter to him which, together with his warm reply, will be spread upon the Minutes of the Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington 25, D. C., October 15, 1956.

DEAR JUSTICE MINTON:

As the day of your retirement from service on the Supreme Court arrives, the realization of our loss bears down upon us. If considerations other than your health had

prompted your decision, we would have joined in urging you to remain with us in active service. We appreciate, however, the sacrifice that your adherence to duty has already occasioned you. Both our admiration for you and our concern for your well-being have increased as you have so faithfully carried on your duties without the loss of a single day in recent years, either from the Bench or the Conference.

You have earned retirement—a long and satisfying one. Your distinguished services to your country as an Infantry Captain overseas in World War I, as a Senator from your native State of Indiana, as an Assistant to the President of the United States, as a member for eight years of the Court of Appeals for the Seventh Circuit, and for the past seven years as a Justice of the Supreme Court justly entitle you to the opportunity which retirement will afford you to recover your health.

We shall miss both your wise counsel and our constant companionship with you. While you no longer will be with us daily, you will continue to be one of us.

Sincerely,

EARL WARREN
HUGO L. BLACK
STANLEY F. REED
FELIX FRANKFURTER
WILLIAM O. DOUGLAS
HAROLD H. BURTON
TOM C. CLARK
JOHN M. HARLAN

HONORABLE SHERMAN MINTON,
Associate Justice of the Supreme Court,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE SHERMAN MINTON,
Washington 13, D. C., October 15, 1956.

MY DEAR CHIEF JUSTICE AND COLLEAGUES:

I am deeply grateful to all of you for the considerate and more than generous comments contained in your letter concerning my retirement.

My stay here has been a happy and rewarding one, sweetened always by the many acts of kindness and friendship you have shown me. It is with much regret that I take my leave of the Court and you, but it is comforting to know that I am still accepted as one of you.

I shall often think of you as I watch from afar. My fondest recollections will be of the Court and each of you with whom I have served.

Faithfully yours,
SHERMAN MINTON

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES.

THE CHIEF JUSTICE said:

We also welcome his successor. The President has appointed the Honorable William Joseph Brennan, Jr., an Associate Justice of the Supreme Court of New Jersey, to succeed Mr. Justice Minton. Justice Brennan has taken the Constitutional Oath administered by the Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the Bench.

The Clerk then read the commission as follows:

DWIGHT D. EISENHOWER,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness and Learning of William Joseph Brennan, Jr., of New Jersey I do appoint him Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said William Joseph Brennan, Jr., until the end of the next session of the Senate of the United States and no longer; subject to the provisions of law.

IN TESTIMONY WHEREOF, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this fifteenth day of October, in the year of our Lord one thousand nine hundred and fifty-six and of the Independence of the United States of America the one hundred and eighty-first.

[SEAL] DWIGHT D. EISENHOWER

By the President:
HERBERT BROWNELL JR.
Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE BRENNAN was escorted by the Marshal to his seat on the bench.

The oaths taken by MR. JUSTICE BRENNAN are in the following words, viz:

I, William Joseph Brennan, Jr., do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

WILLIAM JOSEPH BRENNAN, JR.

Subscribed and sworn to before me this sixteenth day of October, A. D., 1956.

EARL WARREN,
Chief Justice of the United States.

I, William Joseph Brennan, Jr., do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

So help me God.

WILLIAM JOSEPH BRENNAN, JR.

Subscribed and sworn to before me this sixteenth day of October, A. D., 1956.

JOHN T. FEY,
Clerk of the Supreme Court of the United States.

RETIREMENT OF MR. JUSTICE REED.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 25, 1957.

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

THE CHIEF JUSTICE said:

On January 31, 1938, more than nineteen years ago, Mr. Justice Reed, already rich in governmental service and in the practice of his profession, took his oath of office as a member of this Court. There is but one of us—MR. JUSTICE BLACK—who was here on that occasion to welcome him. During the intervening years, he has served with four Chief Justices and eighteen Associate Justices, all of whom became indebted to him in their joint work of the Court for the wide range of his knowledge, the depth of his wisdom, and the warmth of his personality.

Today he retires, having established himself in the hearts of all of us and after having made a significant contribution to American constitutional law.

We, who are his associates, regret his retirement but only in the sense that we shall be deprived of his daily companionship and wise counsel.

For him, we rejoice that this retirement comes while he is in full vigor of mind and body, and capable of enjoying the many good things of life, which his long and devoted public service has compelled him to forego.

Our personal regard for him and our appreciation of his great service to the Court are most adequately expressed in our letter to him which, with his brotherly reply, will be spread upon the Minutes of the Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington 25, D. C., February 23, 1957.

Honorable STANLEY F. REED,
Associate Justice of the Supreme Court,
Washington, D. C.

DEAR JUSTICE REED:

It will seem strange, indeed, after next Monday not to see you in the chairs you have occupied on the bench and in the conference room for the past nineteen years. Only one of our number can recall, as a member of the Court, when you were not a part of it. All of us will remember throughout life the contribution you have made to the work of the Court and your companionship with each of us. This companionship we shall miss, but we have no right to regret your well-earned retirement.

Since 1929, when you came from your home State of Kentucky to Washington, as General Counsel of the Federal Farm Board, and thereafter successively as General Counsel of the Reconstruction Finance Corporation, as Special Assistant to the Attorney General, as Solicitor General of the United States, and as an Associate Justice of this Court, you have given completely twenty-eight of the best years of your life to the nation. More could not be asked of anyone.

You richly deserve the relaxation, which will flow from the relinquishment of the duties you have borne so conscientiously these many years. We rejoice that you are in the good health and spirits to enjoy some of the finer things in life that strict attention to duty has heretofore compelled you to forego.

We shall miss our official association with you, but our friendship and our best wishes for your happiness will always remain unchanged.

Sincerely,

EARL WARREN
HUGO L. BLACK
FELIX FRANKFURTER
WILLIAM O. DOUGLAS
HAROLD H. BURTON
TOM C. CLARK
JOHN M. HARLAN
WILLIAM J. BRENNAN, JR.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., February 25, 1957.

DEAR BRETHREN:

Your gracious letter on my retirement epitomized the close personal relationship between the members of this Court. I shall miss the intimate association that joint interests in the fair administration of justice has engendered.

I, too, shall look forward to the continuance of the close friendships that have thus been nurtured.

That common and abiding interest in the welfare of our Country that has animated our discussions and decisions will hold us together in friendly intercourse during the future years.

With all good wishes for each of you, I am

Faithfully yours,

STANLEY REED.

THE CHIEF JUSTICE
MR. JUSTICE BLACK
MR. JUSTICE FRANKFURTER
MR. JUSTICE DOUGLAS
MR. JUSTICE BURTON
MR. JUSTICE CLARK
MR. JUSTICE HARLAN
MR. JUSTICE BRENNAN

TABLE OF CASES REPORTED

NOTE: Cases reported before page 801 are those decided with opinions of the Court. Those reported on pages 801 *et seq.* are memorandum decisions and orders.

404165 O—57——2

404165 O—57——3

404165 O—57——4

404165 O—57——5

TABLE OF CASES CITED

TABLE OF STATUTES CITED

(A) Statutes of the United States.

(B) Statutes of the States and Territories.

(C) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1956.

MESAROSH, ALIAS NELSON, ET AL. *v.* UNITED STATES.

ON MOTION TO REMAND.

No. 20. Argued and decided October 10, 1956.—Opinions delivered November 5, 1956.

In a Federal District Court, petitioners were convicted of conspiring to violate the Smith Act by advocating the overthrow of the Government of the United States by force and violence. The Court of Appeals affirmed. While a review was pending in this Court, the Solicitor General moved that the case be remanded to the District Court for a determination as to the credibility of the testimony of one of the government witnesses at the trial. He stated that the Government believes that the testimony of this witness at the trial "was entirely truthful and credible," but that, on the basis of information in its possession, the Government now has serious reason to doubt the truthfulness of testimony given by the same witness in other proceedings. Parts of the testimony of this witness in other proceedings were positively established as untrue, and the Solicitor General stated on the argument that he believed other parts to be untrue. Petitioners moved that the case be remanded to the District Court for a new trial. *Held:* Solely on the basis of the Government's representations in its written motion and the statements of the Solicitor General during the argument on the motions, and without reaching any other issue, the Government's motion is denied, the judgment is reversed, and the case is remanded to the District Court with instructions to grant petitioners a new trial. Pp. 3–14.

1. The witness's credibility has been wholly discredited by the disclosures of the Solicitor General; the dignity of the United States Government will not permit the conviction of any person on tainted testimony; this conviction is tainted; and justice requires that petitioners be accorded a new trial. Pp. 4–9.

2. The situation presented by the Government's motion in this case is entirely different from that presented by a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. P. 9.

3. In this case, it cannot be determined conclusively by any court that the testimony of this discredited witness before a jury was insignificant in the general case against petitioners; it has tainted the trial as to all petitioners. Pp. 10–11.

4. In this criminal case, where the finder of fact was a jury, the District Judge is not the proper agency to determine that there was sufficient other evidence to sustain a conviction; only the jury can determine what it would do on a different body of evidence. *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115, distinguished. Pp. 11–13.

5. There is no factual issue upon which the District Court could make an unassailable finding that this witness's other falsehoods were differentiated from his testimony herein. P. 13.

6. This Court has supervisory jurisdiction over the proceedings of the federal courts. P. 14.

223 F. 2d 449, reversed and remanded to the District Court.

Solicitor General Rankin argued in support of the Government's motion to remand. *Assistant Attorney General Tompkins* was with him on the motion.

Frank J. Donner argued in opposition to the Government's motion and in support of petitioners' motion that the case be remanded to the District Court for a new trial. *Arthur Kinoy, Marshall Perlin* and *Hubert T. Delany* were with him on petitioners' motion and a supporting memorandum.

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

The decision herein passes only on the integrity of a criminal trial in the federal courts. It does not determine the guilt or innocence of the petitioners, and we do not reach other issues propounded in the lengthy briefs or which may be present in the trial record of 5,147 pages. The Solicitor General of the United States moved to remand the case to the trial court for further proceedings because of untruthful testimony given before other tribunals by Joseph D. Mazzei, a Government witness in this case. The counter-motion of petitioners asked for a new trial. The decision is based entirely upon the representations of the Government in its written motion and on the statements of the Solicitor General during the argument on the motions.[1]

The petitioners were charged in a one-count indictment in the District Court for the Western District of Pennsylvania with conspiracy to violate the Smith Act.[2] They

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[1] The Court directed that oral argument on the motions be heard at the time previously scheduled for the argument on the merits. 352 U. S. 808. MR. JUSTICE FRANKFURTER, believing the motion should be granted without argument, filed a dissent.

After hearing argument on the motions, October 10, 1956, the Court recessed to consider the matter, following which its decision to order a new trial was announced from the bench. 352 U. S. 862. Argument on the merits, therefore, was not heard. MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN dissented from the denial of the Government's motion to remand.

This opinion has been written to amplify the decision announced October 10, 1956. It should be noted that MR. JUSTICE MINTON participated in the consideration and decision of the motions, voting in favor of the order of the Court. On October 15, 1956, prior to the writing of this opinion, he retired from the Court. Therefore he did not participate in the consideration of this opinion.

[2] It was alleged that between 1945 and the date of the indictment the petitioners had conspired to advocate the overthrow of the Gov-

were convicted, and the Court of Appeals for the Third Circuit, sitting *en banc,* affirmed by a divided court. 223 F. 2d 449. This Court granted the petition for writ of certiorari, 350 U. S. 922, and the case was scheduled for argument on October 10, 1956.

On September 27, 1956, the Solicitor General of the United States filed a motion calling the attention of the Court to the testimony given in other proceedings by Mazzei, who was one of the seven witnesses for the Government in this case. In his motion, he stated that the Government, on the information in its possession, now has serious reason to doubt the truthfulness of Mazzei's testimony in those proceedings. While adhering to its position that "the testimony given by Mazzei at the trial [in this case] was entirely truthful and credible," the motion stated that "these incidents, taken cumulatively, lead us to suggest that the issue of his truthfulness at the trial of these petitioners should now be determined by the District Court after a hearing."

The material cited by the Government indicating the untruthfulness of Mazzei on occasions other than this trial can best be presented by setting forth verbatim the description of these incidents presented in the Motion of the Government to Remand:

> "On June 18, 1953, Mazzei testified before the Senate Permanent Subcommittee on Investigations, in Washington, D. C., that, at a meeting of the Civil Rights Congress on December 4, 1952, one Louis

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ernment of the United States by force and violence and to organize a society or group, the Communist Party, devoted to that purpose. The trial judge ruled that the organization charge was barred by the statute of limitations, but that evidence concerning the 1945 organization of the Communist Party, as well as earlier events, was admissible in determining whether petitioners had conspired to advocate violence.

Bortz told him that he, Bortz, had been 'selected by the Communist Party to do a job in the liquidation of Senator Joseph McCarthy.' Mazzei further testified that the said Bortz conducted Communist Party classes in Pittsburgh to familiarize Party members with the handling of firearms and to instruct them in the construction of bombs.

"On November 14, 1952, Mazzei pleaded guilty to charges of adultery and bastardy in a Pennsylvania state court. This fact was brought out during his cross-examination at the petitioners' trial. On October 2, 1953—after the completion of the trial—Mazzei filed a petition in the state court to have the guilty plea set aside. One of the grounds set forth in his petition was that he 'was not guilty of the charge to which he was induced to plead * * * but did so only in his official capacity (as a Government informant) at the insistence of his superior in the FBI to avoid testifying.' At a hearing on the above petition on October 6, 1953, a Special Agent of the FBI denied Mazzei's allegations under oath. Mazzei's petition was dismissed by the court on October 6, 1953.

"In November 1953, Mazzei, at a secret proceeding, identified a certain Government official as a long-time active Communist Party member.

"On June 10 and 11, 1955, Mazzei testified before the Senate Subcommittee on Internal Security regarding possible Communist influences motivating attempts to discredit Justice Michael Musmanno of the Supreme Court of Pennsylvania. In the course of his testimony, Mazzei identified John J. Mullen, National Director, Political Action Committee, Steel Workers of America, as a member of the Communist Party in Pittsburgh during the period that Mazzei

was a Government informant. Mazzei also testified that since 1942 he met Mullen ten or fifteen times a year, as a fellow Communist Party member.

"On July 2, 1956, Mazzei testified in disbarment proceedings against one Leo Sheiner before the Circuit Court of the Eleventh Judicial Circuit of Florida, in Miami. On cross-examination, Mazzei reiterated his charge that he was induced to plead guilty to the adultery and bastardy charge in the Pennsylvania state court in November 1952 by an Agent of the FBI. Items of his testimony as to alleged Communist activity are as follows:—that he visited Dade County, Florida, on behalf of the Communist Party during each of the years from 1946 to 1952; that the Communist Party in Miami had attempted to lease a bus line which served the Opa-locka Air Base; that in 1948 the Communist Party made plans for the armed invasion of the United States on orders from the Soviet Union and that he, Mazzei, was selected to go to Miami in 1948 because it was a seaport; that he took courses in the Communist Party on sabotage, espionage, and handling arms and ammunition; that he was taught by officers of the Communist Party in Pittsburgh how to blow bridges, poison water in reservoirs, and to eliminate people; that he discussed with Sheiner in 1948 'knocking off' a Judge Holt (a Florida judge) whom they (presumably the Communist Party) were having trouble with, and importing one Louis Bortz, the strong-arm man for the Communist Party, to do the job; that he and the Communist Party had made plans to assassinate Senators, Congressmen, and even went to Washington and beat up a Senator; and that, to his knowledge, Sheiner was extensively engaged in Communist Party activities in 1945, 1947, 1950, 1951, and 1952.

None of this testimony at the Florida proceeding is supported or corroborated by information in the possession of the Government.

"Mazzei likewise testified that the FBI arranged to get him into the Army so that he could watch a certain Communist Party member; that he never wore a uniform and that he was discharged the day after the Communist Party member he was to watch was discharged. In actual fact, Mazzei's career in the Army was the result of the operation of the Selective Training and Service Act of 1940 and the FBI had nothing to do with his service in the armed forces. He also testified that sometimes the FBI paid him about $1,000 a month for expenses. From the period 1942 to 1952, according to the Bureau records, Mazzei was paid the total of $172.05 as expense money.

"Mazzei likewise testified that he had never been arrested in his life. In fact, he was arrested in connection with the paternity case brought against him in Pennsylvania by one Irene Corva. He has been arrested several times subsequent to this for his failure to make support payments to this woman."

On the argument of the motion the Solicitor General, in response to questions by the Court, stated with commendable candor that he believed the testimony given by Mazzei on June 18, 1953, before the Senate Committee concerning "the liquidation of Senator Joseph McCarthy" was untrue. He likewise stated that he believed the testimony given by Mazzei on July 2, 1956, in the Circuit Court of Florida was untrue. And in addition to the Solicitor General's personal opinion, the text of the motion itself shows that the Department of Justice is certain that some of Mazzei's post-trial testimony was contrary to the facts. The Pennsylvania statement of

October 2, 1953, concerning his conviction of adultery and bastardy was controverted under oath at that hearing by an agent of the FBI. Mazzei again asserted in the Florida proceeding that he was induced to plead guilty to the adultery charge by an agent of the FBI. In the Florida testimony, he said that the FBI sometimes paid him a thousand dollars a month for expenses, whereas the records of the Bureau showed he was paid a total of $172.05 as expense money. He also testified there that the FBI arranged to put him in the Army to spy on a Party member, whereas the FBI had nothing to do with his Army service; he had been inducted in accordance with the Selective Service Act. All these discrepancies are pointed out in the motion, as quoted above.

As to his bizarre testimony in the Florida proceeding concerning sabotage, espionage, handling of arms and ammunition, and plots to assassinate Senators, Congressmen, and a state judge, the Government's motion suggests that none of it is worthy of belief by stating therein: "None of this testimony at the Florida proceeding is supported or corroborated by information in the possession of the Government."

At the oral argument, however, the Solicitor General stated that although he believed all of this testimony to be untrue, he was not prepared to say the witness Mazzei was guilty of perjury in giving the testimony; that his untrue statements might have been caused by a psychiatric condition, and that such condition might have arisen subsequent to the time of this trial. The Solicitor General, in the light of this position, asked to have the argument on the main case stricken from the calendar and the case remanded to the District Court for a full consideration of the credibility of the testimony of witness Mazzei. Commendable as the action of the Solicitor General was in promptly bringing the matter to our

attention when it came to the attention of his office,[3] we do not believe the disposition of the case suggested by him should be made.

Either this Court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of this Government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.

It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is "merely cumulative or impeaching" is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial.[4]

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[3] The Solicitor General's motion stated that his office came into possession of "the history of Mazzei's post-trial testimony" less than ten days before the motion was filed. With one exception, the motion does not indicate when other units of the Department of Justice acquired their information of Mazzei's conduct.

[4] See, *e. g.*, *United States* v. *Johnson*, 142 F. 2d 588, 592, cert. dismissed, 323 U. S. 806; *United States* v. *Rutkin*, 208 F. 2d 647,

Here we have an entirely different situation. The witness Mazzei was a paid informer of the Government—he had been in its employ from 1942 to 1953 for the purpose of infiltrating the Communist Party and reporting the facts found. He testified in this case in that capacity, as a Government witness. It is the Government which now questions the credibility of its own witness because in other proceedings in the same field of activity he gave certain testimony—some parts of it positively established as untrue and other parts of it believed by the Solicitor General to be untrue. The Solicitor General conceded that without Mazzei's testimony in this case the conviction of two of the petitioners cannot stand, but he argued that as to the other three Mazzei's evidence may not have had a substantial effect. But the trial judge believed Mazzei's testimony was material against them for, over objection, he admitted it against all the defendants. There were only seven witnesses. The testimony of Mazzei, at least, gave flesh-and-blood reality to the mass of Communist literature read to the jury to show advocacy of violence by the Communist Party.[5] This being so, it cannot be deter-

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654; *United States* v. *Frankfeld,* 111 F. Supp. 919, 923, aff'd *sub nom. Meyers* v. *United States,* 207 F. 2d 413. But see *United States* v. *On Lee,* 201 F. 2d 722, 725–726 (dissenting opinion).

See also *United States* v. *Johnson,* 327 U. S. 106, 110–111, n. 4 and n. 5.

[5] Although we have not examined the evidence in this case, in view of the disposition made, we deem it appropriate to consider herein the nature of Mazzei's testimony, since petitioners' countermotion referred us to the appropriate pages of the transcript. The same pages had also been cited in the main briefs of both parties in summarizing the evidence.

Mazzei testified quite specifically about statements by defendants Careathers and Dolsen, made in classes each had taught at a Communist Party school he had attended in 1943 or in private conversations each had had with him at that time.

Careathers taught in his class, Mazzei testified, about the part

mined conclusively by any court that his testimony was insignificant in the general case against the defendants. Thus it has tainted the trial as to all petitioners. As we said last Term in *Communist Party* v. *Subversive Activities Control Board:*

> "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." 351 U. S. 115, 124.

There we remanded to the Subversive Activities Control Board for reconsideration of its original determination in

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the Negro people would play in bringing about a revolution. [Tr. 1940–1941.] Dolsen told his class, with Careathers present, that the only way a revolution could come about would be by violent overthrow of the government, with the Communist Party helping. [Tr. 1923.] Mazzei related other details of Dolsen's teaching, and passages were read to the jury which he said Dolsen had read to the class from the *History of the Communist Party of the Soviet Union.* [Tr. 1922–1923, 1936–1938.]

Mazzei told how Dolsen and Careathers had each given him private instruction after class, because each was unsatisfied with his understanding of a lesson in Dolsen's class. Mazzei related that each had told him in these separate private sessions that a revolution in this country could only come by armed violence, and that it would be with the help of the Communist Party and the Soviet Union. [Tr. 1940, 1943.] Mazzei also testified that Dolsen had told him, on an auto trip, that if a revolution came about, he would not hesitate to kill, as he had done in China, where he had worked with the Communist Party. [Tr. 1945.]

the light of the record shorn of the tainted testimony. But there the Board, an administrative agency, was the original finder of fact. Here, on the other hand, in a criminal case, the original finder of fact was a jury. The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case.[6] For this reason, as well as that stated in the preceding paragraph, if on a remand the District Court should rule that the verdict against some of the petitioners could stand, we would be obliged, on a subsequent appeal, to reverse and, at that late date, direct that a new trial be granted.[7] This case was insti-

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[6] Cf. *Gordon* v. *United States,* 344 U. S. 414, 422–423.

The present situation is different from that in *United States* v. *Flynn,* 130 F. Supp. 412, reargument denied, 131 F. Supp. 742. There the defense moved for a new trial on the basis of an affidavit in which a witness recanted his testimony after the trial. The Government charged that the recantation, rather than the testimony it contradicted, was the lie. Hence there was a factual issue to be determined at the outset, unlike the present case, where there is no conflict between the trial testimony and the subsequent matter brought forward by the Government as bearing on credibility. This difference has been recognized by the courts as calling for the application of different tests in passing on a motion for new trial, even without the added distinction of this case that it is the *Government* which questions the witness's credibility. See, *e. g., United States* v. *Johnson,* 142 F. 2d 588, 591–592, cert. dismissed, 323 U. S. 806; *United States* v. *Hiss,* 107 F. Supp. 128, 136, aff'd, 201 F. 2d 372. Therefore, we express no opinion as to the procedure followed by Judge Dimock in the *Flynn* case.

[7] Cf. *Remmer* v. *United States,* 347 U. S. 227, 348 U. S. 904, 350 U. S. 377.

Because the situation raised by the Solicitor General's motion is quite distinct from that of the ordinary defense motion for new trial, see pp. 9–11, *supra,* we would not consider ourselves bound on a

tuted four and one-half years ago; petitioners have been proceeding *in forma pauperis*. The interests of justice could not be served by a remand that must prove futile.

It might be different if we could see in this case any factual issue upon which the District Court, on a remand, could make an unassailable finding that Mazzei's other falsehoods were differentiated from his testimony herein. But it is not within the realm of reason to expect the district judge to determine, as the Government indicated it would ask him to do, that the witness Mazzei testified truthfully in this case in 1953 as an undercover informer concerning the activities of the Communist conspiracy, yet concurrently appeared in the same role in another tribunal and testified falsely—possibly because of a psychiatric condition—about a plan by different members of the Communist conspiracy to assassinate a United States Senator.[8] That would be an unreasonable determination to make even though the judge might believe that Mazzei's bizarre testimony in 1956 concerning plans for the assassination of other officials, the destruction of bridges, training in sabotage and handling arms, and the poisoning of water in reservoirs, all to destroy the Government of the United States, was the product of a mental or emotional con-

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review of the District Court's ruling in this situation by the limitations expressed with reference to the defense motion in *United States* v. *Johnson*, 327 U. S. 106.

See also note 6, *supra*.

[8] The trial of petitioners started February 24, 1953. Mazzei testified against petitioners on March 26, 27, and 30. It was on June 18 that he testified before the Senate Committee. On July 9, a motion for a mistrial was made on the basis of the prejudice alleged to be caused petitioners by the publicity given the June 18 testimony of Mazzei concerning the assassination of Senator McCarthy. Mistrial was denied. The jury found petitioners guilty on August 20. They were sentenced on August 25, on which date motions for new trial were denied.

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dition that had developed only after the time of this trial.

Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts.[9] If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

> "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." *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115, 124.

The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial.

It is so ordered.

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

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[9] Cf. *McNabb* v. *United States,* 318 U. S. 332, 340–341; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 225.

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

When the Court's order denying the Government's motion to remand, and granting the petitioners a new trial, was announced by THE CHIEF JUSTICE on October 10, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON and I dissented.[1] We reserved our right to file an opinion stating our reasons for thinking that the Government's motion should have been granted. This is that opinion.

On August 20, 1953, after a lengthy jury trial, petitioners were convicted of violating the Smith Act and the general federal conspiracy statute, 54 Stat. 670, 671, 18 U. S. C. §§ 2385, 371, by conspiring to advocate the overthrow of the United States Government by force and violence. The Court of Appeals for the Third Circuit, sitting *en banc,* affirmed by a divided vote.[2] This Court granted certiorari.[3]

On September 27, 1956, about two weeks before the case was scheduled for argument, the Solicitor General filed a motion asking us to remand the case to the District Court for a hearing as to the truthfulness and credibility of one Mazzei, a government informant and witness at the trial. The occasion for this motion was that the Solicitor General's office, some ten days before, had come into possession of information which led it seriously to doubt the correctness of certain testimony given by Mazzei in various independent proceedings, all but one of which occurred after the trial, as to his relations with Communists and the Federal Bureau of Investigation.[4]

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[1] 352 U. S. 862.

[2] 223 F. 2d 449.

[3] 350 U. S. 922.

[4] One of these episodes took place before the Senate Permanent Subcommittee on Investigations, in Washington, D. C., on June 18, 1953 (while the trial was still in progress). There Mazzei had testified that at a meeting of the Civil Rights Congress on December

In its motion papers the Government stated that while it still believed that Mazzei's testimony at the trial had been "entirely truthful and credible," his post-trial testimony in these other proceedings was such as to "lead us to suggest that the issue of his truthfulness at the trial of these petitioners should now be determined by the District Court after a hearing." Petitioners' answer to this motion was that, while they considered themselves entitled to a judgment of acquittal or a new trial on the basis of the Government's disclosures, disposition of the Government's motion should nevertheless await this Court's decision on the issues brought here by the writ of certiorari.

On October 8, the Court directed that the Government's motion be heard orally at the threshold of the main case. My brother FRANKFURTER, who felt that the motion should have been granted forthwith, filed a dissenting memorandum.[5] When the matter was heard by the Court on October 10, the positions taken by the Government and the defense were as follows: The Government was not yet prepared to say that Mazzei had committed

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4, 1952, one Louis Bortz (an alleged Communist Party functionary) told him that he, Bortz, had been "selected by the Communist Party to do a job in the liquidation of Senator Joseph McCarthy." On the oral argument the Solicitor General told us that the Government was not prepared at the time of the trial to regard this testimony of Mazzei as a fabrication, because Bortz when questioned on this subject before the Senate Committee had pleaded his privilege, stating that the answers to the questions "would" incriminate him. It appears that Mazzei's Senate testimony was brought to the attention of the trial judge and that it was the basis of an unsuccessful defense motion for a mistrial. The Solicitor General further stated that it was not until the recent discovery of Mazzei's later testimony in the other post-trial collateral proceedings—particularly that given in certain Florida disbarment proceedings on July 2, 1956—that his department began to have serious doubts as to Mazzei's truthfulness or credibility.

[5] 352 U. S. 808.

perjury either at the trial or in any of the collateral proceedings.[6] Conceivably, the Solicitor General thought, it might turn out that Mazzei was a psychiatric case. The Solicitor General pointed out that the petitioners had

[6] As to Mazzei's trial testimony, the Solicitor General stated: "Before the witness [Mazzei] was presented to the [trial] court, his testimony was carefully appraised as to whether or not it was supported by any other material the Department had, and he was not contradicted. Although witnesses took the stand in behalf of the defendants his testimony was not contradicted at all, and that was one of the factors that bothered the Government in connection with these subsequent events that have caused us to conclude that this man's testimony should be carefully reexamined by the lower court in regard to validity at the time of the trial, because of what has occurred since, which, ordinarily, even though there was actual perjury, would not determine the validity of the testimony at the trial, depending upon what the circumstances were."

As to Mazzei's testimony in the collateral proceedings, the Solicitor General stated: "We believe that his [1953 Senate] testimony in that regard [the McCarthy incident] was not credible in light of what happened later [in the Florida disbarment proceedings]. We do not know at this point whether or not there is something psychiatric about this situation. We are disturbed about that." The Solicitor General further stated that, while his "personal belief is he [Mazzei] was not truthful" in his testimony as to the McCarthy episode, "I don't want it left on the record that I believe this man to be a perjurer, because I think in order to commit perjury you have to have the intent, and that is what disturbs me about this whole situation. I can't accept his testimony, over all these events [referring to Mazzei's Senate and Florida testimony], as being valid. But whether or not he knowingly does it with the intent [to commit perjury] is something else and that is what I can't follow through."

As to the possibility of Mazzei's being a psychopath: The Government's motion papers showed that in 1952 Mazzei had pleaded guilty to charges of adultery and bastardy in a Pennsylvania state court, and that this fact had been brought out at petitioners' trial. They further showed that in 1953, after petitioners' trial had ended, Mazzei had moved in the Pennsylvania court to set aside his former plea, alleging that he "was not guilty of the charge to which he was induced to plead . . . but did so only in his official capacity (as a Government informant) at the insistence of his superior in the FBI

not previously moved for a new trial on the grounds relied upon in the Government's motion, although much of the later information as to Mazzei was known to them at the time of their motion for reargument in the Court of Appeals. Even so, the Solicitor General felt that in the broader interests of justice it was his duty to pursue the matter as soon as it came to his knowledge that a cloud was cast upon Mazzei's truthfulness or credibility.[7] If he had been satisfied that Mazzei was a per-

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to avoid testifying." These allegations, the Government informs us, were denied under oath by the F. B. I. and Mazzei's application to set aside his plea was denied by the Pennsylvania court. Further, the Government's motion papers here show that in the 1956 Florida disbarment proceedings Mazzei testified that the F. B. I. had arranged to get him into the Army so that he could watch a certain Communist Party member, whereas in fact Mazzei was drafted into the Army, and the F. B. I. had nothing to do with it. The Government states that in the same proceedings Mazzei testified that the F. B. I. paid him about $1,000 a month for expenses, whereas over the entire period from 1942 to 1952 the F. B. I. had paid him total expense money of only $172.05; and that Mazzei testified he had never been arrested, whereas in fact he had been arrested several times. As to these episodes the Solicitor General stated at the oral argument: "It certainly seems to me that that is a very peculiar action, and that he [Mazzei] should have anticipated, even if he wanted to lie about it, that the FBI agent would be there promptly testifying to the facts. And so it is very unusual to me that a person normally, wanting to falsify, would do such a thing. But, I think the trial courts have examined into competency a good many times, and do it every day, and should be able to determine whether or not he was competent at the time." The Solicitor General also stated that he was "disturbed about whether it [a psychopathic condition] occurred even back at the trial [of these petitioners], and I think the court should examine into that carefully." (The above, and similar quotations, are taken from the tape recording of the Solicitor General's oral argument before this Court, the writer's interpolations being indicated by brackets.)

[7] As to this the Solicitor General stated: "If I may say one word more in regard to that [the failure of the defense to move for a new trial], I feel that the obligation of the Government in a situation of

jurer, the Solicitor General stated, he would have recommended that this Court reverse the convictions of two of the petitioners (Careathers and Dolsen). Since he was not so satisfied, he thought the proper procedure was to remand the case to the District Court for full exploration of the truthfulness and credibility of this witness.[8] As to the other three petitioners, the Solicitor General regarded Mazzei's trial testimony of so little importance that the trial court, even if it found Mazzei was a perjurer, would have to review the entire case against them before ordering a new trial. Petitioners' position was that if this Court was unwilling to hear the main case on the merits, it should, without more, deny the Government's motion and reverse the convictions with directions for acquittal or at least a new trial. At the conclusion of the oral argument on the motion to remand, the Court re-

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this kind reaches far beyond the rights of these particular defendants, and it is its duty to this Court, and to the country, and it is our obligation in a situation of this kind, to try and see that justice is done. . . . We may be criticized for being too late, but I think it is never too late, to try to do justice. Having come to that conclusion [that the validity of this testimony is open to doubt], I think we should come before the courts, whichever one is proper, and try to get a correction of the wrong, if there is one."

[8] The Solicitor General stated: "Well, we would have recommended that [reversal] to the Court if we had been satisfied ourselves that Mazzei's testimony at the time of trial—which we think was the determining point in the proper conduct of judicial proceedings—[was untruthful], . . . because we feel at least as to these two defendants [petitioners Careathers and Dolsen] there was no [other] basis for their conviction. But it is possible that something has happened to this man [Mazzei], that his uncontradicted testimony was valid at the time of trial, and it seemed to us that with a long case tried like this and the jury involved and the trial court and the courts of appeal, and so on, the proper thing to do was to send it back to the trial court for its examination carefully into this question to determine what the fact is, and then assume that he [the trial court] would do his duty, which I think he will, and have the case handled properly at that point."

cessed to consider the matter, following which its decision denying the Government's motion was announced from the bench.

We are in full agreement that the Court properly refused to pass on the merits of the case until this cloud upon the integrity of the convictions had been dissolved. *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115. What we object to is that this Court itself should have undertaken to deal with the subtle and complicated issues presented by the Government's motion instead of sending the case back to the District Court for the determination of these issues after a full investigation. It is fitting that we state our reasons for this view.

1. We believe that the reversal of these convictions represents an unprecedented and dangerous departure from sound principles of judicial administration. The Court has overturned the results of a complex, protracted, and expensive trial before any investigation has been made of the suspicions which the Solicitor General brought to the attention of the Court promptly after the facts giving rise to them came to his notice. We find the Court's justification of its summary action unconvincing.

The basic justification given is that "either this Court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of this Government witness." In effect, the Court has treated the case as if the Solicitor General had conceded the untrustworthiness of Mazzei's testimony at the trial. To us this reflects a misunderstanding of the Solicitor General's position. As to Mazzei's trial testimony, the Solicitor General—whose forthrightness and candor no one could doubt, and whose conduct in this situation has been commended by this Court—represented that the Government did not consider it yet had sufficient basis for regarding such testi-

mony as untruthful. As to Mazzei's testimony in collateral proceedings, the Solicitor General, while stating his personal belief that some of it was untruthful, represented that he could not responsibly say whether such testimony involved perjury rather than psychopathic imbalance, and, if the latter, when that condition first arose or whether it was of such a character as to affect Mazzei's competency as a witness. In short, we think it abundantly clear that the Solicitor General conceded no more than that the situation was one that called for a thorough investigation.

We also observe that the Court finds that "no other conclusion is possible" than that "Mazzei's credibility has been wholly discredited," and that some parts of his post-trial testimony have been "positively established as untrue." We do not see how these conclusions can be reached in the face of the Government's representation that it still believes Mazzei's trial testimony to have been "entirely truthful and credible," and without the production of any evidence, or the examination and cross-examination of Mazzei and those who contradicted him, as to the post-trial episodes which have been called in question. Nor can we agree with the manner in which the Court has dealt with the Solicitor General's contentions as to petitioners Mesarosh, Albertson and Weissman. The Court simply says that Mazzei's testimony against Careathers and Dolsen was of such a character that, having been admitted against all defendants, it tainted the whole trial. But we cannot understand how this can be said short of a painstaking appraisal of the entire record which the Court acknowledges it has not read. The Court was quite right not to read the record, for in our view this was not the business of this Court, but that of the District Court; but by the same token, we think, the decision as to whether a new trial was justified was also, in the first instance, the business of the District Court.

In the *Communist Party* case, *supra,* where there were undenied charges of perjury, we did not undertake to resolve those charges here, but instead sent the case back to the Board for exploration. We think a similar course should have been followed in this case. The Court suggests that the situation presented here differs from that in the *Communist Party* case, in that there the Board was the trier of the facts, whereas here it was for the jury, not the court, to weigh the truthfulness and credibility of Mazzei's trial testimony. This, however, overlooks the fact that as a preliminary to a new trial it must first be determined whether any of Mazzei's collateral testimony, now drawn in question, so reflects upon the truthfulness or credibility of his trial testimony as to warrant submission of the case to a new jury. That preliminary determination has always been recognized as the function of the trial court. *United States* v. *Johnson,* 327 U. S. 106; *United States* v. *Troche,* 213 F. 2d 401; *United States* v. *Rutkin,* 208 F. 2d 647; *Gordon* v. *United States,* 178 F. 2d 896, cert. denied, 339 U. S. 935.[9]

Finally, the Court suggests that a different result might have been required if it were dealing with a defense motion for a new trial. However, we fail to see why the Government's motion, which was prompted by a desire to ascertain the true facts in all their ramifications, and which is aimed at the possibility of a new trial, calls for a different result or procedure than a defense motion for a new trial based on similar suspicions.

2. The District Court was the proper forum for the kind of investigation which should have been conducted here. This Court, and for that matter the Courts of Appeals, are

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[9] Whatever may be the differences between the rules governing a motion for a new trial based upon recantation of trial testimony or other types of "newly discovered" evidence, *ante,* p. 12, n. 6, certainly none of those differences suggest that the trial court is not the proper tribunal for resolution of the issues presented by such a motion.

ill-equipped for such a task. We need say no more than that appellate courts have no facilities for the examination of witnesses; nor in the nature of things can they have that intimate knowledge of the evidence and "feel" of the trial scene, which are so essential to sound judgment upon matters of such complexity and subtlety as those involved here, and which are possessed by the trial court alone.

3. Certainly there is no room for doubting the Solicitor General's good faith in this matter, or for supposing that the conduct of the further proceedings below would fall short of the highest standards of criminal justice. We have the Solicitor General's assurance that all of the Government's information bearing upon Mazzei's truthfulness and credibility would be made available to the defense, subject to appropriate safeguards.[10] As to the end result,

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[10] In response to a question as to whether the defense would be furnished with all of the Government's information bearing on the truth of Mazzei's Senate testimony relating to the McCarthy incident, the Solicitor General stated: "Well, that would depend on what the trial court thought should be done, I think, in the conduct of the case. The only reason I suggest that possibly it should not be made available to them is that in this whole problem there are several people involved who might get hurt by a public airing of their connection with this matter. And it would be too bad, and very unfortunate, if it wasn't handled so as not to injure those people when it isn't necessary to the proper handling of this problem. . . . We will do whatever this Court thinks we should do, but what I had in mind was to lay before the judge all of the information the Government has about the entire matter, and then he can sort out and protect the various innocent persons, who are described in the files, and should not be hurt in such a proceeding, and yet give them [the defendants] the benefit of the full and complete protection in such a proceeding as to what the facts are in this matter. . . . I had in mind that certain portions the judge would handle in camera so as to protect innocent people. And all others, that would reach into the merits of the situation, would certainly be handled by the court in such a way as to give all the parties an adequate opportunity to present their defense."

the Solicitor General stated that in his view the trial court would have to acquit petitioners Careathers and Dolsen if it found that Mazzei had perjured himself at the trial or had then been incompetent to testify, and as to the other petitioners might have to order a new trial.[11] We need not consider at this time whether the Solicitor General's statement exhausts all of the factors that might require a new trial. Suffice it to say that we regard the Solicitor General's approach to this difficult situation as unexceptionable; and it is hardly to be assumed that the District Court would not do its full duty or would fall into error. We need only add that had the Government's

[11] The Solicitor General stated: "Yes, without his [Mazzei's] testimony as to those defendants [Careathers and Dolsen], I do not think they could have been convicted. I think the court would have had to direct a verdict in their favor, at least. As to the other three defendants, there is practically no testimony by this witness. It is very slight. I could give it to the Court. . . . [It] seems to me the lower court would have to examine the situation and see . . . whether or not it [Mazzei's testimony] had an effect on the conviction of every one of the defendants. . . . It would seem to me that . . . the trial court could determine the extent of the effect that this witness might have had on the other defendants, because there was a large volume of testimony in regard to the other defendants that bore directly upon their participation in the conspiracy, and their overt acts; and the testimony of this witness was so limited as to even a reference—he said that they solicited money from him, two of them—and is so slight as to any direct connection with it, that it seems to me the court would have to weigh whether or not, under that situation, he would decide that there is a doubt in his mind, in which case I am sure he would [direct a new trial]." In the absence of an exhaustive examination of the voluminous record, we are unable to understand how any adequate evaluation could be made of these considerations as to the petitioners Mesarosh, Albertson, and Weissman. When he was asked to "assume" that the trial court would find Mazzei to have been a perjurer, and his trial testimony to have been of importance in the conviction of these three petitioners, the Solicitor General promptly stated that he was "satisfied" that the court would set aside their convictions "if he came to these conclusions."

motion been granted this Court would no doubt have accompanied its remand with appropriate instructions to guide the District Court in coping with this complicated problem. And surely the fact that this case has been long-drawn-out does not justify short-circuiting normal and orderly judicial procedures. The procedure adopted in *United States* v. *Flynn,* 130 F. Supp. 412, 131 F. Supp. 742, commends itself to us as a proper means of dealing with problems such as those raised by the Solicitor General's motion. We do not, of course, even remotely imply that we give any tolerance to the notion that a criminal conviction found to be infected by tainted testimony should be allowed to stand. We do say that ascertainment of where the truth lies here requires the kind of probing that is beyond the facilities and practices of this Court.

For the foregoing reasons we dissent. We think that the Government's motion to remand should have been granted.

[REPORTER'S NOTE: The following memorandum by MR. JUSTICE FRANKFURTER was not filed in connection with the foregoing Opinion of the Court nor in connection with the Court's memorandum decision of October 10, 1956, *post,* p. 862. It was filed in connection with the Court's order of October 8, 1956, *post,* p. 808, which postponed to the hearing on the merits consideration of the Government's motion to remand, directed counsel at the outset to address themselves to that motion, and allotted 30 additional minutes to each side for that purpose. It is reported below for the convenience of those members of the Bench and Bar who may wish to read all of the views expressed by Members of the Court in connection with this case.]

MR. JUSTICE FRANKFURTER.

Less than six months ago, in *Communist Party* v. *Control Board,* 351 U. S. 115, a case that raised important constitutional issues, this Court refused to pass on those

issues when newly discovered evidence was alleged to demonstrate that the record out of which those issues arose was tainted. It did so in the following language:

> "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 cannot pass upon a record containing such challenged testimony. . . ." 351 U. S., at 124–125.

The Court in that case, over the protest of the Government, remanded the proceedings to the Subversive Activities Control Board so that it might consider the allegations against the witnesses and, if necessary, reassess the evidence purged of taint.

In this case, the Government itself has presented a motion to remand the case, alleging that one of its witnesses, Joseph Mazzei, since he testified in this case, "has given certain sworn testimony (before other tribunals) which the Government, on the basis of the information in its possession, now has serious reason to doubt." Some of the occurrences on which the motion is based go back to 1953. (It should be noted that the petition for certiorari was filed in this Court on October 6, 1955.) Thus the action by the Government at this time may appear belated. This is irrelevant to the disposition of this motion. The fact is that the history of Mazzei's post-trial testimony did not come to the Solicitor Gen-

eral's notice until less than ten days before the presentation of this motion.* It would, I believe, have been a disregard of the responsibility of the law officer of the Government especially charged with representing the Government before this Court not to bring these disturbing facts to the Court's attention once they came to his attention. And so, it would be unbecoming to speak of the candor of the Solicitor General in submitting these facts to the Court by way of a formal motion for remand. It ought to be assumed that a Solicitor General would do this as a matter of course.

The Government in its motion sets forth the facts which lead it to urge remand. The Government lists five incidents of testimony by Mazzei between 1953 and 1956 about the activities of alleged Communists and about his own activities in behalf of the Federal Bureau of Investigation which it now "has serious reason to doubt." The Government also notes that in the trial of this case Mazzei "gave testimony which directly involved two of the petitioners, Careathers and Dolsen." Although the Government maintains "that the testimony given by Mazzei at the trial was entirely truthful and credible," it deems the incidents it sets forth so significant that it asks that the issue of Mazzei's truthfulness be determined by the District Court after a hearing such as was held in a similar situation in *United States* v. *Flynn,* 130 F. Supp. 412.

How to dispose of the Government's motion raises a question of appropriate judicial procedure. The Court has concluded not to pass on the Solicitor General's mo-

*The motion for remand states: "The complete details of Mazzei's testimony in Florida, as set forth in this motion, did not come to the attention of the Department of Justice until September 1956, and the history of Mazzei's post-trial testimony did not come to the Solicitor General's attention until less than ten days ago."

tion at this time. It retains the motion to be heard at the outset of the argument of the case as heretofore set down. I deem it a more appropriate procedure that the motion be granted forthwith, with directions to the District Court to hear the issues raised by this motion. I feel it incumbent to state the reasons for this conviction. Argument can hardly disclose further information on which to base a decision on the motion. Furthermore, there may be controversy over the facts, and the judicial methods for sifting controverted facts are not available here. The basic principle of the *Communist Party* case that allegations of tainted testimony must be resolved before this Court will pass on a case is decisive. Indeed, the situation here is an even stronger one for application of that principle, for we have before us a statement by the Government that it "now has serious reason to doubt" testimony given in other proceedings by Mazzei, one of its specialists on Communist activities, and a further statement by the Government that Mazzei's testimony in this case "directly involved two of the petitioners."

This Court should not even hypothetically assume the trustworthiness of the evidence in order to pass on other issues. There is more at stake here even than affording guidance for the District Court in this particular case. This Court should not pass on a record containing unresolved allegations of tainted testimony. The integrity of the judicial process is at stake. The stark issue of rudimentary morality in criminal prosecutions should not be lost in the melange of more than a dozen other issues presented by petitioners. And the importance of thus vindicating the scrupulous administration of justice as a continuing process far outweighs the disadvantage of possible delay in the ultimate disposition of this case. The case should be remanded now for a hearing before the trial judge.

Syllabus.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* PARNELL.

NO. 21. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued October 18, 1956.—Decided November 13, 1956.

Alleging diversity of citizenship, petitioner, a bank in California, sued in a Federal District Court in Pennsylvania to recover the value of certain bonds alleged to have been converted in Pennsylvania. They were bearer bonds of the Home Owners' Loan Corporation, guaranteed by the United States, maturing in 1952 but called for redemption in 1944. They disappeared from petitioner's possession in 1944, and respondent Parnell, acting for one Rocco, presented them in 1948 to respondent bank in Pennsylvania, which collected the proceeds and paid them to Parnell, who paid them to Rocco. On the theory that state law governed, the District Court instructed the jury that respondents had the burden of showing that they took the bonds in good faith, without knowledge or notice of defect in title. Verdicts and judgments were for petitioner; but the Court of Appeals reversed on the ground that, under federal law, the bonds were not "overdue" when presented to respondent bank and petitioner had the burden of showing notice and lack of good faith on the part of respondents. *Held:* The judgment of the Court of Appeals is reversed and the case is remanded to that Court for further proceedings. Pp. 30–34.

(a) This litigation is purely between private parties, it does not touch the rights and duties of the United States, and the issues of burden of proof and good faith are governed by the law of Pennsylvania, where the transactions took place. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, distinguished. Pp. 32–34.

(b) That the floating of securities by the United States might be adversely affected by the local rule of a particular State regarding the liability of a converter is too speculative and remote a possibility to justify the application of federal law to transactions essentially of local concern. Pp. 33–34.

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*Together with No. 22, *Bank of America National Trust & Savings Association* v. *First National Bank in Indiana,* also on certiorari to the same court.

404165 O—57——9

(c) A decision with respect to the "overdueness" of the bonds is a matter of federal law. P. 34.

(d) The circumstances of these cases require reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. P. 34.

226 F. 2d 297, reversed and remanded.

Erwin N. Griswold argued the cause for petitioner. With him on the brief were *Robert L. Kirkpatrick* and *John G. Buchanan.*

Edward Dumbauld argued the cause and filed a brief for respondent in No. 21.

Harvey A. Miller, Jr. argued the cause for respondent in No. 22. With him on the brief were *Harvey A. Miller* and *J. Lee Miller.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner, alleging diversity of citizenship, brought suit in the District Court for the Western District of Pennsylvania alleging that in September and October 1948 two individual defendants, Parnell and Rocco, and two corporate defendants, the First National Bank in Indiana and the Federal Reserve Bank of Cleveland, had converted 73 Home Owners' Loan Corporation bonds which belonged to petitioner. Only Parnell and the First National Bank are respondents here, since the Federal Reserve Bank was dismissed, on its motion, after petitioner had presented its case in the District Court, and since Rocco did not appeal from the District Court's judgment.

At the trial it appeared that these bonds were bearer bonds with payment guaranteed by the United States. They carried interest coupons calling for semi-annual payment. They were due to mature May 1, 1952, but pursuant to their terms, had been called on or about May 1, 1944. On May 2, 1944, the bonds disappeared

while petitioner was getting them ready for presentation to the Federal Reserve Bank for payment. In 1948 they were presented to the First National Bank for payment by Parnell on behalf of Rocco. The First National Bank forwarded them to the Federal Reserve Bank of Cleveland. It cashed them and paid the First National Bank, which issued cashier's checks to Parnell. Parnell then turned the proceeds over to Rocco less a fee—there was conflicting testimony as to whether the fee was nominal or substantial.

The principal issue at the trial was whether the respondents took the bonds in good faith, without knowledge or notice of the defect in title. On this issue the trial judge charged:

> "As I have indicated, however, in the case—and if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence. Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith. . . ."

The jury brought in verdicts for petitioner against both respondents. On appeal, the Court of Appeals for the Third Circuit, the seven circuit judges sitting *en banc,* reversed, with three judges dissenting. It held that the District Court had erred in treating the case as an ordinary diversity case and in regarding state law as governing the rights of the parties and the burden of proof. 226 F. 2d 297. It considered our decision in *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, controlling and held that federal law placed the burden of proof on petitioner

to show notice and lack of good faith on the part of respondents. The court further found that there was no evidence of bad faith by the First National Bank since the bonds were not "overdue" as a matter of federal law when presented to it and therefore directed entry of judgment for it. The court found that there was evidence of bad faith on the part of Parnell but ordered a new trial because of the erroneous instructions.

The dissenters agreed in applying the doctrine of the *Clearfield Trust* case to determine the nature of the contract and the rights and duties of the United States as a party but not the rights of private transferees among themselves. They, like the majority, looked to federal law to determine whether the bonds were "overdue paper" when presented to the First National Bank. They concluded that since the respondent bank knew of the call, as to it, the bonds became demand paper and that the bank took the paper an unreasonable length of time after maturity, as advanced by the call.

In the view of the dissenters, state law was controlling with respect to proof of good faith and the burden thereon. They found that state law placed the burden of proof on respondents to demonstrate their good faith, and that there was sufficient evidence to support the jury's verdict that the burden of proving good faith had not been sustained even if, with respect to the respondent bank, the bonds were not to be regarded as demand paper taken an unreasonable time after maturity, as advanced by the call.

Petitioner sought a writ of certiorari to review the judgments of the Court of Appeals. Because the determination of the applicable law raised an important issue of federal-state relations, we granted certiorari. 350 U. S. 963.

The District Court in this suit, based on diversity jurisdiction, for the conversion in Pennsylvania of pieces of

paper of defined value, deemed itself a court of Pennsylvania in which, in view of the nature of the claim, Pennsylvania law would govern. See *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108. But respondents claim, and the Court of Appeals sustained them, that the decision in *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, compels the application of federal law to the entire case. The Court of Appeals misconceived the nature of this litigation in holding that the *Clearfield Trust* case controlled. In that case we held that a suit by the United States to recover on an express guaranty of prior endorsements on a Government check with a forged endorsement was governed by federal law. The basis for this decision was stated with unclouded explicitness:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." 318 U. S., at 367.

Securities issued by the Government generate immediate interests of the Government. These were dealt with in *Clearfield Trust* and in *National Metropolitan Bank* v. *United States,* 323 U. S. 454. But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to jus-

tify the application of federal law to transactions essentially of local concern.

We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties, or that it is beyond the range of federal legislation to deal comprehensively with Government paper. We do not of course foreclose such judicial or legislative action in appropriate situations by concluding that this controversy over burden of proof and good faith represents too essentially a private transaction not to be dealt with by the local law of Pennsylvania where the transactions took place. Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves. A decision with respect to the "overdueness" of the bonds is therefore a matter of federal law, which, in view of our holding, we need not elucidate.

This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Appeals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court to review the judgments of the District Court in the light of the controlling state law. The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the court which should so decide. Likewise, if state law casts the burden on respondents to demonstrate their good faith, it is for the Court of Appeals to assess the evidence in light of that standard.

The judgments of the Court of Appeals for the Third Circuit are therefore reversed and the cases are remanded to that court for proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, dissenting.

We believe that the "federal law merchant," which *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367, held applicable to transactions in the commercial paper of the United States, should be applicable to all transactions in that paper. Indeed the Court said in *National Metropolitan Bank* v. *United States,* 323 U. S. 454, 456, that "legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law." Not until today has a distinction been drawn between suits by the United States on that paper and suits by other parties to it. But the Court does not stop there. Because this is "essentially a private transaction," it is to be governed by local law. Yet the nature of the rights and obligations created by commercial paper of the United States Government is said to be controlled by federal law. Thus, federal law is to govern some portion of a dispute between private parties, while that portion of the dispute which is "essentially of local concern" is to be governed by local law. The uncertainties which inhere in such a dichotomy are obvious. Cf. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Davis* v. *Department of Labor,* 317 U. S. 249.

The virtue of a uniform law governing bonds, notes, and other paper issued by the United States is that it provides a certain and definite guide to the rights of all parties rather than subjecting them to the vagaries of the laws of many States. The business of the United States will go on without that uniformity. But the policy surrounding our choice of law is concerned with the convenience, certainty, and definiteness in having one set of rules governing the rights of all parties to government paper, as contrasted to multiple rules. If the rule of the *Clearfield Trust* case is to be abandoned as to some parties, it should be abandoned as to all and we should start afresh on this problem.

BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* CHASE NATIONAL BANK OF NEW YORK, TRUSTEE, ET AL.

CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT.

No. 24. Argued October 16–17, 1956.—Decided November 19, 1956.

In an action brought by a trustee in New York state courts for a construction of the indenture and for an accounting, the Alien Property Custodian, later succeeded by the Attorney General of the United States, intervened and, in effect, tendered his claim to the entire property, by virtue of a vesting order issued under § 5 of the Trading with the Enemy Act, as amended. The state courts denied such relief, and no review was sought here. The Attorney General subsequently amended the vesting order and brought suit in the New York state courts, praying that the principal of the trust be transferred to him. The state courts denied the relief. *Held:* Principles of *res judicata* bar the present suit. Pp. 37–39. 286 App. Div. 808, 143 N. Y. S. 2d 623, affirmed.

George B. Searls argued the cause for petitioner. With him on a brief were *Solicitor General Rankin, Assistant Attorney General Townsend* and *James D. Hill. Simon E. Sobeloff*, then Solicitor General, was also on a brief with *Mr. Townsend, Mr. Hill* and *Mr. Searls.*

Thomas A. Ryan argued the cause and filed a brief for the Chase National Bank of New York, Trustee, respondent.

Samuel Anatole Lourie argued the cause and filed a brief for Schaefer et al., respondents.

Arthur J. O'Leary argued the cause for Schwarzburger et al., respondents. With him on the brief was *Kenneth J. Mullane.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in the case is whether petitioner, by virtue of a vesting order issued under § 5 of the Trading with the Enemy Act, as amended, 40 Stat. 411, 50 U. S. C. App. § 5, is entitled to the *res* of a trust established in 1928 by one Cobb and administered by respondent under an indenture. The trust was created for the benefit of the descendants of Bruno Reinicke who, by reason of his powers over the trust and his ownership of the right of reversion, was the real settlor.

In 1945, when this Nation was at war with Germany, the Alien Property Custodian issued an order vesting "all right, title, interest and claim of any kind or character whatsoever" of the beneficiaries of the trust, declaring that they were nationals of Germany. Subsequently the Custodian (for whom the Attorney General was later substituted) intervened in an action brought by the trustee in the New York courts for a construction of the indenture and for an accounting. Relief sought by that intervention was that the income of the trust be paid to the Attorney General and that the powers reserved to the settlor be held to have passed by virtue of the vesting order to the Attorney General. We are also advised by the report of the case in the Court of Appeals that the Attorney General also claimed that, if the vesting order had not transferred the settlor's powers to the Attorney General, "then the trust had failed and all of the trust property should pass to the Attorney General under the vesting order as being property of alien enemies." *Chase National Bank* v. *McGrath,* 301 N. Y. 602, 603–604, 93 N. E. 2d 495.

The New York Supreme Court denied the relief asked by the Attorney General, holding he was not entitled to the income of the trust, that he had not succeeded to the powers of the settlor, and that those powers were vested

in the trustee as long as the settlor was barred from asserting them. On appeal the Appellate Division affirmed. *Chase National Bank* v. *McGrath,* 276 App. Div. 831, 93 N. Y. S. 2d 724. The Court of Appeals in turn affirmed. *Chase National Bank* v. *McGrath,* 301 N. Y. 602, 93 N. E. 2d 495. No review of that order was sought here.

Some years passed, when, in 1953, the Attorney General amended the vesting order by undertaking to appropriate "all property in the possession, custody or control" of the trustee.* In a suit in the New York courts he asked, among other things, that the principal of the trust be transferred to him. The Supreme Court of New York denied the relief. The Appellate Division affirmed without opinion. *Chase National Bank* v. *Reinicke,* 286 App. Div. 808, 143 N. Y. S. 2d 623. The Court of Appeals denied leave to appeal. *Chase National Bank* v. *Reinicke,* 309 N. Y. 1030, 129 N. E. 2d 790. The case is here on certiorari. 350 U. S. 964.

We do not reach the several questions presented under the Trading with the Enemy Act for we are of the view that the principles of *res judicata* require an affirmance. In the first litigation, the Attorney General sought to reach the equitable interests in the trust and the powers of the settlor. When the Attorney General now seeks the entire bundle of rights, he is claiming for the most part what was denied him in the first suit. That is not all. In the first suit he claimed that if he were denied the

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* The state of war between this country and Germany was declared ended by the Joint Resolution of October 19, 1951, 65 Stat. 451. That Resolution contained, however, a proviso that all property, which, prior to January 1, 1947, was subject to seizure under the Act, continued to be subject to the Act. The 1953 vesting order preceded by a few days the termination of the vesting program of German-owned properties announced by the President on April 17, 1953.

powers which the settlor had over the trust, the trust must fail and all the trust property must be transferred to him. In other words, the Attorney General tendered in the first suit his claim to the entire property. Cf. *Young* v. *Higbee Co.*, 324 U. S. 204, 208–209. Under familiar principles of *res judicata,* the claim so tendered may not be relitigated. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Tait* v. *Western Maryland R. Co.,* 289 U. S. 620, 623. If he was not content with the first ruling, his remedy was by certiorari to this Court. *Angel* v. *Bullington,* 330 U. S. 183, 189. Having failed to seek and obtain that review, he is barred from relitigating the issues tendered in the first suit.

Affirmed.

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

UNITED STATES *v.* BERGH ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 17. Argued October 15, 1956.—Decided November 19, 1956.

In the absence of a valid employment agreement to the contrary, per diem employees of the Navy are not entitled, under the Joint Resolution of June 29, 1938, 5 U. S. C. § 86a, or the Joint Resolution of January 6, 1885, 23 Stat. 516, to an extra day's compensation for each holiday worked during the year 1945. Pp. 40–48.

(a) This conclusion, and the conclusion that the 1885 Resolution was repealed *in toto* by the 1938 Resolution, are supported by the legislative history, by the contemporary administrative interpretation of the 1938 Resolution, and by the treatment accorded these Resolutions by the House Committee on the Revision of the Laws. Pp. 42–47.

(b) *United States* v. *Kelly*, 342 U. S. 193, distinguished. Pp. 47–48.

132 Ct. Cl. 564, 132 F. Supp. 462, reversed.

Alan S. Rosenthal argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade.*

Herbert S. Thatcher argued the cause for respondents. With him on the brief were *J. Albert Woll* and *James A. Glenn.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This action was instituted in the United States Court of Claims by government per diem employees to recover holiday pay consisting of an extra day's compensation for each holiday worked during the year 1945.

Each of the respondents was employed by the Navy under a Schedule of Wages which provided that "whenever an employee is relieved or prevented from working solely because of the occurrence of any day declared a

holiday" he was to receive the same pay for such days as for other days. This language was taken from a Joint Resolution of Congress of June 29, 1938, 52 Stat. 1246,[1] having to do with holiday pay. In 1945 the respondents were not relieved from working on certain holidays named in this Resolution and were paid only the regular scheduled pay for the work performed on those days. They contend that under a Joint Resolution of January 6, 1885, 23 Stat. 516,[2] they have a vested right to an additional full day's wage as "gratuity pay" for each holiday worked. The Government urges that the 1885 Resolution was repealed *in toto* by the Joint Resolution of June 29, 1938,

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[1] Joint Resolution of June 29, 1938, c. 818, 52 Stat. 1246, 5 U. S. C. § 86a:

". . . [W]henever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict."

[2] 23 Stat. 516 (1885), as amended, 24 Stat. 644 (1887), 5 U. S. C. (1934 ed.) § 86, which provides:

". . . The employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the day of each year which is celebrated as 'Memorial' or 'Decoration Day', the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days."

or in the alternative that the latter is inconsistent and in conflict with the provisions of the earlier Resolution upon which respondents rely.

The Court of Claims entered judgment for respondents, believing that the issue "was considered and disposed of by [its] majority opinion . . . in *Kelly* v. *United States,* 119 C. Cls. 197," holding that the employees concerned were entitled to gratuity pay under a Joint Resolution of 1895, not here involved, as well as under their wage agreement negotiated through collective bargaining in 1924. 132 Ct. Cl. 564, 132 F. Supp. 462. While we affirmed the *Kelly* case, 342 U. S. 193, it was on the basis of the wage agreement present there. We left open the issue involved here. Subsequently, thousands of claims based on the 1885 Resolution, including those of respondents, were filed against the Government, necessitating a decision on the question now presented. We granted certiorari, 350 U. S. 953.

The legislative history of the 1938 Resolution is clear. Executive Order No. 7763 of December 6, 1937, 2 Fed. Reg. 2685, excused all government employees from work on December 24, 1937. Under the 1885 Resolution per diem employees received no compensation for that day since the holidays enumerated therein did not include December 24. A Joint Resolution was introduced in the House by Representative Ramspeck to allow holiday pay to per diem employees for that day. On referral to the House Committee on Civil Sevice, advice was sought from the Civil Service Commission, the Bureau of the Budget, and the Comptroller General. The Civil Service Commission advised by letter dated February 15, 1938, that the "accounting authorities, however, have held that in the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination

against these groups of Federal employees." The Commission advised, further, that "there is the broader question involved of securing statutory authority for such payments as a general practice . . . ." H. R. Rep. No. 2683, 75th Cong., 3d Sess. 2. The Commission suggested the language that might be inserted in a Resolution that "would give permanent statutory authority" for holiday pay. In addition, the Commission's reference to the "accounting authorities" revealed that the Comptroller General had advised the Secretary of the Navy on December 20, 1937, that under existing law (a) per annum employees suffered no loss of income as the result of holidays, whether declared by statute or executive order, whereas per diem employees received pay only for those holidays enumerated in the 1885 Resolution; (b) per diem employees received statutory holiday pay whether the holiday happened to fall on a nonwork day (Saturday or Sunday) or not, while per annum workers were allowed neither additional pay nor holiday time when the holiday happened to fall on a nonwork day; and (c) if a per diem employee worked on a statutory holiday falling on such a nonwork day, he received double pay.[3]

In its Report, *supra,* to the House, the Committee incorporated the letter from the Commission, the advisory opinion of the Comptroller General, and a letter dated February 14, 1938, from the Bureau of the Budget advising that the proposed legislation would not be "in conflict with the program of the President." The Committee drafted an entirely new Resolution, incorporating the language suggested by the Commission, intending for it to cover the "general practice" of the Government in regard to holiday pay. The only legislation then cover-

[3] This double pay resulted from interpretation of the 1885 Resolution by the office of the Comptroller of the Treasury. 13 Comp. Dec. 40. See also, 13 Comp. Gen. 295, 297.

ing the general practice of the Government as to holiday pay was the 1885 Resolution and as to it the Committee categorically declared in its Report:

> "Section 2 [of the Resolution] proposes to repeal the joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), which is as follows: . . ." [It then sets out in full the 1885 Resolution.]

Furthermore, there is no indication anywhere in its Report that any portion of the 1885 Resolution—much less any administrative practice thereunder—was to survive. In addition to this unequivocal statement that the purpose of the 1938 Resolution was to repeal the 1885 one, the Committee further revealed by its action under the Rules of the 75th Congress that it so intended. The Rules required a Committee reporting out a bill repealing an act or part thereof to include in its report the text of the act or part thereof proposed to be repealed. The Report here included the text of the 1885 Resolution *in toto*. On the other hand, if it was intended only that the 1885 Resolution be amended, the Rules required the Committee to insert in its report a comparative print of the part of the act which it proposed to be amended. Here no such comparative print was inserted.

Moreover, the few brief statements on the floor of the House show nothing to the contrary. Representative Ramspeck declared that the Resolution "gives the same right to per diem employees as to the regular monthly employees." Representative Rogers stated, "This simply prevents an unintentional discrimination." Nothing was said as to the 1885 Resolution, nor did anyone contend, contrary to the Committee Report, that it was not the intention to repeal it *in toto*. See 83 Cong. Rec. 9466–9467.

It is contended that the purpose of the 1938 Resolution was to increase the number of holidays for per diem

employees to include those allowed by executive order, but to leave intact the allowance of double pay for per diem employees who worked on the holidays specified in the 1885 Resolution. This cannot be correct, for no one contends that the 1938 Resolution did not repeal the 1885 Resolution, as interpreted, with reference to holiday pay on *nonwork* days. That being so, we cannot see why the 1885 Resolution should be regarded as having been left unrepealed with reference to holiday pay on *work* days.[4] Moreover, respondents' contention is entirely untenable in light of the Committee Report. Confusion would be created rather than eliminated if the contention were accepted. The purpose, as shown by the letters, the advisory opinion, the Report, and the statements on the floor of the House, was to alleviate discriminations as to holiday pay and to treat employees alike insofar as possible. This the 1938 Resolution accomplished. Should the respondents' interpretation prevail, it would result in a double standard of pay for per diem employees working on holidays. On those holidays included in the 1885 Resolution, the employees would receive double pay, while on holidays included in or created pursuant to the authority provided by the 1938 Resolution alone they would receive only single pay. This result is required because the 1938 Resolution permits no holiday pay when the employee is required to work. We cannot attribute such anomalous results to the Congress. It is urged that our interpretation would result in a per diem employee receiving the same pay for working on a holiday as is

[4] It is true that the Comptroller General's 1937 letter pointed up the discrimination between per annum and per diem employees on *nonwork* days. But, even though not specifically adverted to, it would seem that a similar discrimination was also apparent as to *work* days in that per annum employees would receive no extra pay, while per diem employees would receive not only their regular wage but an equal amount as holiday pay.

404165 O—57——10

received by his fellow employee who is excused from so working. But this is no discrimination as it likewise is visited upon the per annum employee.[5]

We now turn to other indications supporting the position that the 1885 Resolution was repealed. As we indicated earlier, the double payment for holiday work recognized prior to the 1938 Resolution came about in 1906 through an interpretation of the 1885 Resolution by the Assistant Comptroller of the Treasury. This ruling was recognized by all departments and agencies of the Government until August 1938, when the Comptroller General held that the 1885 Resolution had been repealed by the 1938 Resolution and gratuity pay for holidays was no longer a right of per diem employees.[6] This opinion was followed consistently by all of the departments and agencies of the Government. In this regard it is of importance to note that several efforts were made to repeal this interpretation by specific Act of Congress, but in each instance the bill failed to pass.[7] This contemporaneous interpretation of the 1938 Resolution by the agency charged with its supervision—an interpretation followed by all agencies of the Government—together

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[5] Moreover, the Schedule of Wages here provided for 50% additional pay for work required on holidays not included in the regular tour of duty and 125% additional for work in excess of eight hours on such days.

[6] 18 Comp. Gen. 10, 13; 18 Comp. Gen. 186.

[7] H. J. Res. 303, 76th Cong., 1st Sess.; H. R. 1386, 77th Cong., 1st Sess.; S. 1930, 77th Cong., 1st Sess.; H. R. 6222, 77th Cong., 1st Sess.; S. 1679, 79th Cong., 2d Sess.

The policy of allowing gratuity pay for holidays worked in peacetime and of prohibiting it in wartime is reflected in a section of the Federal Employees Pay Act of 1945, 59 Stat. 298, 5 U. S. C. § 922. This section provided for gratuity pay for holidays worked but was not to go into effect until the cessation of hostilities in World War II. By implication then, there was no gratuity pay allowed by statute for holidays worked during wartime.

with acquiescence of the Congress, must be given great weight.

Likewise it is noted that the House Committee on the Revision of Laws has similarly treated the 1938 Resolution. In the 1940 and 1946 recodifications of the United States Code the 1885 Resolution is listed as being repealed by the later Resolution of 1938. Again in the 1952 edition of the Code the 1885 Resolution is not only listed as repealed but its entire text is omitted from the Code. An explanatory notation states that this Resolution was repealed and is now covered by § 86a which is the 1938 Resolution.

As we noted earlier, this case is not disposed of by *United States* v. *Kelly,* 342 U. S. 193, and nothing in *Kelly* lends support to the employees' argument here. Kelly was a printer employed at the Government Printing Office. The wages of employees in Kelly's office were fixed by a collective-bargaining agreement pursuant to the Act of June 7, 1924, 43 Stat. 658. This Act, though amended, remained in effect as to the provisions involved here at the time of Kelly's claim. The contract Kelly sued on was entered into by the Government under this Act. We said the problem was "whether the [1938] Resolution somehow precludes the awarding of the gratuity pay which the agreement [so made] seems to grant." 342 U. S., at 194. We held that "since the agreement provided for gratuity pay for holidays worked, [Kelly] was entitled to such pay." [8] The award to Kelly,

[8] Kelly also claimed under a Joint Resolution. The Resolution of 1885 provided for "gratuity pay" for holidays for *all* government per diem employees. A Joint Resolution of 1895 referring specifically to Government Printing Office employees is substantially identical in regard to holiday pay with the 1885 Resolution. The *Kelly* case was considered on the basis of the 1895 Resolution, but the Court was not required to determine whether Kelly was entitled to any pay under that Resolution.

then, was solely on the basis of the collective-bargaining agreement. Here there is no such agreement. There is nothing on which the employees can rely which affirmatively grants the double pay they claim.

The judgment of the Court of Claims is, therefore,

Reversed.

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

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

The issue before us is purely one of statutory construction. For the reasons hereafter stated, we believe that the Court has misconstrued the Resolution of 1938 by treating it as completely repealing the Resolution of 1885 and all other prior holiday pay statutes. Our conclusion is based upon (1) the long-established practice under the Resolution of 1885, as amended, of allowing a full day's gratuity pay to per diem employees on holidays, whether or not those employees also received pay for services actually rendered on those days; (2) the language of the 1938 Resolution; (3) the circumstances which led to the presentation of the 1938 Resolution; and (4) the legislative history of its consideration by Congress.

The Joint Resolution of January 6, 1885, 23 Stat. 516, 5 U. S. C. (1934 ed.) § 86, provided—

> "That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth

> day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days." [1]

This Resolution was interpreted repeatedly by the Comptroller of the Treasury, the Comptroller General of the United States, and later the Court of Claims, as allowing the designated per diem employees, on the specified holidays, their regular rate of pay as a gratuity, whether or not they worked on those days. Those who worked on such holidays received their scheduled pay for such work in addition to the holiday gratuity.[2] The administrative practice conformed to this interpretation.

This interpretation and the reason for it is made clear in the following quotation from the Comptroller of the Treasury:

> "I can not reconcile with any ideas of equity and justice the proposition that Congress ever intended by this or any other statute to allow the employees (and we are now speaking of per diem employees who are paid from a lump sum and not a stated, fixed annual salary) a legal holiday with pay, and place it in the power of yourself or any other person to cause any such employee to work on such day, such em-

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[1] In 1887 a fifth holiday was added—Memorial Day. Joint Resolution of February 23, 1887, 24 Stat. 644. For an earlier similar provision, applicable only to employees of the Government Printing Office, see 21 Stat. 304. A subsequent like provision for such employees, the Act of January 12, 1895, 28 Stat. 601, 607, was "consistently administered as providing for gratuity pay in addition to regular compensation if the employee worked on a holiday." *United States* v. *Kelly*, 342 U. S. 193, 195.

[2] See 8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 21 Comp. Dec. 566 (1915); 22 Comp. Dec. 404 (1916); 24 Comp. Dec. 218 (1917); 24 Comp. Dec. 529 (1918); 3 Comp. Gen. 411 (1924); and 15 Comp. Gen. 809 (1936). See also, *Kelly* v. *United States*, 119 Ct. Cl. 197, 206–207, 96 F. Supp. 611, 612–613.

ployee so working receiving just the same amount of pay for said day as those who are not compelled to work, and no more.

. . . . . .

"The laborer is worthy of his hire and should have it when compelled to work on a holiday. The giving him pay for such a day when he does not work is the free gift of Congress, and I will not stultify such gift by taking away from him his pay on a day for which he worked because Congress saw fit to give him pay for legal holidays when he did not work.

"You are therefore authorized to pay to the employees named their wages for work done on Thanksgiving Day in addition to their pay as provided by said act of 1895." 8 Comp. Dec. 322, 325 (1901).

Thus, until 1938, it was the Government's settled practice to allow gratuity pay to per diem employees on the specified holidays, whether or not the employees performed work on those holidays. It was in that significant context, late in 1937, that the incident occurred which led to the House Joint Resolution of June 29, 1938, 52 Stat. 1246, 5 U. S. C. (1952 ed.) § 86a.

On December 6, 1937, the President, by Executive Order No. 7763, 2 Fed. Reg. 2685, closed the government offices and excused all government employees from work on Friday, December 24, the day before Christmas. As December 24 was not a holiday specified by the Resolution of 1885, as amended, the Acting Comptroller General by letter of December 20, 1937, advised the Secretary of the Navy that per diem employees of the Navy Department would not be entitled either to gratuity or scheduled pay for that day unless, of course, they earned the latter by working. The difficulty was that the government offices had been closed by an Executive Order whereas

the Resolutions limited the allowance of holiday gratuities to a list of statutory holidays.[3] The above-mentioned letter gave unquestioning recognition to the existing statutory authorization of gratuity pay for specified holidays, whether or not additionally compensated labor was performed on those days. It contained no suggestion that such payments were invalid or even unwise, except to point out that the existing law allowed such gratuities even when a holiday occurred on a nonworkday. On this point, the letter commented that "even when any of such holidays falls on a nonworkday (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compensation for the day if work is performed thereon." H. R. Rep. No. 2683, 75th Cong., 3d Sess. 5.

With this situation before him, Representative Ramspeck of the House Committee on Civil Service introduced House Joint Resolution 551 providing that the "employees . . . who were excused from duty on December 24, 1937, by the Executive order of December 6, 1937, shall receive compensation for December 24, 1937, any law or regulation to the contrary notwithstanding." See 83 Cong. Rec. 9466.

This was referred to the Civil Service Commission which returned it with the suggested substitute which later became the Resolution of 1938. The Commission explained the need for the substitute as follows:

> "It is believed that the President had in view that the benefits of the holiday be accorded to all classes of employees to the greatest extent possible. The accounting authorities, however, have held that in

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[3] The letter of December 20, 1937, appears in full in H. R. Rep. No. 2683, 75th Cong., 3d Sess. 3–5, relating to House Joint Resolution 551, later approved June 29, 1938, and now before us.

the absence of specific legislation the regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis lose pay for that day. This has resulted in discrimination against these groups of Federal employees.

"The proposed joint legislation provides for the payment of compensation to these employees to cover the single day, December 24, 1937; but there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress. Such a resolution, for example, was required last year to provide payment for these same classes of employees in Washington, D. C., who were excused from duty on January 20, 1937, the date of the inauguration of the President.

"It is believed that general legislation in the following phraseology would give permanent statutory authority for payments under the circumstances indicated:

" 'Hereafter, whenever regular employees of the Federal Government, whose compensation is fixed at a rate per day, per hour, or on a piece work basis, are relieved or prevented from working solely because of the occurrence of a holiday, such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the Departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed .

" 'SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws incon-

sistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.' " H. R. Rep. No. 2683, 75th Cong., 3d Sess. 2.[4]

The letters, constituting the Committee Report, thus pointed to the following changes to be accomplished by the new Resolution:

1. Extend the gratuity to include not only statutory holidays but also any holidays and other nonworkdays prescribed by Executive Order.

2. Extend the gratuity to cover all "regular employees of the Federal Government, whose compensation is fixed at a rate per day, per hour, or on a piece work basis . . . ." *Ibid.*

The above extensions followed the suggestion of the Civil Service Commission that the new Resolution should answer "the broader question involved of securing statutory authority for such payments [as that of December 24, 1937] as a general practice and thus obviate the necessity for special resolutions by Congress." *Ibid.*

The new Resolution also met the implied criticism relating to the allowance of gratuities for holidays occurring on other than workdays. It did this by expressly limiting gratuity allowances to those days on which the employees "are relieved or prevented from working *solely* because of the occurrrence of a holiday such as New Year's Day . . . ." (Emphasis supplied.) 52 Stat. 1246. It thus excluded holidays when the relief from work was due in part to the day not being a workday without regard to its designation as a holiday.

The few brief statements made by the sponsor of the Resolution, Representative Ramspeck, at the time of its adoption, confirm the view that the Resolution was merely

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[4] For the official text of the Resolution as approved June 29, 1938, see 52 Stat. 1246, 5 U. S. C. (1952 ed.) § 86a.

a corrective measure intended to aid "the lowest-paid group of employees in the Government service," rather than a measure designed to abolish substantial benefits enjoyed by per diem laborers under a 50-year-old governmental practice.[5]

It is hardly conceivable that, if either the sponsor of this Resolution or the Committee recommending its adoption had seen in it the deprivation of pay now contended for by the Government, the sponsor or the Committee would not have mentioned that effect in the presentation of the measure. The absence of any such mention is eloquent testimony that the Resolution had no such meaning. It is equally inconceivable that Congress would unanimously reduce the pay of the Govern-

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[5] The following comprises nearly all that was said about the Resolution on the floor of the House:

"Mr. O'MALLEY. . . . What does this cover?

"Mr. RAMSPECK. This covers the lowest-paid group of employees in the Government service. It is those who work on a per diem basis. For instance, last Christmas Eve the President excused all Government employees from rendering any service. His Executive order, of course, applied to every employee in the Government service. Those who are working on a monthly salary got their pay for Christmas Eve, but those who work on a per diem were forced to take the day off, and they lost the day's pay. *This is simply to correct that situation.*

. . . . . .

"Mr. COLLINS. What does it have to do with?

"Mr. RAMSPECK. It covers only those cases where the President by Executive order excuses employees from a day's work. It gives the same right to per diem employees as to the regular monthly employees.

. . . . . .

"Mrs. ROGERS of Massachusetts. *This simply prevents an unintentional discrimination.*

"Mr. RAMSPECK. That is correct. The per diem employees are unintentionally discriminated *against*." (Emphasis supplied.) 83 Cong. Rec. 9466.

ment's lowest paid employees *sub silentio*. Read in its context, and in the light of the explanation, made on the floor, that this Resolution sought "simply to correct" such a situation as that which occurred on Christmas Eve, and to prevent an unintentional discrimination *against* per diem employees, it is difficult to read into the Resolution the meaning, contrary to their interests, for which the Government now contends.

The fact that, at the time the 1938 Resolution was enacted, it was the general practice of private industry to pay some type of premium pay for holidays worked emphasizes the unlikelihood of the interpretation contended for by the Government. In *Kelly* v. *United States*, 119 Ct. Cl. 197, 209, 96 F. Supp. 611, 614, the Court of Claims, in interpreting the 1938 Resolution, described the circumstances in that year as follows:

> "With regard to its per diem and per hour employees, the so-called wage board employees, the Government is in competition with private employers, and attempts to keep its wages and working conditions in step with those in private enterprise. It is completely unthinkable that the owner of a printing shop could, by practice, or by contract, maintain the policy as to holiday pay which the Government here seeks to attribute to Congress. Such an employer might, and many employers did, in 1938, have a policy of not paying for holidays not worked. If the holiday was worked, it was paid for. Some such employers then, and most of them now [1951] have contracts with their employees providing for paid holidays, but in all such contracts there is a provision that if the holiday is in fact worked, it will be paid for again, usually at premium pay, and in addition to the holiday pay. But in no case which we have heard of, or can imagine, could an employer maintain a

practice whereby an employee who worked on a holiday received merely the same pay as one who did not work." [6]

The foregoing changes in the existing law retained its general pattern. They clarified both the classes of per diem employees entitled to a holiday gratuity, and the occasions when that gratuity was to be payable. Nowhere in the Resolution or in its legislative history is there any express statement of the Government's present contention that an employee who comes within the statutory classification of eligibility for the holiday gratuity is deprived of it if he performs some compensated labor for the Government on the holiday in question.

The Government emphasizes the phrase, added in 1938, which states that its regular per diem employees shall receive holiday pay "whenever [they] are relieved or prevented from working solely because of the occurrence of a holiday . . . ." This is interpreted by the Court of Claims as eliminating gratuity pay for those holidays which occur on nonworkdays. It does this aptly because the occurrence of a holiday on a nonworkday obviously is not the *sole* cause preventing per diem employment on those days. The Government, however, suggests that this clause also means that if a per diem employee, who becomes entitled to gratuity pay solely because of the occurrence of a holiday on a workday, nevertheless responds to a call to work on that day, he loses the

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[6] See also, a study entitled "Personnel Practices Governing Factory and Office Administration," prepared in 1937 by F. Beatrice Brower for the National Industrial Conference Board, Inc., New York City. This covered about 450 industrial concerns employing wage earners totaling about 370,000. (P. 2.) Over 60% of such companies paid some type of premium or gratuity to their wage earners for work performed on Sundays or holidays, the *extra* pay ranging from 25% to 100%, in addition to the regular rate of pay. (Pp. 36–37.)

gratuity. Such an interpretation discriminates against the loyal holiday worker.

Moreover, such an interpretation produces the inequitable result that an employee who works on a holiday receives no more pay than an employee who is not required to work on the same holiday.

Concededly, this was not so before 1938. At least until then the 1885 Resolution was recognized as authorizing gratuity pay for holidays, whether or not work was performed on those days. Accordingly, in 1938, it would have been a simple thing to repeal the 1885 Resolution outright if that result were intended. Instead of doing so, the repealing section in the 1938 Resolution expressly limited itself to the inconsistencies and conflicts between, on the one hand, the new Resolution and, on the other, the 1885 Resolution and "all other laws inconsistent or in conflict with the provisions" of the new Resolution. Such a limited repeal well reflects the above-recited legislative history. It shows the character of the new Resolution to be that of corrective legislation in the interests of the laborers. To be sure, the House Committee Report in its treatment of § 2 of the new Resolution did set forth the text of the 1885 Resolution as that of the Resolution cited in that repealing section. That recital is not sufficient to change the specifically restricted repealing clause into an outright repeal in the face of its express limitation to inconsistencies and conflicts.

The Resolutions of 1885 and 1938 are *in pari materia* and should be read together. When so read, there is no basis for treating differently the several holidays specified in the Resolutions. No "double standard" results. The 1938 Resolution expands the statutory list of holidays to include various other days that might be designated by Executive Orders. None of the original list are excluded.

Petitioner cites no judicial decision upholding its interpretation. The Court of Claims has twice rejected it and taken the opposite view.[7]

Petitioner cites as authority for its position the brief rulings of the Comptroller General under the 1938 Resolution. Without reviewing the material which has influenced the Court of Claims, those rulings assume, without discussion or judicial support, that the Resolution of 1938 completely repealed the Resolution of 1885. See 18 Comp. Gen. 10, 16, 186, 191 (1938). The treatment of the amendment in the publication of the United States Code is not controlling and cites no judicial authority.

In *United States* v. *Kelly,* 342 U. S. 193, we held that per diem employees of the Government Printing Office were entitled to the gratuity pay guaranteed by their collective-bargaining agreement. We also said expressly that the 1938 Resolution "was silent on the subject of gratuity pay for holidays on which work was performed." *Id.,* at 195. The *Kelly* case thus shows that, at the very least, the gratuity policy of the 1885 Resolution is not prohibited after 1938. Accordingly, it would be consistent with that case to uphold the Court of Claims in the instant case. The collective-bargaining contract in the *Kelly* case was declaratory of, not contrary to, the policy of the 1885 Resolution.

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

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[7] *Kelly* v. *United States* (two judges dissenting), 119 Ct. Cl. 197, 96 F. Supp. 611, aff'd on other grounds, *United States* v. *Kelly,* 342 U. S. 193; and the instant case, *Bergh* v. *United States* (one judge dissenting), 132 Ct. Cl. 564, 132 F. Supp. 462. See also, *Adams* v. *United States,* 42 Ct. Cl. 191, 212–213.

UNITED STATES *v.* WESTERN PACIFIC RAILROAD CO. ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 18. Argued October 15, 1956.—Decided December 3, 1956.

The three respondent railroads sued the United States in the Court of Claims under the Tucker Act to recover the difference between the tariff rates actually paid and those allegedly due on certain Army shipments of steel aerial bomb cases filled with napalm gel but without the bursters and fuses required to ignite them. The carriers claimed to be entitled to payment at the high first-class rates established in Item 1820 of Consolidated Freight Classification No. 17 for "incendiary bombs." In each case the suit was brought within six years, though not within two years, after the cause of action accrued. The Court of Claims entered summary judgment for respondents. On review here, *held:*

1. In the circumstances here presented, the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission. Pp. 62–70.

(a) The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. Pp. 63–65.

(b) A determination of the meaning of the term "incendiary bomb" in Item 1820 involves factors "the adequate appreciation of which" presupposes an "acquaintance with many intricate facts of transportation." Pp. 65–68.

(c) Where, as here, the problem of cost-allocation is relevant, and where therefore the questions of the construction of a tariff and of the reasonableness of the tariff are so intertwined that the same factors are determinative on both issues, then it is the Commission which must first pass upon them. Pp. 68–69.

2. The issues as to the construction and reasonableness of the tariff having been raised by way of defense, referral of those questions to the Commission is not barred by the two-year limitation prescribed by § 16 (3) of the Interstate Commerce Act. Pp. 70–74.

3. The Court of Claims erred in disposing by summary judgment of the Government's defense that two of the respondents were estopped from charging the "1820" rate. Pp. 74–76.

132 Ct. Cl. 115, 131 F. Supp. 919, reversed and remanded.

Morton Hollander argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Ralph S. Spritzer* and *Melvin Richter.*

Frederick Bernays Wiener argued the cause for respondents. With him on the brief was *Lawrence Cake.*

Mr. Justice Harlan delivered the opinion of the Court.

The three respondent railroads each sued in the Court of Claims to recover from the United States as shipper the difference between the tariff rates actually paid and those allegedly due on 211 Army shipments of steel aerial bomb cases filled with napalm gel.[1] Approximately 200 of the shipments were made over the lines of respondents Bangor and Seaboard in 1944; the remainder were carried by respondent Western Pacific in 1948 and 1950.

Napalm gel is gasoline which has been thickened by the addition of aluminum soap powder. The mixture is inflammable but not self-igniting. In a completed incendiary bomb the napalm gel is ignited by white phosphorus contained in a burster charge, which in turn is fired by a fuse. These shipments, however, involved only the steel casings and the napalm gel; burster and fuse had not yet been added.

The carriers billed the Government at the high first-class rates established in Item 1820 of Consolidated Freight Classification No. 17 for "incendiary bombs." Pursuant to § 322 of the Transportation Act of 1940,[2] the

[1] The suits were brought under the Tucker Act, 28 U. S. C. § 1491.

[2] 54 Stat. 955, 49 U. S. C. § 66. This section provides: "Payment for transportation of the United States mail and of persons or prop-

Government paid the bills of the Bangor and the Seaboard as presented; on post-audit, however, the General Accounting Office made deductions against these respondents' subsequent bills on other shipments, on the ground that the shipments in question should have been carried at the lower, fifth-class, rate applicable to gasoline in steel drums.[3] The bills of the Western Pacific were initially paid at the lower rate. Respondents thereupon brought the present suits to recover the difference between the bills as rendered and as paid in the case of the Western Pacific, and the amount of the deductions in the other two cases.

The Government defended on three grounds: (1) that Item 1820 was inapplicable because absence of burster and fuse deprived these bombs of the essential characteristics of "incendiary bombs," and hence no additional sums were due; (2) that if this tariff item was held to govern, the tariff would be unreasonable as applied to these shipments, and that as to this issue the court proceedings should be suspended and the matter referred to

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erty for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

[3] It is not entirely clear from the record just what rate the Government believes is applicable to these shipments. It seems to concede that Item 1895 of Consolidated Freight Classification No. 17, covering "Empty Aerial Bombs," does not apply, although this was the original classification assigned to such shipments by the Official Classification Committee, a railroad tariff agency. The essence of the Government's position seems to be that these shipments, being nonincendiary, were a mere combination of gasoline, napalm thickener, and steel casings. Since these three items, standing alone, are all carried at the fifth-class rate, the Government urges that the "combination rule" should apply and the articles be carried at the same fifth-class rate under Rule 18 of Consolidated Freight Classification No. 17.

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the Interstate Commerce Commission; and (3) that in any event the Bangor and Seaboard were estopped from charging the "1820" rate.

The Court of Claims, relying on its earlier decision in *Union Pacific R. Co.* v. *United States*, 125 Ct. Cl. 390, 111 F. Supp. 266,[4] entered summary judgment for respondents, two judges dissenting.[5] It held that the shipments in question were "incendiary bombs" within the meaning of Item 1820 of the tariff and thus entitled to the higher rate. In addition, while seemingly recognizing the Government's right to have the defense of unreasonableness determined by the Interstate Commerce Commission, the court ruled that the running of the two-year period of limitations provided by § 16 (3) of the Interstate Commerce Act[6] cut off the right of referral to the Commission. Lastly, the court overruled the defense of estoppel as to the respondents Bangor and Seaboard. Because of the importance of these questions in the administration of the Interstate Commerce Act, and alleged conflict among the lower courts on the issue of limitations, we granted certiorari. 350 U. S. 953.

I.

We are met at the outset with the question of whether the Court of Claims properly applied the doctrine of primary jurisdiction in this case; that is, whether it correctly allocated the issues in the suit between the jurisdiction of the Interstate Commerce Commission and that of the court. In the view of the court below, the case presented two entirely separate questions. One was the question

[4] In that case the Court of Claims held Item 1820 applicable to shipments similar to those involved here. The Government did not seek review of that decision.

[5] 132 Ct. Cl. 115, 131 F. Supp. 919. The dissenters were Judge Madden and Chief Judge Jones.

[6] 24 Stat. 384, as amended, 49 U. S. C. § 16 (3).

of the construction of the tariff—whether Item 1820 was applicable to these shipments. The second was the question of the reasonableness of that tariff, if so applied. The Court of Claims assumed, as it had in the *Union Pacific* case, *supra,* that the first of these—whether the "1820" rate applied—was a matter simply of tariff construction and thus properly within the initial cognizance of the court.[7] The second—the reasonableness of the tariff as applied to these shipments—it seemed to regard as being within the initial competence of the Interstate Commerce Commission. Before this Court neither side has questioned the validity of the lower court's views in these respects. Nevertheless, because we regard the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation policy to be of continuing public concern, we have been constrained to inquire into this aspect of the decision. We have concluded that in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary

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[7] The Court of Claims stated in the *Union Pacific* case, 125 Ct. Cl., at 393, 111 F. Supp., at 268: "At the outset, it should be noted that while this court has no rate-making functions . . . the construction and application of published rates and classifications are proper matters for the courts as well as for the Interstate Commerce Commission."

jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 433.

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference* v. *United States,* 342 U. S. 570. The two factors are part of the same principle,

> "now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by prelimi-

> nary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.*, at 574–575.

The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations.[8]

Thus the first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act. Decision is governed by two earlier cases in this Court. In *Texas & Pacific R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, a shipper attempted to ship oak railroad ties under a tariff for "lumber." The carrier rejected them, urging that such ties were not lumber. In a damage action expert testimony was received on the question. This Court, however, held that the Interstate Commerce Commission alone could resolve the question. The effect of the holding is clear: the courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well. A particularization of such circumstances emerged in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. There the Court held that where the

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[8] Jaffe, Primary Jurisdiction Reconsidered, 102 Univ. Pa. L. Rev. 577, 583–584 (1954).

question is simply one of construction the courts may pass on it as an issue "solely of law." But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that "the enquiry is essentially one of fact and of discretion in technical matters," then the issue of tariff application must first go to the Commission. The reason is plainly set forth: such a "determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." *Id.*, at 291. We must therefore decide whether a determination of the meaning of the term "incendiary bomb" in Item 1820 involves factors "the adequate appreciation of which" presupposes an "acquaintance with many intricate facts of transportation." We conclude that it does.

A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially. In the case of "incendiary bombs," since it is expensive to take the elaborate safety precautions necessary to carry such items in safety, evidently there must have been calculation of the costs of handling, supervising and insuring an inherently dangerous cargo. In other words, there were obviously commercial *reasons* why a higher tariff was set for incendiary bombs than for, say, lumber. It therefore follows that the decision whether a certain item was intended to be covered by the tariff for incendiary bombs involves an intimate knowledge of these very reasons themselves. Whether steel casings filled with napalm

gel are incendiary bombs is, in this context, more than simply a question of reading the tariff language or applying abstract "rules" of construction. For the basic issue is how far the reasons justifying a high rate for the carriage of extra-hazardous objects were applicable to the instant shipment. Do the factors which make for high costs and therefore high rates on incendiary bombs also call for a high rate on steel casings filled with napalm gel? To answer that question there must be close familiarity with these factors. Such familiarity is possessed not by the courts but by the agency which had the exclusive power to pass on the rate in the first instance. And, on the other hand, to decide the question of the scope of this tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics.

The main thrust of the Government's argument on the construction question went to the fact that the shipments here involved were not as hazardous as contemplated by the term "incendiary bomb" as used in the tariff, and that therefore the tariff should not be construed to cover them.[9] Similarly, the dissenting judges below emphasized the absence from the shipments of the commercial factors which call for a high rate on incendiary bombs: "If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it." 132 Ct. Cl., at 118, 131 F. Supp., at 921. The difficulty with this line of argument is that we do not know whether

[9] In response to the motion for summary judgment the Government presented affidavits by chemical engineers stating that napalm gel is not incendiary. But these affidavits become meaningful only if the court knows the precise relevance of the incendiary quality of the shipments to the setting of the rate.

the "incendiary quality of the freight" was in fact the reason for the high rate, still less whether that was the only reason and how much weight should be assigned to it. Courts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors, and the extent to which they are present or absent in the particular case, is tantamount to engaging in judicial guesswork. It was the Commission and not the court which originally determined why incendiaries should be transported at a high rate. It is thus the Commission which should determine whether shipments of napalm gel bombs, minus bursters and fuses, meet those requirements; that is, whether the factors making for certain costs and thus a certain rate on incendiaries are present in the carriage of such incompleted bombs.

This conclusion is fortified by the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied, the latter being recognized by all to be one for the Interstate Commerce Commission. For the Government's thesis on the issue of reasonableness is not that the rate on incendiary bombs is, in general, too high. It argues only that the rate "as applied" to these particular shipments is too high—*i. e.*, that since the expenses which have to be met in shipping incendiaries have not been incurred in this case, the carriers will be making an unreasonable profit on these shipments. This seems to us to be but another way of saying that the wrong tariff was applied. In both instances the issue is whether the factors which call for a high rate on incendiary bomb shipments are present in a shipment of bomb casings full of napalm gel but lacking bursters and fuses. And the mere fact that the issue is phrased in one instance as a matter of tariff construction and in the other as a matter of reasonableness should not

be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader.[10]

By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* which call for decision based on the particular facts of each case. Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it. See *Crancer* v. *Lowden,* 315 U. S. 631. And in many instances construing the tariff does not call for examination of the underlying cost-allocation which went into the making of the tariff in the first instance. We say merely that where, as here, the problem of cost-allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, then it is the Commission which must first pass on them.

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[10] The artificiality of trying to separate the issue of "construction" from that of "reasonableness as applied" is illustrated by the Court of Claims' holding in the *Union Pacific* case, *supra.* There, after holding that the absence of bursters and fuses did "not affect the identity of the articles" as incendiary bombs, the court went on to say that "it may well be that a lower tariff rate should apply to the carriage of the less hazardous incendiary bomb [one without burster and fuse]. This question is not within our jurisdiction, however, as the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission." 125 Ct. Cl., at 393, 394, 111 F. Supp., at 268. Similarly, the Government here concedes that the question of hazard "goes to the issue of reasonableness," although arguing that it is "also relevant to the question of tariff interpretation, for, like any other instrument, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness."

We hold, therefore, that both the issues of tariff construction and the reasonableness of the tariff as applied were initially matters for the Commission's determination.

II.

We come then to the question of whether referral of these issues to the Commission was barred by the two-year period of limitation contained in § 16 (3) of the Interstate Commerce Act. We hold that it was not.

Section 16 (3)(a) provides that "all actions at law by carriers subject to this chapter for recovery of their charges . . . shall be begun within two years from the time the cause of action accrues, and not after." [11] This provision makes it clear that where a carrier sues a private shipper the action must be brought within two years. However, the Tucker Act, 28 U. S. C. § 2501, provides that "every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues." Relying on the broad language of the latter act, the Court of Claims has, since 1926, consistently held that § 16 (3) does not apply to suits by carriers to recover alleged undercharges from the United States as shipper. *Southern Pac. Co.* v. *United States,* 62 Ct. Cl. 391; *Seaboard Air Line R. Co.* v. *United States,* 113 Ct. Cl. 437, 83 F. Supp. 1012; *Union Pacific R. Co.* v. *United States,* 114 Ct. Cl. 714, 86 F. Supp. 907. The present suits were thus held timely brought,[12] even though more than two

[11] 24 Stat. 384, as amended, 49 U. S. C. § 16 (3)(a).

[12] The suits were instituted in 1954. In the *Western Pacific* case the carrier's claims accrued in 1948 and 1950, when the United States paid the lower rate instead of the "1820" rate for which it was billed. As to the *Bangor* and *Seaboard* cases, where the United States initially paid the "1820" rate as billed (presumably in 1944 when the shipments were made), and subsequently readjusted that rate on post-audit, it is impossible to say when the claims accrued as the record is silent as to when the post-audit readjustment was made.

years had elapsed since the accrual of the cause of action.[13] However, the Court of Claims held that the two-year limitation of § 16 (3) did bar the Government from obtaining a reference of its defense of unreasonableness to the Interstate Commerce Commission.[14] Presumably it would have ruled likewise as to the issue of tariff construction had it regarded that question as lying initially within the competence of the Commission. In other words, the holding below was that the United States can be sued for six years but can raise certain defenses only if the suit is brought in the first two of those years.

We may assume, without deciding, that the Government would have been barred by § 16 (3) from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. Respondents in effect ask us to hold that a suit may be brought for six years but that certain defenses thereto may be raised only for two years. Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.

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[13] Although questioning the soundness of this ruling which subjects carriers' claims against the United States as shipper to a more lenient statute of limitations than that applicable to their claims against other shippers, the Government has not challenged it here. We therefore do not pass on it.

[14] The opinion of the Court of Claims does not expressly refer to the two-year period of § 16 (3). The cases cited by the court, however, make it clear that it had in mind that provision, probably § 16 (3)(c), which reads: "For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after . . . ."

Section 16 (3) does not deal with referral of questions to the Commission incident to judicial proceedings. On its face it has to do only with the commencement of actions or reparation proceedings before the Commission. There is therefore no language which militates against the conclusion that the statute does not apply to referrals. More important, the basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.

It is argued that this Court has construed § 16 (3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. Reliance is placed upon *A. J. Phillips Co.* v. *Grand Trunk R. Co.*, 236 U. S. 662; *William Danzer & Co.* v. *Gulf & S. I. R. Co.*, 268 U. S. 633; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356. But these cases all dealt with affirmative claims for the recovery of transportation charges, and not with referrals incident to suits which were originally brought in time. The teaching of the *Midstate* case, for instance, is that the running of the statute destroys the *right* to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties. But here the

Government is not asserting a right to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense. It is therefore irrelevant whether the statute of limitations is "jurisdictional" or not; the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits. Nor does *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, help the respondents. There again the statute of limitations was invoked against a plaintiff in order to bar an affirmative claim which was untimely filed. A coal shipper had sued a carrier for damages arising out of the alleged discriminatory allotment of railroad cars for its use. Stating that the propriety of the carrier's method of allotment, even though incident to a damage action, was cognizable only by the Commission, and that redress there was governed by the two-year statute of limitations, the Court held that the statute could not be evaded by filing suit in the District Court, rather than before the Commission, and then having the barred claim adjudicated by referral to the latter. In effect the holding was that the plaintiff had invoked the wrong tribunal, and that since limitations barred suit before the correct tribunal no referral could be made to the latter. *Morrisdale* must be limited to its peculiar facts, and we shall not extend it to bar the referral of defenses in actions properly and timely brought, as the Court of Claims has held this one was.[15]

We are told that the Government can protect itself, when it believes it has been charged an unreasonable rate,

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[15] The fact that in this instance the issues of tariff "construction" and "reasonableness" were both referrable to the Commission does not, of course, bring the case within *Morrisdale*. Both of these questions were issues only by reason of the Government's defense; neither was part of the carrier's affirmative case. In other words, had the applicability of this tariff not been challenged by the Government, the carrier's own case would have presented nothing which was referrable to the Commission.

by filing an affirmative claim for reparations with the Commission within the two-year period provided by § 16 (3). But Congress has relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier if, on post-audit, it finds that the United States has been overcharged.[16] This right was thought to be a necessary measure to protect the Government, since carriers' bills must be paid on presentation and before audit. On respondents' theory the Government could invoke this right only at the peril of losing its defenses in a later suit by the carrier. Evidently this was not the purpose of Congress in authorizing unilateral set-off.[17]

We hold, therefore, that the limitation of § 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff.

III.

There remains the question of whether the Court of Claims properly dismissed the Government's defense of estoppel as to the respondents Bangor and Seaboard. We deal with it now because that defense would be reached should the further proceedings below, which must follow in consequence of what we have already said, result in

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[16] See n. 2, *supra*.

[17] Statistics furnished by the Comptroller General show that since 1948 the General Accounting Office has post-audited 17,220,783 bills presented by carriers. In the same period post-audit revealed overpayment in 1,102,654 cases. The magnitude of these figures underscores the impossibility of requiring the Government to file anticipatory suits before the I. C. C. in every case where it thinks the carrier might later sue to recover the amount set off by the Government.

adherence to the view that Item 1820 applies to these shipments.[18]

The Government's claim is that the Bangor and Seaboard were estopped from charging the "1820" rate because of the Army's reliance on a ruling of the Official Classification Committee, a railroad tariff agency to which these two respondents belonged, that this type of napalm gel bomb shipment would be carried at a lower rate. The Court of Claims rejected this defense because (1) the ruling was later withdrawn by the Committee; (2) the Government had shown no detrimental reliance on the ruling; (3) it had paid the high rate billed for all shipments; and (4) neither carrier had acquiesced in the Committee's ruling.

We think that the Court of Claims erred in disposing of this defense by summary judgment. It appears to be undisputed that the ruling in question was not rescinded until *after* all of these shipments had been made.[19] The Government's affidavits in opposition to the motion for summary judgment were, in our opinion, sufficient to entitle it to an opportunity to prove reliance and detriment. The fact that the Government paid the carrier's bills as rendered is without significance in light of § 322 of the Transportation Act, *supra,* requiring payment "upon presentation" of such bills and postponing final settlement until audit. And the question whether the Official Classification Committee had authority to bind these two carriers to acceptance of a lower rate presents

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[18] The estoppel defense is not asserted against the Western Pacific, so that this case must in any event go to the Commission. Hence adjudication of the estoppel defense as to the Bangor and Seaboard would no doubt await the Commission's determination as to whether the "1820" tariff was applicable to these shipments, and reasonable if so applied.

[19] The ruling was made in 1943 and was confirmed in 1945. The Bangor and Seaboard shipments were made in 1944.

issues of fact which must be tried. Nor, unlike the case of a private shipper, do we think that the defense of estoppel is unavailable to the Government. See 49 U. S. C. § 22. Cf. *Oregon-Wash. R. & N. Co.* v. *United States,* 255 U. S. 339; *Western Pac. R. Co.* v. *United States,* 255 U. S. 349.[20] We conclude that the Government should have an opportunity to prove estoppel, without any intimation, of course, as to whether it will be able to establish the defense.

The judgment below must be reversed and the case remanded to the Court of Claims for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Douglas dissents from a reference of these matters to the Interstate Commerce Commission, since he is of the view that the principles of *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, are applicable here.

Mr. Justice Reed and Mr. Justice Brennan took no part in the consideration or decision of this case.

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[20] A private shipper may not invoke the defense of estoppel to prevent a carrier from collecting a higher applicable tariff rate than that which may have been actually quoted by the carrier. This results from § 6 (7) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 6 (7), forbidding departures from the published tariff. See *Pittsburgh, Cincinnati, Chicago & St. Louis R. Co.* v. *Fink,* 250 U. S. 577, 583. The same considerations do not obtain when the Government is the shipper, in view of § 22 of the Act, 24 Stat. 387, as amended, 49 U. S. C. § 22, providing that "nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States."

UNITED STATES *v.* CHESAPEAKE & OHIO RAILWAY CO.

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

No. 19. Argued October 15, 1956.—Decided December 3, 1956.

The respondent railroad sued the United States in the District Court under the Tucker Act to recover a sum allegedly due for certain transportation of military supplies, the United States having paid the *export* rate rather than the higher *domestic* rate. The goods had been shipped via respondent railroad to an Atlantic port for export; that exportation had been frustrated by wartime developments; they were stored domestically; and later shipped from a Pacific port to a different foreign country. The District Court gave judgment for the respondent, and the Court of Appeals affirmed. On review here, *held:*

1. On the record in this case, this Court cannot say whether the issue of tariff construction should have been referred to the Interstate Commerce Commission. Pp. 80–81.

2. The question of tariff construction should be determined by the Court of Appeals upon a full record, which would include consideration of the factors shown by the record in the earlier case on which it relied, but which is not before this Court. P. 81.

3. Referral to the Interstate Commerce Commission of the question of tariff construction is not barred by the two-year limitation contained in § 16 (3) of the Interstate Commerce Act. *United States* v. *Western Pacific R. Co., ante,* p. 59. P. 81.

224 F. 2d 443, reversed and remanded.

Morton Hollander argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter.*

Meade T. Spicer, Jr. argued the cause and filed a brief for respondent.

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MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents questions similar to those involved in *United States* v. *Western Pacific R. Co., ante,* p. 59, decided today.

In 1941 and 1942 the Government shipped from Pontiac, Michigan, to Newport News, Virginia, over the respondent's lines, various military supplies destined for China, via the port of Rangoon, Burma. This intended exportation was frustrated by the fall of Rangoon to Japanese military forces on March 8, 1942. The Government therefore took possession of the shipments at Newport News, reshipped them about three months later to storage centers in Pennsylvania and New Jersey, and more than a year later again reshipped some of the goods to various points on the Pacific Coast, whence they were exported to Calcutta, India. Had the original purpose of a shipment to China been accomplished, the *export* rate provided in Item 23030 of Tariff No. 218–M [1] would have applied to the transportation between Pontiac and Newport News. However, when that shipment was frustrated, the respondent billed the Government at the higher

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[1] "APPLICATION OF EXPORT RATES TO NORTH ATLANTIC SEABOARD PORTS OF EXPORT

"The rates named in this tariff, or as same may be amended, and designated as 'Export Rates' will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given. (C. F. A. Inf. 8179, 13607)"

domestic rate.[2] The Government paid these bills as rendered, but subsequently, on post-audit by the General Accounting Office, readjusted the charges to the lower export rate, deducting the difference from subsequent bills of the carrier for other transportation services.[3] Thereafter the respondent sued the United States in the District Court for the Eastern District of Virginia under the Tucker Act[4] to recover the amount of these deductions. The District Court gave judgment for the respondent,[5] the Court of Appeals affirmed,[6] and we granted certiorari.[7]

The Court of Appeals, following its earlier decision in *United States* v. *Chesapeake & Ohio R. Co.*, 215 F. 2d 213, held "that the intention to export to China was abandoned and that the movement which began at Pontiac, Michigan, as an export was converted by the shipper into a domestic shipment"; hence the domestic rate applied. It further held that the District Court had properly denied the Government's request for a referral to the Interstate Commerce Commission of the question whether the domestic rate, if applied to these shipments, would be reasonable. As to this the Court of Appeals said that the "question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide." Therefore, it concluded that there were no "administrative questions" for the Commission to determine. Further, without questioning the timeliness of the

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[2] Central Freight Association, Freight Tariff No. 490–A.

[3] This procedure was authorized by § 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U. S. C. § 66.

[4] 28 U. S. C. § 1346 (a)(2).

[5] The District Court filed no written opinion. It rendered a short oral opinion which appears at pages 40–41 of the record.

[6] 224 F. 2d 443.

[7] 350 U. S. 953.

respondent's suit under the Tucker Act,[8] the Court of Appeals held that in any event referral to the Commission of the question of the reasonableness of the domestic tariff as applied to these shipments was barred by the two-year statute of limitations of the Interstate Commerce Act.[9]

Unlike the Court of Claims in *United States* v. *Western Pacific R. Co., supra,* the Court of Appeals, correctly we think, regarded the questions of whether the domestic tariff applied to these shipments, and whether it was reasonable if so applied, as simply two ways of stating the same underlying problem. Hence we face the same question as the one we have dealt with in the *Western Pacific* case, *supra,* namely: does the issue of tariff construction, which the Court of Appeals regarded as one for the court, involve such acquaintance with rate-making and transportation factors as to make the issue initially one for the Interstate Commerce Commission, under the doctrine of primary jurisdiction? In this instance we cannot say positively whether or not there should have been a referral to the Commission. The Government, treating the issues of "construction" and "reasonableness" as separable, did not question the Court of Appeals' holding that the domestic tariff applied, but argued only that the tariff was unreasonable as applied to these shipments. The parties, therefore, have not briefed or argued the factors making for or against the application of the domestic rather than the export tariff. Consequently, we do not know what kinds of factors are involved, and we therefore cannot say on this record whether the issue of tariff con-

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[8] The respondent's cause of action accrued no later than the summer of 1946, when the Government deducted the difference between the domestic rate and the export rate. The respondent filed its suit on March 10, 1952. On the assumption that the Tucker Act applies (see our opinion in the *Western Pacific* case, *ante,* p. 59, at pp. 70–71), the suit was timely brought.

[9] 24 Stat. 384, as amended, 49 U. S. C. § 16 (3).

struction should have been referred to the Commission. We think this question should be determined by the Court of Appeals upon a full record, which would no doubt include consideration of the factors shown by the record in the earlier case which it followed here,[10] and which is not before us.[11] For the reasons given in our opinion in the *Western Pacific* case, *supra,* we hold that referral to the Commission would not be barred by the § 16 (3) statute of limitations.

We shall therefore reverse the judgment below and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion and with our opinion in *United States* v. *Western Pacific R. Co., supra,* decided this day.

It is so ordered.

MR. JUSTICE DOUGLAS dissents from a reference of these matters to the Interstate Commerce Commission, since he is of the view that the principles of *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, are applicable here.

MR. JUSTICE REED and MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

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[10] 215 F. 2d 213.

[11] The Government suggests that in comparable situations the Commission has decided that the export rate should apply. See *C. B. Fox Co.* v. *Gulf, Mobile & Ohio R. Co.,* 246 I. C. C. 561; *River Petroleum Corp.* v. *Yazoo & M. V. R. Co.,* 258 I. C. C. 1; *Mid-Continent Petroleum Corp.* v. *Illinois Central R. Co.,* 258 I. C. C. 422; *Products-From-Sweden, Inc.* v. *Lehigh Valley R. Co.,* 263 I. C. C. 760. Respondent, in turn, cites *California Texas Oil Co.* v. *Bessemer & Lake Erie R. Co.,* 264 I. C. C. 147; *Pacific Chemical & Fertilizer Co.* v. *Pennsylvania R. Co.,* 268 I. C. C. 468; and *War Materials Reparations Cases,* 294 I. C. C. 5. We express no opinion as to the effect of these decisions, for we think their relevancy to the situation at hand should be left to the Court of Appeals in the first instance. See our opinion in the *Western Pacific* case, *ante,* p. 59.

PUTNAM ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 25. Argued October 17, 1956.—Decided December 3, 1956.

In a business venture not connected with his law practice, petitioner, a lawyer, organized a corporation, supplied its capital, and financed its operations through advances and guaranties of its debts. He wound up the corporation's affairs and liquidated its assets but did not terminate its corporate existence. Its assets were insufficient to pay its debts, and petitioner paid $9,005 of its debts in discharge of his obligation as guarantor. *Held:* In computing petitioner's income tax, this $9,005 loss was a nonbusiness bad debt loss to be given short-term capital loss treatment under § 23 (k) (4) of the Internal Revenue Code of 1939; and it was not fully deductible under § 23 (e) (2) as a loss "incurred in [a] transaction . . . for profit, though not connected with [his] trade or business." Pp. 83–93.

1. The loss sustained by a guarantor unable to recover from the debtor is by its very nature a loss from a bad debt to which the guarantor becomes subrogated upon discharging his liability as guarantor. Pp. 85–86.

2. There is no justification for consideration of petitioner's loss under § 23 (e) (2) as an ordinary nonbusiness loss sustained in a transaction entered into for profit. As a loss attributable to a bad debt, it must be regarded as a bad debt loss, deductible as such or not at all. *Spring City Co.* v. *Commissioner,* 292 U. S. 182. Pp. 87–88.

3. *Pollak* v. *Commissioner,* 209 F. 2d 57, *Edwards* v. *Allen,* 216 F. 2d 794, and *Cudlip* v. *Commissioner,* 220 F. 2d 565, turn upon erroneous premises. Pp. 88–90.

(a) A guarantor who pays a creditor in discharge of his obligation as guarantor of the debt of an insolvent does not voluntarily acquire a debt known by him to be worthless; he involuntarily suffers a loss on a bad debt. P. 88.

(b) A worthless new obligation does not arise in favor of a guarantor upon his payment to a creditor of an insolvent; he is subrogated to an existing debt which "becomes" worthless in his hands, within the meaning of § 23 (k). Pp. 88–89.

(c) *Eckert* v. *Burnet,* 283 U. S. 140, distinguished. Pp. 89–90.

4. Application of § 23 (k) (4) to the loss here involved is in accordance with the objectives sought to be achieved by Congress in providing short-term capital loss treatment for nonbusiness bad debts. Pp. 90–93.

224 F. 2d 947, affirmed.

Richard E. Williams argued the cause for petitioners. With him on the brief was *A. Lyman Beardsley.*

Philip Elman argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Joseph F. Goetten.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner, Max Putnam, in December 1948, paid $9,005.21 to a Des Moines, Iowa, bank in discharge of his obligation as guarantor of the notes of Whitehouse Publishing Company. That corporation still had a corporate existence at the time of the payment but had ceased doing business and had disposed of its assets eighteen months earlier. The question for decision is whether, in the joint income tax return filed by Putnam and his wife for 1948, Putnam's loss is fully deductible as a loss "incurred in [a] transaction . . . for profit, though not connected with [his] trade or business" within the meaning of § 23 (e) (2) of the Internal Revenue Code of 1939,[1] or whether it is a nonbusiness bad debt within the

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

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

. . . . . .

"(e) LOSSES BY INDIVIDUALS.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

. . . . . .

"(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; . . . ." 53 Stat. 13, 26 U. S. C. § 23 (e) (2).

meaning of § 23 (k)(4) of the Code,[2] and therefore deductible only as a short-term capital loss.

The Commissioner determined that the loss was a nonbusiness bad debt to be given short-term capital loss treatment. The Tax Court [3] and the Court of Appeals [4] for the Eighth Circuit sustained his determination. Because of an alleged conflict with decisions of the Courts of Appeals of other circuits,[5] we granted certiorari.[6]

Putnam is a Des Moines lawyer who in 1945, in a venture not connected with his law practice,[7] organized Whitehouse Publishing Company with two others, a newspaperman and a labor leader, to publish a labor newspaper. Each incorporator received one-third of the issued capital stock, but Putnam supplied the property and cash with which the company started business. He also financed its operations, for the short time it was in business, through advances and guarantees of payment of salaries and debts.

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

. . . . . .

"(k) BAD DEBTS.—

. . . . . .

"(4) NON-BUSINESS DEBTS.—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term 'non-business debt' means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." 53 Stat. 13, 56 Stat. 820, 26 U. S. C. § 23 (k)(4).

[3] 13 CCH TC Mem. Dec. 458.

[4] 224 F. 2d 947.

[5] *Pollak* v. *Commissioner*, 209 F. 2d 57 (C. A. 3d Cir.); *Edwards* v. *Allen*, 216 F. 2d 794 (C. A. 5th Cir.); *Cudlip* v. *Commissioner*, 220 F. 2d 565 (C. A. 6th Cir.).

[6] 350 U. S. 964.

[7] Petitioners abandoned in this Court the alternative contention made below that the loss was deductible in full as a business bad debt under § 23 (k)(1).

Just before the venture was abandoned, Putnam acquired the shares held by his fellow stockholders and in July 1947, as sole stockholder, wound up its affairs and liquidated its assets. The proceeds of sale were insufficient to pay the full amount due to the Des Moines bank on two notes given by the corporation and guaranteed by Putnam for moneys borrowed in August 1946 and March 1947.

The familiar rule is that, *instanter* upon the payment by the guarantor of the debt, the debtor's obligation to the creditor becomes an obligation to the guarantor, not a new debt, but, by subrogation, the result of the shift of the original debt from the creditor to the guarantor who steps into the creditor's shoes.[8] Thus, the loss sustained by the guarantor unable to recover from the debtor is by its very nature a loss from the worthlessness of a debt. This has been consistently recognized in the administrative and the judicial construction of the Internal Revenue laws[9] which, until the decisions of the

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[8] *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 242; *Aetna Life Ins. Co.* v. *Middleport*, 124 U. S. 534, 548; *Howell* v. *Commissioner*, 69 F. 2d 447, 450; *Scott* v. *Norton Hardware Co.*, 54 F. 2d 1047; Brandt, Suretyship and Guaranty (3d ed.), § 324; 38 C. J. S., Guaranty, § 111; 24 Am. Jur., Guaranty, § 125. Iowa follows this rule. *Randell* v. *Fellers*, 218 Iowa 1005, 252 N. W. 787; *American Surety Co.* v. *State Trust & Sav. Bank*, 218 Iowa 1, 254 N. W. 338. There is not involved here a question of the effect of state law upon federal tax treatment of Putnam's loss. Cf. *Watson* v. *Commissioner*, 345 U. S. 544; *Lyeth* v. *Hoey*, 305 U. S. 188; *Burnet* v. *Harmel*, 287 U. S. 103.

[9] The bad debt deduction provisions of earlier Revenue Acts were enacted in § 214 (a) (7) of the Revenue Act of 1921, 42 Stat. 239; § 214 (a) (7) of the Revenue Act of 1924, 43 Stat. 269; § 214 (a) (7) of the Revenue Act of 1926, 44 Stat. 26; § 23 (j) of the Revenue Act of 1928, 45 Stat. 799; § 23 (j) of the Revenue Act of 1932, 47 Stat. 179; § 23 (k) of the Revenue Act of 1934, 48 Stat. 688; § 23 (k) of the Revenue Act of 1936, 49 Stat. 1658; § 23 (k) of the Revenue Act of 1938, 52 Stat. 460; and § 23 (k) of the Internal Revenue Code of 1939, 53 Stat. 12.

Courts of Appeals in conflict with the decision below, have always treated guarantors' losses as bad debt losses.[10] The Congress recently confirmed this treatment in the Internal Revenue Code of 1954 by providing that a payment by a noncorporate taxpayer in discharge of his obligation as guarantor of certain noncorporate obligations "shall be treated as a debt." [11]

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[10] See, *e. g.*, 2 Cum. Bull. 137; 5 Cum. Bull. 146; III–1 Cum. Bull. 158; III–1 Cum. Bull. 166; *Shiman* v. *Commissioner*, 60 F. 2d 65 (C. A. 2d Cir.); *Hamlen* v. *Welch*, 116 F. 2d 413 (C. A. 1st Cir.); *Gimbel* v. *Commissioner*, 36 B. T. A. 539; *Roberts* v. *Commissioner*, 36 B. T. A. 549; *Sharp* v. *Commissioner*, 38 B. T. A. 166; *Hovey* v. *Commissioner*, P–H 1939 B. T. A. Mem. Dec. ¶39,081; *Pierce* v. *Commissioner*, 41 B. T. A. 1261; *Whitcher* v. *Welch*, 22 F. Supp. 763.

Similar decisions rendered since the Revenue Act of 1942 include: *Ortiz* v. *Commissioner*, 42 B. T. A. 173, reversed on another ground, *sub nom. Helvering* v. *Wilmington Trust Co.*, 124 F. 2d 156, reversed (without discussion on this point), 316 U. S. 164; *Burnett* v. *Commissioner*, P–H 1942 B. T. A. Mem. Dec. ¶42,528; *Ritter* v. *Commissioner*, P–H 1946 TC Mem. Dec. ¶46,237; *Greenhouse* v. *Commissioner*, P–H 1954 TC Mem. Dec. ¶54,250; *Estate of Rosset* v. *Commissioner*, P–H 1954 TC Mem. Dec. ¶54,346; *Watson* v. *Commissioner*, 8 T. C. 569; *Sherman* v. *Commissioner*, 18 T. C. 746; *Aftergood* v. *Commissioner*, 21 T. C. 60; *Stamos* v. *Commissioner*, 22 T. C. 885.

[11] "SEC. 166. BAD DEBTS.

. . . . . .

"(f) GUARANTOR OF CERTAIN NONCORPORATE OBLIGATIONS.—A payment by the taxpayer (other than a corporation) in discharge of part or all of his obligation as a guarantor, endorser, or indemnitor of a noncorporate obligation the proceeds of which were used in the trade or business of the borrower shall be treated as a debt becoming worthless within such taxable year for purposes of this section (except that subsection (d) shall not apply), but only if the obligation of the borrower to the person to whom such payment was made was worthless (without regard to such guaranty, endorsement, or indemnity) at the time of such payment." 68A Stat. 50, 26 U. S. C. § 166 (f). And see 65 Yale L. J. 247.

There is, then, no justification or basis for consideration of Putnam's loss under the general loss provisions of § 23 (e)(2), *i. e.,* as an ordinary nonbusiness loss sustained in a transaction entered into for profit. Congress has legislated specially in the matter of deductions of nonbusiness bad debt losses, *i. e.,* such a loss is deductible only as a short-term capital loss by virtue of the special limitation provisions contained in § 23 (k)(4). The decision of this Court in *Spring City Co.* v. *Commissioner,* 292 U. S. 182, is apposite and controlling. There it was held that a debt excluded from deduction under § 234 (a)(5) of the Revenue Act of 1918 was not to be regarded as a loss deductible under § 234 (a)(4). Chief Justice Hughes said for the Court:

> "Petitioner also claims the right of deduction under § 234 (a)(4) of the Act of 1918 providing for the deduction of 'Losses sustained during the taxable year and not compensated for by insurance or otherwise.' We agree with the decision below that this subdivision and the following subdivision (5) relating to debts are mutually exclusive. We so assumed, without deciding the point, in *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243, 246. The making of the specific provision as to debts indicates that these were to be considered as a special class and that losses on debts were not to be regarded as falling under the preceding general provision. What was excluded from deduction under subdivision (5) cannot be regarded as allowed under subdivision (4). If subdivision (4) could be considered as ambiguous in this respect, the administrative construction which has been followed from the enactment of the statute—that subdivision (4) did not refer to debts—would be entitled to great weight. We see no reason for disturbing that construction." 292 U. S., at 189.

Here also the statutory scheme is to be understood as meaning that a loss attributable to the worthlessness of a debt shall be regarded as a bad debt loss, deductible as such or not at all.

The decisions of the Courts of Appeals in conflict with the decision below turn upon erroneous premises.[12] It is said that the guarantor taxpayer who involuntarily acquires a worthless debt is in a position no different from the taxpayer who voluntarily acquires a debt known by him to be worthless. The latter is treated as having acquired no valid debt at all.[13] The situations are not analogous or comparable. The taxpayer who voluntarily buys a debt with knowledge that he will not be paid is rightly considered not to have acquired a debt but to have made a gratuity. In contrast the guarantor pays the creditor in compliance with the obligation raised by the law from his contract of guaranty. His loss arises not because he is making a gift to the debtor but because the latter is unable to reimburse him.

Next it is assumed, at least in the *Allen* case, that a new obligation arises in favor of the guarantor upon his payment to the creditor. From that premise it is argued that such a debt cannot "become" worthless but is worthless from its origin, and so outside the scope of § 23 (k). This misconceives the basis of the doctrine of subrogation, apart from the fact that, if it were true that the debt did not "become" worthless, the debt nevertheless would not be regarded as an ordinary loss under § 23 (e). *Spring City Co.* v. *Commissioner, supra.* Under the doctrine of subrogation, payment by the guarantor, as we have seen, is treated not as creating a new debt and extinguishing the original debt, but as preserving the original debt and

[12] See n. 5, *supra.*

[13] *Reading Co.* v. *Commissioner,* 132 F. 2d 306; *W. F. Young, Inc.* v. *Commissioner,* 120 F. 2d 159; *American Cigar Co.* v. *Commissioner,* 66 F. 2d 425.

merely substituting the guarantor for the creditor. The reality of the situation is that the debt is an asset of full value in the creditor's hands because backed by the guaranty. The debtor is usually not able to reimburse the guarantor and in such cases that value is lost at the instant that the guarantor pays the creditor. But that this instant is also the instant when the guarantor acquires the debt cannot obscure the fact that the debt "becomes" worthless in his hands.

Finally, the Courts of Appeals found support for their view in the following language taken from the opinion of this Court in *Eckert* v. *Burnet,* 283 U. S. 140:

> "The petitioner claims the right to deduct half that sum as a debt 'ascertained to be worthless and charged off within the taxable year,' under the Revenue Act of 1926, c. 27, § 214 (a)(7); 44 Stat. 9, 27.
>
> "It seems to us that the Circuit Court of Appeals sufficiently answered this contention *by remarking that the debt was worthless when acquired. There was nothing to charge off.* The petitioner treats the case as one of an investment that later turns out to be bad. But in fact it was the satisfaction of an existing obligation of the petitioner, having, it may be, the consequence of a momentary transfer of the old notes to the petitioner in order that they might be destroyed. It is very plain we think that the words of the statute cannot be taken to include a case of that kind." 283 U. S., at 141. (Emphasis added.)

That statement did not imply a determination by this Court that the guarantor's loss was not to be treated as a bad debt.[14] This Court was not faced with the ques-

[14] The basis for this statement came from the opinion of the Court of Appeals for the Second Circuit and was explained by that court in its later opinion in *Shiman* v. *Commissioner,* 60 F. 2d 65, 67, as follows:

tion in *Eckert*. The point decided by the case was that a guarantor reporting on a cash basis and discharging his guaranty, not by a cash payment, but by giving the creditor his promissory note payable in a subsequent year, was not entitled to a bad debt loss deduction in the year in which he gave the note. The true significance of the quoted language is that, although "the debt was worthless when acquired," it could not be "charged off" within the taxable year as the promissory note given for its payment was not paid or payable within that year.[15]

The objectives sought to be achieved by the Congress in providing short-term capital loss treatment for nonbusiness bad debts are also persuasive that § 23 (k)(4) applies to a guarantor's nonbusiness debt losses. The

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"Though there was no debt until Shiman paid the brokers, it then became such at once and was known to be worthless as soon as it arose; verbally at any rate there is no difficulty. Nor is there any reason to impute a purpose to except such cases; the loss is as real and unavoidable as though the debt had had some value for a season. The analogy of section 204 (b) is apt. We can see no ground therefore for question except some of the language used in Eckert v. Burnet, 283 U. S. 140, 51 S. Ct. 373, 75 L. Ed. 911, taken from our opinion in 42 F. (2d) 158. That was quite another situation. Eckert, the taxpayer, had been an accommodation endorser for a corporation which became insolvent. When called upon to pay he gave his note instead, not payable within the year. The court refused to allow the deduction, because Eckert was keeping his books on a cash basis, but it intimated that when he paid he might succeed; until then he had done no more than change the form of the obligation. Yet if it were enough to defeat him that the debt was 'worthless when acquired,' the same objection ought to be good after he had paid; contrary to what was suggested. We cannot therefore think that the language so thrown out was intended as an authoritative statement by which we must be bound."

[15] See *Helvering* v. *Price*, 309 U. S. 409. The requirement that the debt be "ascertained to be worthless and charged off within the taxable year" was superseded in the Revenue Act of 1942, § 124 (a), by the requirement that the debt be one which "becomes worthless within the taxable year."

section was part of the comprehensive tax program enacted by the Revenue Act of 1942 to increase the national revenue to further the prosecution of the great war in which we were then engaged.[16] It was also a means for minimizing the revenue losses attributable to the fraudulent practices of taxpayers who made to relatives and friends gifts disguised as loans.[17] Equally, however, the

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[16] Chairman Doughton of the House Committee on Ways and Means opened the hearings on the bill which became the Revenue Act of 1942 with the statement: ". . . the meeting of the committee this morning is the first step in the consideration, preparation, and reporting of perhaps the largest tax bill that it has ever been the duty and responsibility of our committee to report.

"We are faced with revenue needs and a tax program of a magnitude unthought of in modern times, and we all realize it is necessary to raise every dollar of additional revenue that can be raised without seriously disturbing or shattering our national economy." Hearings before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. 1.

[17] Petitioners argue that this was its sole purpose and that the section should be construed as limited in application to such loans. The context of the segment of the House Ways and Means Committee Report discussing this objective does not support the petitioners' argument. H. R. Rep. No. 2333, 77th Cong., 2d Sess. 45:

"C. Nonbusiness Bad Debts

"The present law gives the same tax treatment to bad debts incurred in nonbusiness transactions as it allows to business bad debts. *An example* of a nonbusiness bad debt would be an unrepaid loan to a friend or relative, while business bad debts arise in the course of the taxpayer's trade or business. This liberal allowance for nonbusiness bad debts has suffered considerable abuse through taxpayers making loans which they do not expect to be repaid. This practice is particularly prevalent in the case of loans to persons with respect to whom the taxpayer is not entitled to a credit for dependents. This situation has presented serious administrative difficulties because of the requirement of proof.

"The bill treats the loss from nonbusiness bad debts as a short-term capital loss. The effect of this provision is to take the loss fully into account, but to allow it to be used only to reduce capital gains. Like any other capital loss, however, the amount of such bad

plan was suited to put nonbusiness investments in the form of loans on a footing with other nonbusiness investments. The proposal originated with the Treasury Department, whose spokesman championed it as a means "to insure a fairer reflection of taxable income," [18] and the House Ways and Means Committee Report stated that the objective was "to remove existing inequities and to improve the procedure through which bad-debt deductions are taken." [19] We may consider Putnam's case in the light of these revealed purposes. His venture into the publishing field was an investment apart from his law practice. The loss he sustained when his stock became worthless, as well as the losses from the worthlessness of the loans he made directly to the corporation, would receive capital loss treatment; the 1939 Code so provides as to nonbusiness losses both from worthless stock investments and from loans to a corporation, whether or not the loans are evidenced by a security.[20] It is clearly a "fairer reflection" of Putnam's 1948 taxable income to treat the instant loss similarly. There is no real or economic difference between the loss of an investment made in the form of a direct loan

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debt losses may be taken to the extent of $1,000 against ordinary income and the 5-year carry-over provision applies." (Emphasis added.)

[18] Hearings before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. 90.

[19] H. R. Rep. No. 2333, 77th Cong., 2d Sess. 44.

[20] Section 23 (g) (2) and (3) as to worthless stock. Section 23 (k) (2) (3) and (4) as to loans. As Judge Stewart pointed out in his dissenting opinion in the *Cudlip* case, 220 F. 2d, at 572:

"Had the petitioner made the necessary additional investment in the conventional form of subscribing for stock, his loss upon the failure of the corporation would have been a capital loss, § 23 (g) (2), I. R. C. Had he made the investment in the form of a loan to the corporation evidenced by an instrument bearing interest coupons, his loss would likewise have been a capital loss, § 23 (k) (2), I. R. C. Had he made the additional investment in the form of an ordinary

to a corporation and one made indirectly in the form of a guaranteed bank loan. The tax consequences should in all reason be the same, and are accomplished by § 23 (k)(4).[21] The judgment is

Affirmed.

MR. JUSTICE HARLAN, dissenting.

Being unreconciled to the Court's decision, which settles a conflict on this tax question among the Courts of Appeals and thus has an impact beyond the confines of this particular case, I must regretfully dissent.

The Court's approval of the Commissioner's treatment of petitioner's loss as one arising from a "nonbusiness debt," within the meaning of § 23 (k)(4) of the Internal Revenue Code of 1939,[1] instead of as a loss incurred in a

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loan to the corporation, his loss would likewise have been a capital loss, § 23 (k)(4) I. R. C., Commissioner of Internal Revenue v. Smith, supra.

"Because the petitioner happened instead to risk his money by guaranteeing the corporation's bank loans, the court now holds that the petitioner may take an ordinary loss, deductible in full from his ordinary income. Yet from the petitioner's viewpoint, the situation would have been precisely the same had he himself borrowed the money and then lent it to the corporation. It therefore seems to me that the result reached by the court in this case is significantly unrealistic."

[21] Upon this ground, contrary to the holding in *Fox* v. *Commissioner*, 190 F. 2d 101, the guarantor's nonbusiness loss would receive short-term capital loss treatment despite the nonexistence of the debtor at the time of the guarantor's payment to the creditor.

[1] "[§ 23 (k)] (4) NON-BUSINESS DEBTS.

"In the case of a taxpayer, other than a corporation, if a nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term 'non-business debt' means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business."

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"transaction entered into for profit," under § 23 (e)(2),[2] rests on what is, in my opinion, a strained application of the equitable doctrine of subrogation. No one contends that petitioner acquired the Company's debt to the lending Bank when he entered into the agreement guaranteeing payment of that indebtedness. Rather, the Government's basic argument, as taken from its brief, is this:

> "The principle is well established, both generally and in the State of Iowa [where the guaranty was executed and performed], that a guarantor who is required to make payment under his guaranty contract succeeds to the rights of the creditor by subrogation. The law implies a promise on the part of the principal debtor to reimburse the guarantor, and the guarantor's payment is treated not as extinguishing the debt but as merely substituting the guarantor for the creditor. . . . Accordingly, while a guarantor by entering into the guaranty contract and making payment thereunder puts himself in a position where he may sustain a loss, it is only if, and to the extent that, the debt which he acquires by subrogation is worthless that he actually sustains a loss. Thus, if the guarantor, having made payment under his guaranty contract, is able to recover in full from the principal debtor, he clearly suffers no loss at all. It follows, therefore, that any loss, the existence and extent of which is wholly and directly dependent

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[2] "§ 23. DEDUCTIONS FROM GROSS INCOME.

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

. . . . . .

"(e) LOSSES BY INDIVIDUALS.

"In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

. . . . . .

"(2) if incurred in any transaction entered into for profit, though not connected with the trade or business . . . ."

upon the worthlessness of a debt, should be attributed to the worthlessness of that debt, *i. e.*, should be considered a bad debt loss."

The Government then adds this footnote: "So long as payment of a debt is guaranteed by a solvent guarantor, the insolvency of the principal debtor obviously does not render the debt worthless. Consequently, if the debt which a guarantor acquires by subrogation becomes worthless, it necessarily becomes worthless in the hands of the guarantor rather than in the hands of the original creditor."

Upon analysis, the Government's argument comes down to this: when the petitioner honored his guaranty obligation his payment was offset by the acquisition of the creditor Bank's rights against the Company on its indebtedness; in the Bank's hands those rights were worth full value, since the Company's indebtedness was secured by the guaranty; therefore petitioner's loss should be attributed to the subrogation debt, which became worthless in his hands because no longer so secured.

This argument would have substance in a case where the principal debtor was not insolvent at the time the guaranty was fulfilled; for in such a case it could be said that the acquired debt was not without value in the guarantor's hands, and hence he should not be allowed a tax deduction until the debt turns out to be worthless. But when, as here, the debtor is insolvent at the very time the guarantor meets his obligation, it defies reality to attribute the guarantor's loss to anything other than the discharge of his guaranty obligation. To attribute that loss to the acquired debt in such a case requires one to conceive of the debt as having value at the moment of acquisition, but as withering to worthlessness the moment the guarantor touches it. That the same debt in the same millisecond can have both of these antagonistic

characteristics is, for me, too esoteric a concept to carry legal consequences, even in the field of taxation.

It was this departure from reality which first led the Court of Appeals for the Second Circuit to reject the Commissioner's theory, as applied to a loss incurred by a widow upon a guaranty of her husband's brokerage account which she was called upon to honor long after his death and the winding up of his insolvent estate. *Fox* v. *Commissioner,* 190 F. 2d 101. In that case the court, after referring to the "illusory character" of the subrogation claim which, the Tax Court held, she had acquired against her late husband upon her payment of the guaranty, went on to say, at pp. 103–104:

> "She [the widow] argues that the court's theory of a debt against her husband's estate amounts to a subrogation forced upon her, contrary to the equitable spirit of the doctrine, to yield her an utterly worthless claim and a very real tax liability. . . . [W]e think her argument persuasive. . . . Clearly . . . the [guaranty] transaction was not then one involving a bad debt, since she had not even made the payment which alone would give rise to a claim in her favor. Nor could payment ten years later create a debt out of something less than even the proverbial stone. It is utterly unrealistic to consider the payment as one made in any expectation of recovery over or of any legal claim for collection. Actually it was merely the fulfillment of her contractual obligation of the earlier date. The bad-debt provision thus had no direct application; only by straining the statutory language can we erect here a disembodied debt against an insolvent and long dead debtor."

Being unable to differentiate the worthlessness of a subrogation debt claim against a nonexistent individual

debtor from such a claim against an existent, but insolvent, corporate debtor, the Courts of Appeals, until the present case,[3] have consistently applied the reasoning of the *Fox* case to losses incurred on individual guaranties of corporate indebtedness where the corporation, though still in existence, was insolvent at the time the guaranty was honored. *Pollak* v. *Commissioner,* 209 F. 2d 57;[4] *Edwards* v. *Allen,* 216 F. 2d 794;[5] *Cudlip* v. *Commissioner,* 220 F. 2d 565;[6] see also *Ansley* v. *Commissioner,* 217 F. 2d 252.[7] The rationale of these four Courts of Appeals is, in my opinion, more convincing than that of the Commissioner, and I think this Court should have approved and followed it here by holding that this taxpayer's loss was fully deductible under § 23 (e)(2) as a loss on a "transaction entered into for profit," instead of regarding it as a "nonbusiness debt" loss, subject to capital loss treatment under § 23 (k)(4).

I cannot agree with the Court that either the circumstances under which § 23 (k)(4) was enacted in 1942, or the provisions of § 166 (f) of the Internal Revenue Code of 1954,[8] point to an opposite conclusion. Section 23 (k)(4) created a new category of debt losses, namely,

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[3] 224 F. 2d 947.

[4] Third Circuit.

[5] Fifth Circuit.

[6] Sixth Circuit.

[7] Third Circuit.

[8] "[§ 166] (f) GUARANTOR OF CERTAIN NONCORPORATE OBLIGATIONS.—A payment by the taxpayer (other than a corporation) in discharge of part or all of his obligation as a guarantor, endorser, or indemnitor of a noncorporate obligation the proceeds of which were used in the trade or business of the borrower shall be treated as a debt becoming worthless within such taxable year for purposes of this section (except that subsection (d) shall not apply), but only if the obligation of the borrower to the person to whom such payment was made was worthless (without regard to such guaranty, endorsement, or indemnity) at the time of such payment."

"nonbusiness debt" losses, which were thenceforth to be given capital loss treatment instead of the full loss deduction theretofore accorded them.[9] The Court finds the "objectives sought to be achieved by the Congress," through the enactment of this section, "persuasive that § 23 (k)(4) applies to a guarantor's nonbusiness debt losses," in that the "section was part of the comprehensive tax program enacted by the Revenue Act of 1942 to increase the national revenue," in connection with World War II, and "was suited to put nonbusiness investments in the form of loans on a footing with other nonbusiness investments." But it seems to me that the House Ways and Means Committee Report on the bill shows that § 23 (k)(4) was aimed at a specific narrow objective, namely, that of reducing revenue loss from the deduction of "family" or "friendly" loans which were in reality gifts. The Report states:

> "C. Nonbusiness Bad Debts.
>
> "The present law gives the same tax treatment to bad debts incurred in nonbusiness transactions as it allows to business bad debts. An example of a nonbusiness bad debt would be an unrepaid loan to a friend or relative, while business bad debts arise in the course of the taxpayer's trade or business. This liberal allowance for nonbusiness bad debts has suffered considerable abuse through taxpayers making loans which they do not expect to be repaid. This practice is particularly prevalent in the case of loans to persons with respect to whom the taxpayer is not entitled to a credit for dependents. This situation has presented serious administrative difficulties because of the requirement of proof.

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[9] I. R. C., 1939, § 23 (k)(1), 53 Stat. 13, 26 U. S. C. (1940 ed.) § 23 (k)(1).

> "The bill treats the loss from nonbusiness bad debts as a short-term capital loss. The effect of this provision is to take the loss fully into account, but to allow it to be used only to reduce capital gains. Like any other capital loss, however, the amount of such bad debt losses may be taken to the extent of $1,000 against ordinary income and the 5-year carryover provision applies." [10]

I am unable to find in this, or in any of the other legislative history to which the Court refers, any clear intimation of a broad policy to analogize generally all types of nonbusiness loans to other forms of capital investment,[11] still less anything which indicates that guarantors' losses were considered as falling within the new section.[12]

Likewise I think that the Court's reliance on § 166 (f) of the 1954 Code is misplaced. That section provides that an individual taxpayer's guaranty payment discharging the obligation of a noncorporate debtor "shall be treated as a debt becoming worthless within such taxable year," and shall be deductible in full if (a) the proceeds of the guaranteed obligation were used "in the trade or business of the borrower," and (b) that obligation was worthless at the time the guarantor made payment.[13] The Court says that by enacting this section Congress confirmed the administrative practice of treating guarantors' losses as

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[10] H. R. Rep. No. 2333, 77th Cong., 2d Sess. 45.

[11] Had this been the congressional purpose, it could have been accomplished simply by subjecting nonbusiness debt losses to the provisions of the statute dealing with worthless securities. See § 23 (g) (2)–(4) of the Internal Revenue Code of 1939.

[12] When it enacted § 23 (k) (4) Congress left undisturbed § 23 (e) (2) relating to the deductibility of losses on "any transaction entered into for profit," and that section was subsequently re-enacted, unchanged, as § 165 (c) (2) of the Internal Revenue Code of 1954.

[13] See note 8, *supra*.

bad debt losses, at least so far as guaranties of certain noncorporate obligations are concerned. I cannot agree, for again I think this section had a specific and limited purpose, which did not include the thrust which the Court now gives the section. That purpose, I think, was simply to permit deduction of certain guaranty payments that were not deductible at all under the 1939 Code. Payments now deductible under § 166 (f) need not be made in the course of the guarantor's "trade or business," nor need they be attributable to a transaction "entered into for profit." They are deductible, it would seem, so long as the guarantor had some expectation of being repaid—so long, in other words, as the transaction was not a gift. Under prior law, such payments would not have been deductible as "business" debts, under § 23 (k)(1),[14] or as losses on transactions "entered into for profit," under § 23 (e)(2), or even as "nonbusiness" debts under § 23 (k)(4), since the *Fox* line of cases held that such payments do not give rise to "debts." However, here again, as with the enactment of the § 23 (k)(4) "nonbusiness debt" provision in 1942, Congress was concerned with fending against allowance of this type of deduction in cases of fictitious "family" or "friendly" guaranties. Hence it was unwilling to allow the deduction to *all* guarantors of individual borrowings. Considering guaranties of loans sought for business purposes to be free of such infirmities, Congress attempted to obviate abuse of § 166 (f) by limiting its

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[14] "§ 23. DEDUCTIONS FROM GROSS INCOME.

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

. . . . . .

"(k) BAD DEBTS.

"(1) GENERAL RULE.

"Debts which become worthless within the taxable year . . . . This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection."

application to guaranties of loans the proceeds of which "were used in the trade or business of the borrower."

In light of what seems to have been the particular congressional purpose, I think it strains § 166 (f) to read it as broadly confirming the treatment of guaranty losses as bad debt losses.[15] Congress presumably knew of the *Fox* line of cases, *supra,* which had refused "debt" treatment to guarantors' losses, and it is not without significance that the Senate Report on § 166 (f) stated: "If the requirements of this section are not met, the taxpayer will, *as under present law,* be treated taxwise under whatever provisions of the code are applicable in the factual situation." [16] It is true that § 166 (f) provides that any payment included therein "shall be treated as a debt"; but of more significance is the fact that the person claiming the deduction need *not* show that he in fact owned a "debt" or that such debt had "become worthless during the taxable year"—the requirement for deductibility of both business and nonbusiness bad debts under § 23 (k)(1) and (4)—since "for purposes of this section" (§ 166 (f)) the guarantor's loss is "treated as" a debt "becoming worthless within such taxable year" as the loss occurs. In other words, though assimilated to a "debt" loss, the loss arising from the guaranty payment in fact need have none of the attributes of a debt loss in order to be deductible. The primary thrust of

[15] The Senate Report on § 166 (f) simply states: "Your committee also provided that business bad debt treatment will be available where a noncorporate taxpayer, who was the endorser (or guarantor or indemnitor) of the obligation of another, is required to pay the other's debt (and cannot collect it from the debtor). However, this treatment is to be available only where the debt represents money used in the other person's trade or business. Your committee believes that this treatment should be available in such cases since in most cases debts of this type usually are incurred because of business relationships." S. Rep. No. 1622, 83d Cong., 2d Sess. 24–25.

[16] S. Rep. No. 1622, 83d Cong., 2d Sess. 200. (Italics supplied.)

§ 166 (f) was to make deductible some kinds of losses which were theretofore not deductible, and I think that drawing from the language of the Section a definitive characterization of such losses as "debts" involves a misplacing of emphasis.

Of still greater significance is the fact that § 166 (f) losses are deductible *in full*. This, it seems to me, is more consistent with the view that Congress did not intend to disturb the line of cases which, following *Fox*, gave a full deduction under § 23 (e)(2) to losses on guaranties of corporate obligations, than it is with the Court's view that § 166 (f) confirms Congress' intent that such losses should be only *partially* deductible as nonbusiness bad debts under § 23 (k)(4). Otherwise we would have the anomalous result that under the 1954 Code individual guarantors of noncorporate obligations are given better treatment than those guaranteeing corporate obligations, even though the basic limitation which Congress imposed upon the deductibility of § 166 (f) losses, namely, that the proceeds of the guaranteed obligation "were used in the trade or business of the borrower," is always present in the case of a guaranty of a corporate obligation.

In short, I think that when the purposes and provisions of § 166 (f) are taken together, it is quite evident that the section was intended to *complement* the decisions of these four Courts of Appeals,[17] and not to override them.

Finally, the Government suggests that giving guarantors' losses the same capital loss treatment as nonbusiness debt losses would make for a better tax structure, since, it is argued, both kinds of losses are comparable to losses from investments, which receive capital loss treatment under both the 1939 and 1954 Codes.[18] Even if that be so, this would be a matter for Congress. Our duty is to take the statute as we find it. I would reverse.

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[17] *Ante*, p. 97.

[18] I. R. C., 1939, § 23 (g)(2)–(4); I. R. C., 1954, § 165 (g).

Syllabus.

NELSON ET AL., SUCCESSOR TRUSTEES, ET AL. *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 30. Argued November 7, 1956.—Decided December 10, 1956.

Under Title D, Chapter 17, of the New York City Administrative Code, the City proceeded to foreclose liens for unpaid water charges on two parcels of land held in trust by appellants. In accordance with the statute, notice was given by posting, publication and mailing notices to the trust estate. Because of the derelictions of a bookkeeper, these notices were not brought to the attention of appellants, and they claimed to have had no knowledge of the foreclosure proceedings until after judgments of foreclosure had been entered by default and the City had acquired title to the property. The City sold one parcel for an amount many times that of the unpaid water charges and retained all the proceeds. The value of the other parcel was many times the amount of the unpaid water charges, and the City retained title to it. Appellants moved to have the defaults opened, the deed to one parcel set aside and to recover the surplus proceeds from the sale of the other parcel. Such relief was denied. *Held:*

1. The City having taken steps to notify appellants of the arrearages and the foreclosure proceedings, and appellants' agent having received such notices, application of the statute did not deprive appellants of procedural due process. Pp. 107–109.

(a) The City cannot be charged with responsibility for the misconduct of the appellants' bookkeeper nor for the carelessness of the managing trustee in overlooking notices of arrearages given on tax bills. P. 108.

(b) In view of the fact that there are 834,000 tax parcels, the City cannot be held to a duty to determine why appellants neglected water charges while paying much larger real estate taxes. *Covey* v. *Town of Somers,* 351 U. S. 141, distinguished. P. 108.

2. Since the statute requires that, when the strict foreclosure provisions of Title D, Chapter 17, are invoked, they must be used against all parcels in a section of the City on which charges have been outstanding for four years, appellants were not denied equal protection of the laws by failure of the City officials to resort to other remedies which would not necessarily have resulted in forfeiture of the entire value of their property. P. 109.

3. Appellants not having taken timely action to secure the relief available under the statute although adequate steps were taken to notify them of the charges due and the foreclosure proceedings, they were not deprived of property without due process of law nor was their property taken without just compensation by reason of the City's retention of property, in one instance, and retention of the proceeds of sale, in the other instance, far exceeding in value the amounts due. Pp. 109–111.

(a) *United States* v. *Lawton*, 110 U. S. 146, distinguished. Pp. 109–110.

(b) Relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. Pp. 110–111.

309 N. Y. 94, 801, 127 N. E. 2d 827, 130 N. E. 2d 602, affirmed.

William P. Jones argued the cause for appellants. With him on the brief was *Watson Washburn.*

Seymour B. Quel argued the cause for appellee. With him on the brief were *Peter Campbell Brown, Harry E. O'Donnell, Benjamin Offner* and *Joseph Brandwen.*

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

Appellants challenge as violative of the Fourteenth Amendment the application of Title D, Chapter 17, of the New York City Administrative Code to two improved parcels of land owned by them as trustees. The statute is the counterpart, operative in the City of New York, of the state tax lien foreclosure statute that was before us last Term in *Covey* v. *Town of Somers,* 351 U. S. 141.[1]

[1] The statute, §§ D17–1.0 *et seq.*, enacted in 1948, provides for the judicial foreclosure of tax liens on real property. The city treasurer files in the appropriate county clerk's office a list of all parcels in a section or ward of the City on which tax liens have been unpaid for at least four years. Tax liens include unpaid taxes, assessments or water rents, interest and penalties. This filing constitutes the

In 1950, the City proceeded to foreclose its lien on the first of these parcels, referred to as the 45th Avenue property, for water charges that had been unpaid for four years. These charges, for the years 1945 and 1946, amounted to $65;[2] the property was assessed at $6,000. The action was begun on May 20 with the filing of a list of 294 liened parcels, including the 45th Avenue property, in two sections of the Borough of Queens. Under the statute, this constituted the filing of a complaint.[3] The statute requires that notice of such a foreclosure proceeding be posted and published and a copy of the published notice mailed to the last known address of the owner of property sought to be foreclosed.[4] It is undisputed that the statutory notice requirements were satisfied in this case; a copy of the published notice was mailed to the address of the trust estate. However, appellants took no

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filing of a complaint and commences an action against the property. Provision is made for notice by posting, publication and mail. The notice must be mailed to the property owner at his last known address. The prescribed notice is to the effect that, unless the amount of unpaid tax liens, together with interest and penalties, are paid within 7 weeks or an answer interposed within 20 days thereafter, any person having the right to redeem or answer shall be foreclosed of all his right, title and interest and equity in and to the delinquent property. Provision is made for entry of a judgment of foreclosure awarding possession of the property to the City and directing execution of a deed conveying an estate in fee simple absolute to the City. The City may retain the property or sell it and retain the entire proceeds.

[2] Appellants and the New York Court of Appeals used the figure $72.50. But the figures given in the affidavit of appellant Gerald D. Nelson (R. 68) yield a total of $65. Altogether, back charges, including those less than four years old, totaled $320.20. This includes $91.20 representing the second half of the 1948–1949 real estate taxes. No water charges were paid from 1945 on. All real estate taxes, with the exception noted, were paid.

[3] § D17–5.0.

[4] § D17–6.0.

action during the 7 weeks allowed for redeeming the property through payment of back charges nor during the 20 additional days allowed for answering the City's complaint. Judgments of foreclosure were entered by default, and on August 22 the City acquired title to the parcel. The property was later sold to a private party for $7,000, the City retaining all the proceeds.

On December 17, 1951, a similar *in rem* foreclosure action was commenced against 1,704 parcels in four sections of the Borough of Brooklyn, including appellants' second parcel, referred to as the Powell Street property. The four-year-old water charges on this parcel amounted to $814.50; [5] the property was assessed at $46,000. Again the statutory notice requirements were satisfied, and again judgment of foreclosure was entered by default. The City acquired title to the Powell Street property on May 19, 1952, and still retains it.

In November 1952, the appellants offered to pay with interest and penalties all amounts owing to the City on the two parcels. The offer was refused, and the appellants instituted a plenary action to set aside the City's deed to the Powell Street property and to recover the surplus proceeds from the sale of the 45th Avenue property. The Appellate Division of the New York Supreme Court affirmed the denial of the requested relief without prejudice to appellants' seeking to open their default by motions in the foreclosure proceedings. The appellants filed such motions, requesting the same relief they had sought in the plenary action. The case was submitted to the Supreme Court, Special Term, on opposing affidavits, and the motions were denied. The Special Term's orders were affirmed by the Appellate Division, 284 App. Div. 894, 134 N. Y. S. 2d 597, and the Court of

[5] For the years 1945 through 1947. No water charges had been paid since 1945, and the second half 1948–1949 real estate tax was not paid. The total delinquency was $2,681. R. 13–14.

Appeals, 309 N. Y. 94, 127 N. E. 2d 827. The Court of Appeals amended its remittitur to show that the federal questions here presented were decided adversely to appellants. 309 N. Y. 801, 130 N. E. 2d 602.

1. Appellants contend they received no actual notice of the foreclosure proceedings. The reason they assign is that the mailed notices were concealed by their trusted bookkeeper, who is also alleged to have concealed from them the nonpayment of the water charges. There is no claim that the bills for the water charges were not mailed to the estate. They assert that it was not until November 1952, when the judgments of foreclosure had long since become final, that they discovered the bookkeeper's derelictions, and thus were made aware of their loss. However, as we have said, it is not disputed that the notices were mailed to the proper address. Nor is this all. Appellants themselves placed in evidence as exhibits 1950–1951 and 1951–1952 real estate tax bills for the 45th Avenue property. These were concededly brought to the attention of appellant Gerald D. Nelson, the "active" or "managing" trustee. On the face of the bills appears the word "ARREARS," with a prominent black arrow pointing to it and beneath the arrow the statement, "The word ARREARS if it appears in the space indicated by the ARROW, means that, as of JUNE 30, 1950, previous TAXES, ASSESSMENTS or WATER CHARGES HAVE NOT BEEN RECORDED AS PAID. If these have not been paid since June 30, 1950, payment should be made IMMEDIATELY."[6] Furthermore, the

[6] The date on the other bill was June 30, 1951. Appellants introduced the tax bills as a basis for an argument that the City's error in continuing to bill them after the City had acquired title to the 45th Avenue property lulled them into thinking that all was well, so that they took no steps to protect the Powell Street property. The effect of the notice of arrears should, it seems, have been quite the opposite.

City's assistant corporation counsel stated in his affidavit that the tax bills for the Powell Street property each year from 1946 to 1953 contained a notice that the property was in arrears. Appellant Nelson stated that the bookkeeper "had been regularly presenting to deponent for payment all of the bills for real estate taxes which were paid through the first half of 1951–52 . . . ." [7] It is clear that the City cannot be charged with responsibility for the misconduct of the bookkeeper in whom appellants misplaced their confidence nor for the carelessness of the managing trustee in overlooking notices of arrearages.

Appellants make the further contention that the City officials should have known from the state of the records of the two parcels that mailed notice would probably be ineffective. That is, the fact that water charges were not paid while the much larger real estate taxes were paid should have indicated to the officials that something was amiss. They rely on *Covey* v. *Town of Somers, supra.* We cannot so hold. In the *Covey* case, there were uncontroverted allegations that the taxpayer, who lived on the foreclosed property, was known by the officials of a small community to be an incompetent, unable 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 judgment of foreclosure in an *in rem* proceeding. The affidavit of the assistant corporation counsel here states that there are more than 834,000 tax parcels in the City, and on the facts of this case the City cannot be held to a duty to determine why a taxpayer neglects some taxes while paying others.

We conclude, therefore, that the City having taken steps to notify appellants of the arrearages and the fore-

[7] In addition, a deputy city collector annexed to his affidavit copies of letters sent to the trust estate on June 5 and July 9, 1951, advising that there had been double payments of the taxes on the 45th Avenue property.

closure proceedings and their agent having received such notices, its application of the statute did not deprive appellants of procedural due process.

2. Appellants also claim a denial of the equal protection of the laws in that the City officials had available to them other remedies for collecting taxes, which would not necessarily have resulted in forfeiture of the entire value of their property. Their theory is that the choice to proceed against their property under Title D, Chapter 17, was arbitrary. We find the contention without merit. The statute is explicit that when the strict foreclosure provisions of Title D, Chapter 17, are invoked, they must be used against all parcels in a section of the City on which charges have been outstanding for four years.[8] It is clear that the aim is to prevent precisely the kind of discrimination of which appellants complain. Appellants do not assert that the statute was not complied with in this regard.

3. In their reply brief, appellants urged that by reasons of the City's retention of property, in one instance, and proceeds of sale in the other, far exceeding in value the amounts due, they are deprived of property without due process of law or have suffered a taking without just compensation. They called our attention to *United States* v. *Lawton,* 110 U. S. 146. In affirming a judgment in favor of a foreclosed landowner for the surplus proceeds from the sale of his land, the Court there said: "To withhold the

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[8] § D17–5.0, which provides for the filing of lists of delinquent property, provides further, "Each such list shall comprise all such parcels within a particular section or ward designated on the tax maps of the city, except those parcels excluded from such lists as hereinafter provided." The grounds for exclusion are (1) question raised as to the validity of the tax lien on the parcel, (2) and (3) accepted agreement to pay delinquent taxes in installments, and (4) tax lien on the property sold within two years and enforcement of the lien not completed.

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surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation." 110 U. S., at 150. However, the statute involved in that case had been construed in *United States* v. *Taylor,* 104 U. S. 216, to require that the surplus be paid to the owner, and there the problem was treated as purely one of statutory construction without constitutional overtones.[9] But we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale. In *City of New York* v. *Chapman Docks Co.,* 1 App. Div. 2d 895, 149 N. Y. S. 2d 679, an owner filed a timely answer in a foreclosure proceeding, asserting his property had a value substantially exceeding the tax due. The Appellate Division construed § D17–12.0 of the statute [10] to mean that upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus. What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.

It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and

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[9] See also *Chapman* v. *Zobelein,* 237 U. S. 135.

[10] Section D17–12.0 (a) provides in pertinent part, "The court shall have full power . . . in a proper case to direct a sale of . . . lands and the distribution or other disposition of the proceeds of the sale." By § D17–6.0 it is provided, "Every person having any right, title or interest in or lien upon any parcel . . . may serve a duly verified answer . . . setting forth in detail the nature and amount of his interest or lien and any defense or objection to the foreclosure."

spoke of the "extreme hardships" resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed. In this connection, we note that the New York Legislature this year has ameliorated to some extent the severity of Title D, Chapter 17. Section D17–25.0 was added to the statute, permitting the reconveyance of property acquired and still held by the City upon payment of arrears, interest and the costs of foreclosure. The City concedes this amendment applies to the Powell Street property. Appellants have applied for a reconveyance of that property, and action has been held in abeyance pending the disposition of this appeal.

Affirmed.

WALKER *v.* CITY OF HUTCHINSON ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 13. Argued October 15–16, 1956.—Decided December 10, 1956.

Pursuant to Article 2, Chapter 26, of the General Statutes of Kansas, a City filed an action to condemn part of appellant's land for public use. Acting under § 26–202, commissioners appointed to determine compensation gave no notice of a hearing except by publication in the official city newspaper, though appellant was a resident of Kansas and his name was known to the city and was on the official records. Alleging that he had no actual knowledge of the proceedings until after damages had been fixed and the time for appeal had passed, appellant sued in equity for an injunction against trespass and for other relief. *Held:* Since there was no reason in this case why direct notice could not be given, newspaper publication alone did not measure up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases. Pp. 112–117.

(a) If feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. P. 115.

(b) *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559, distinguished. P. 116.

178 Kan. 263, 284 P. 2d 1073, reversed and remanded.

Herbert Monte Levy argued the cause for appellant. With him on the brief was *A. Lewis Oswald.*

Fred C. Littooy argued the cause and filed a brief for appellees.

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

The appellant Lee Walker owned certain land in the City of Hutchinson, Kansas. In 1954 the City filed an action in the District Court of Reno County, Kansas, to condemn part of his property in order to open, widen, and

extend one of the City's streets. The proceeding was instituted under the authority of Article 2, Chapter 26 of the General Statutes of Kansas, 1949. Pursuant to § 26–201 of that statute [1] the court appointed three commissioners to determine compensation for the property taken and for any other damage suffered. These commissioners were required by § 26–202 to give landowners at least ten days' notice of the time and place of their proceedings. Such notice could be given either "in writing . . . or by one publication in the official city paper . . . ." [2] The appellant here was not given notice

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[1] Section 26–201 reads in part as follows:
"*Private property for city purposes; survey; ordinance fixing benefit district; application to district court; commissioners.* Whenever it shall be deemed necessary by any governing body of any city to appropriate private property for the opening, widening, or extending any street or alley, . . . the governing body shall cause a survey and description of the land or easement so required to be made by some competent engineer and file with the city clerk. And thereupon the governing body shall make an order setting forth such condemnation and for what purpose the same is to be used. . . . The governing body, as soon as practicable after making the order declaring the appropriation of such land necessary . . . shall present a written application to the judge of the district court of the county in which said land is situated describing the land sought to be taken and setting forth the land necessary for the use of the city and . . . praying for the appointment of three commissioners to make an appraisement and assessment of the damages therefor."

[2] Section 26–202 read in part as follows:
"*Notice to property owners or lienholders of record; appraisement and assessment of damages; reports.* The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations. For the payment of such value and damages the commissioners shall

in writing but publication was made in the official city paper of Hutchinson. The commissioners fixed his damages at $725, and pursuant to statute, this amount was deposited with the city treasurer for the benefit of appellant. Section 26–205 authorized an appeal from the award of the commissioners if taken within 30 days after the filing of their report. Appellant took no appeal within the prescribed period. Some time later, however, he brought the present equitable action in the Kansas District Court. His petition alleged that he had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed. He charged that the newspaper publication authorized by the statute was not sufficient notice to satisfy the Fourteenth Amendment's due process requirements. He asked the court to enjoin the City of Hutchinson and its agents from entering or trespassing on the property "and for such other and further relief as to this Court seem[s] just and equitable." [3] After a hearing, the Kansas trial

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assess against the city the amount of the benefit to the public generally and the remainder of such damages against the property within the benefit district which shall in the opinion of the appraisers be especially benefited by the proposed improvement. The said commissioners may adjourn as often and for such length of time as may be deemed convenient, and may, during any adjournment, perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective notice or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners. . . ."

[3] Although the relief prayed for was an injunction against the taking, the Supreme Court of Kansas evidently construed the pleadings as adequately raising the question whether notice was sufficient to assure the constitutionality of the compensation procedure; in its opinion it passed only on § 26–202, dealing with the latter problem. Since Kansas requires a showing of actual damage for standing to maintain an equity suit, *McKeever* v. *Buker*, 80 Kan. 201, 101 P. 991,

court denied relief, holding that the newspaper publication provided for by § 26–202 was sufficient notice of the Commissioners' proceedings to meet the requirements of the Due Process Clause. Agreeing with the trial court, the State Supreme Court affirmed. 178 Kan. 263, 284 P. 2d 1073. The case is properly here on appeal under 28 U. S. C. § 1257 (2). The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases.

It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.[4] We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recog-

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and since the Kansas court took the complaint as alleging damage as a result of the compensation rather than the taking procedure, the pleading was evidently treated by the state court as alleging monetary damage resulting from the lack of notice in connection with compensation. We accept this construction of the complaint by the Kansas court as sufficient allegation of damage. See *Bragg* v. *Weaver*, 251 U. S. 57, where the adequacy of notice of compensation proceedings was passed on by this Court in an injunction suit like this one.

[4] We applied the same rule in *Covey* v. *Town of Somers*, 351 U. S. 141; see also *City of New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293.

nized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.[5]

Nothing in our prior decisions requires a holding that newspaper publication under the circumstances here provides adequate notice of a hearing to determine compensation. The State relies primarily on *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559. We think that reliance is misplaced. Decided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the landowner was a nonresident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which *Mullane* may have undermined the reasoning of the *Huling* decision.[6]

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[5] Section 26–202 was amended in 1955, after this Court's decision in *Mullane*, to require that the city must give notice to property owners by mailing a copy of the newspaper notice to their last known residence, unless such residence could not be located by diligent inquiry. Kan. Gen. Stat., 1949 (Supp. 1955), § 26.202.

[6] The State also relies on *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, and *Bragg* v. *Weaver*, 251 U. S. 57. But the holdings in

There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use.

For the foregoing reasons the judgment of the Supreme Court of Kansas is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

MR. JUSTICE FRANKFURTER, dissenting.

Appellant contends that the provision of Kan. Gen. Stat., 1949, § 26–202, allowing notice of the hearing on compensation to be given by one publication in the official city newspaper of itself violates the provision of the

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those cases do not conflict with our holding here. The *North Laramie* case upheld c. 73, § 2, of the 1913 Laws of Wyoming, which provided for notice by publication in a newspaper and required that a copy of the newspaper must be sent to the landowner by registered mail. This Court's opinion stated at p. 282 that: "The Supreme Court of Wyoming held that the procedure followed complied with the statutory requirements. By that determination we are bound." In *Bragg* v. *Weaver*, *supra*, at pp. 61–62, this Court stated that the controlling Virginia statute provided that a landowner must be notified "in writing and shall have thirty days after such notice within which to appeal. . . . It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the circuit court."

Fourteenth Amendment that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." [1] The first issue that faces us, however, is to decide from the pleadings exactly what it is that we must decide in this case.

Once appellant discovered that his land had been condemned and that the time for appeal from the award of the commissioners had passed, various possible courses of action, followed separately or in combination and each raising different issues, were open to him. If he considered the award fair but still desired to keep his land, he could have contended that unconstitutionality of the notice for the hearing on compensation invalidated the taking. If he considered the award unfair, he could have

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[1] The important statutory provisions of the Kansas condemnation procedure are set forth in the opinion of the Court, except for the provision in Kan. Gen. Stat., 1949, § 26–204, that title to lands condemned for parkways or boulevards vests in the city immediately on publication of the resolution of condemnation and that the city's right to possession of condemned land vests when the report of the commissioners is filed in the office of the register of deeds. Kan. Gen. Stat., 1949, § 26–204, is as follows:

"That the city clerk shall forthwith, upon any report [of assessment commissioners] being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such city, and if there be deposited with the city treasurer, for the benefit of the owner or owners of such lands, the amount of the award, such treasurer shall thereupon certify such facts upon the copy of the report, and shall pay said awards to such persons as shall be respectively entitled thereto. . . . The title to lands condemned by any city for parks, parkways or boulevards shall vest in such city upon the publication of the resolution of the governing body condemning the same. Upon the recording of a copy of said report so certified in the office of the register of deeds of the county, the right to the possession of lands condemned shall vest in the city and the city shall have the right to forthwith take possession of, occupy, use and improve said lands for the purposes specified in the resolution appropriating the same."

alleged in an appropriate action the unconstitutionality of the notice of the compensation hearing and the inadequacy of the compensation and sought to obtain fair compensation, see *Ward* v. *Love County,* 253 U. S. 17, or to restrain entry onto his land until he received a hearing under Kan. Gen. Stat., 1949, § 26–202, or, making a further allegation of the invalidity of the taking, to obtain a permanent injunction. At this stage, it is not relevant for me to imply any opinion on the merits of any of these possible courses of action.

On a fair reading of the complaint, appellant chose to pursue only the first course. The theory of his action, an attempt to restrain the city from trespassing on his land, is that he still has the right to possession. His petition for injunction based this right to possession solely on the allegation that the statutory notice was insufficient. Nowhere in his petition for an injunction does appellant make any factual allegation that the money deposited by the commissioners did not represent the fair value of his land and therefore left him out of pocket. Nowhere did he indicate that he wanted an injunction only until he received a hearing. The whole theory of his petition is that the property that was being taken without due process of law was his land, not its money value.[2]

In a memorandum filed after oral argument in this Court, appellant contends that the allegation of "irreparable damage" is a sufficient allegation of monetary loss. He states: "Of course, there could be no irreparable damage—indeed there could be no damage at all—unless the amount of the award was less than the actual value of the property. Had this been an action for damages, then an allegation of the differences in value would logi-

[2] The complaint in its entirety is set forth in an Appendix at the end of this opinion, *post,* p. 122.

cally have been found in the petition. But it was an injunction proceeding."

But an allegation of "irreparable damage" is merely a legal conclusion, flowing from, and justified by, the necessary allegation of facts warranting injunctive relief. The usual factual assertion underlying such an allegation in a suit to restrain trespass is that the threatened continuous nature of the entry represents the "irreparable damage." Indeed, in his petition for injunction, appellant made the usual factual assertion, immediately preceding the prayer for relief:

> "That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff."

In view of this assertion and the absence of any other assertion with respect to "irreparable damage," appellant's claim that monetary loss is alleged is baseless.

If the Kansas Supreme Court had construed the pleading of "irreparable damage" as implying a factual assertion that the award was less than the fair value of the land, I would accept that construction. See *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 267–268. But the Kansas Supreme Court did not construe the pleadings at all. It decided the case by upholding the constitutionality of the statute. Kansas has a right to make such an abstract determination for itself. This Court, however, can decide only "Cases" or "Controversies." U. S. Const., Art. III, § 2. It has no constitutional power to render advisory opinions. To assume that the Kansas courts construed these pleadings *sub silentio* as alleging monetary loss is to excogitate. A much more probable inference

is that since the issue so controlling for this Court's jurisdiction was not raised in the pleadings, the Kansas court did not concern itself with it. In any event, lacking an explicit construction of the pleadings by the Kansas courts, we must construe the pleadings ourselves to decide what constitutional questions are here raised on the record as it comes to us. See *Doremus* v. *Board of Education,* 342 U. S. 429, 432.

In my view, the only constitutional question raised by appellant is whether failure to give adequate notice of the hearing on compensation of itself invalidates the taking of his land, apart from any claim of loss. We have held many times that the State's interest in the expeditious handling of condemnation proceedings justifies the taking of land prior to payment, without violating the Due Process Clause, so long as adequate provision for payment of compensation is made. See, *e. g., Bragg* v. *Weaver,* 251 U. S. 57, 62. Appellant must be able to show that the provisions for payment, as they operated in his case, were inadequate before he can attack the Kansas statutory scheme for compensation in condemnation cases. See *Ashwander* v. *T. V. A.,* 297 U. S. 288, 347 and cases cited n. 6 (Brandeis, J., concurring); cf. *Smith* v. *Indiana,* 191 U. S. 138, 148–149. Since on the record before us the compensation was not alleged to be inadequate, the taking was valid and the judgment of the Kansas Supreme Court should be affirmed. At the very least, the case should be returned to the Kansas court so that we may have the benefit of its construction of the pleadings. See *Honeyman* v. *Hanan,* 300 U. S. 14.

But the Court, without explicitly construing the pleadings, passes upon the constitutionality of Kan. Gen. Stat., 1949, § 26–202. Without intimating any opinion whether in the circumstances of this case appellant was denied the due process required in determining fair compensation for property taken under the power of

eminent domain, I feel constrained to point out that the Court's decision does not hold the taking itself invalid and therefore does not require the Kansas court to grant an injunction so long as appellant's rights are protected.

[For dissenting opinion of MR. JUSTICE BURTON, see *post*, p. 126.]

APPENDIX TO DISSENTING OPINION OF MR. JUSTICE FRANKFURTER.

"IN DISTRICT COURT OF RENO COUNTY, KANSAS

"AMENDED PETITION

"Comes now Lee Walker, the plaintiff herein, by his attorneys, Oswald & Mitchell, and for his cause of action against the City of Hutchinson, Reno County, Kansas, T. E. Chenoweth, City Manager, Robert G. King, Mayor and Members of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City Commission, all of the City of Hutchinson, Reno County, Kansas, respectfully states to the Court:

"2. That the Plaintiff is a resident of Hutchinson, Reno County, Kansas, and that his post office address is 907 East 11th Street, Hutchinson, Kansas; that he is a Negro; that he was born in Bargtown, Kentucky on the 15th day of October, 1875; and that he had, as a youth, an education equivalent to the Sixth Grade.

"3. That Defendant City of Hutchinson, Reno County, Kansas is a municipal corporation; that the above named individual Defendants are respectively T. E. Chenoweth, City Manager, Robert G. King, Mayor and a member of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodard and C. E. Johnson, members of the City Commission, all of the City of Hutchinson.

"4. That on or about the 27th day of February, 1905, the Plaintiff acquired fee simple title through a Warranty Deed, duly executed by one Arthur Walker, which deed was duly recorded with the Register of Deeds of Reno County, Kansas, on the 28th day of February, 1905, in Book 85, Page 479, to the following described real estate, all situated in Reno County, Kansas:

> "Lots thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47) and forty-eight (48), Block Five (5), Maple Grove Addition to the City of Hutchinson,

"and ever since that time, the Plaintiff has owned same, enjoyed quiet and peaceful possession thereof and likewise has had and enjoyed all the fruits of such ownership, and has paid, from time to time, all assessments and taxes of every kind and nature legally assessed against said real estate; that he is therefore now the legal and equitable owner of said real estate.

"5. That on or about the 12th day of April, 1954, the defendant City of Hutchinson, through its duly elected or appointed, qualified and acting officials, filed an action in the District Court of Reno County, Kansas, entitled:

> "In the matter of the application of the city of Hutchinson, Kansas, a municipal corporation, for the appointment of commissioners in the matter of the condemnation of property for the acquisition of right of way for the opening, widening and extending of portions of Eleventh Avenue, Harrison Street and Twenty-third Avenue in the city of Hutchinson, Kansas,

"the same being docketed as Case No. 7867.

"6. That said action was for the purpose of taking from the Plaintiff and condemning certain portions of the above

described real estate, as a by-pass, so to speak, for Hutchinson's Super-Sports Arena.

"7. That the Plaintiff has never been, at any time, notified in any manner that the City of Hutchinson coveted the bit of real estate as a by-pass to Hutchinson's Super-Sports Arena he has owned since 1905; nor has he ever been served with any summons, nor given any other personal notice of any kind whatsoever that said defendant City of Hutchinson had filed the aforesaid action for the purpose of taking a part of his said real estate.

"8. That the pretended right of defendant City of Hutchinson to the real estate above legally described, owned by the Plaintiff, rests upon the authority, so far as this Plaintiff and counsel have been able to ascertain, of G. S. 26–201 and 26–202, and Reno County, Kansas District Court Case No. 7867, more fully described in Paragraph 5 herein, brought thereunder, which statute or statutes are void and of no force and effect whatsoever, because same attempt to vest the power in certain municipalities to take property without due process of law.

"9. That the only notice to an owner of real property, which G. S. 26–201 and 26–202 requires is by publication, which is not sufficient notice under the above mentioned due process clauses of both Federal and State Constitutions.

"10. That the Plaintiff had no actual notice, and did not actually know, or have any reason to know that Defendants sought to condemn and take his land, until approximately the middle part of August, 1954; unless by a peculiar quirk of the imagination, it can be said that the single legal publication, published just once in The Hutchinson News-Herald, and that on the 14th day of April, 1954, gave him notice; that said single notice so published in the official newspaper was not sufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

"11. That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.

"12. That the Plaintiff is entitled to an Order of this Court instanter, enjoining and restraining defendant City of Hutchinson from entering upon, or in any manner trespassing upon said real estate, for the reason, inter alia, that there is no other remedy, either at law or in equity, open to the Plaintiff; that if said defendant City of Hutchinson is not so restrained and enjoined, the Plaintiff will suffer irreparable damage by reason thereof.

"13. That the Plaintiff is advised that in some orders by Courts of competent jurisdiction, in the granting of a restraining order, or temporary injunction of this nature, the party seeking same, and obtaining same, is required to post certain indemnity or other type of bond or bonds; that the Plaintiff hereby respectfully and humbly advises the Court that by reason of his limited financial resources, he cannot post such a bond, and therefore asks, upon the above and foregoing statement of facts, that the Court does not make the giving of such a bond or bonds as a condition precedent to Plaintiff's obtaining a restraining order or temporary injunction at this time.

"14. That by reason of the above and foregoing facts, the Plaintiff is entitled to have, and desires to have a permanent injunction against defendant City of Hutchinson, restraining and enjoining it, and its servants, agents and all others in its employment, from entering or trespassing upon the Plaintiff's real estate, above described, or preventing him from otherwise enjoying the quiet and peaceful enjoyment thereof.

"Wherefore and by reason of the foregoing, the Plaintiff prays for an immediate Order of this Court restraining

and enjoining defendant City of Hutchinson from entering or trespassing upon the Plaintiff's real estate, above described, and the Plaintiff further prays for a judgment of this Court permanently enjoining and restraining the City of Hutchinson from entering or trespassing upon Plaintiff's real estate, above described; and Plaintiff further prays for judgment for his costs herein, and for such other and further relief as to this Court seem just and equitable."

MR. JUSTICE BURTON, dissenting.

If the issue in this case is the constitutionality of the statutory provision made for taking the property, its constitutionality seems clear. If, as I assume to be the case, the issue is the constitutional sufficiency of the statutory ten-day notice by publication of the hearing to assess the compensation for the land taken, I consider such a provision to be within the constitutional discretion of the lawmaking body of the State.

In weighing the "due process" of condemnation procedure some reasonable balance must be struck between the needs of the public to acquire the property, and the opportunity for a hearing as to the compensation to be paid for the property. Just compensation is constitutionally necessary, but the length and kind of notice of the proceeding to determine such compensation is largely a matter of legislative discretion. The minimum notice required by this statute may seem to some to be inadequate or undesirably short, but it was satisfactory to the lawmakers of Kansas. It also has been upheld by the Supreme Court of Kansas and the United States Court of Appeals for the Tenth Circuit. To proscribe it as violative of the Federal Constitution fails to allow adequate scope to local legislative discretion. Accordingly, while not passing upon the desirability of the statutory require-

ment before us, I am not ready to hold that the Constitution of the United States prohibits the people of Kansas from choosing that standard. Particularly, I am not ready to throw a nationwide cloud of uncertainty upon the validity of condemnation proceedings based on compliance with similar local statutes. Since 1889, it has been settled that notice by publication in condemnation proceedings to take and to fix the value to be paid for the land of a nonresident comports with due process. *Huling* v. *Kaw Valley R. Co.*, 130 U. S. 559. See also, *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283–287; *Bragg* v. *Weaver*, 251 U. S. 57.

I agree with the court below and with the opinion of the Court of Appeals for the Tenth Circuit rendered in the comparable case of *Collins* v. *Wichita*, 225 F. 2d 132, which came to our attention at the last term of Court and in which certiorari was denied on November 7, 1955, 350 U. S. 886. Therefore, I would affirm the judgment here.

MASSACHUSETTS BONDING & INSURANCE CO. ET AL. *v.* UNITED STATES.

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

No. 31. Argued November 8, 1956.—Decided December 10, 1956.

In an action under the Federal Tort Claims Act, plaintiffs sought damages from the United States for a death alleged to have been caused by the negligence of federal employees in Massachusetts. Under the Massachusetts Death Act, the standard of liability for wrongful death is punitive and the maximum amount recoverable is $20,000. The Tort Claims Act provides that the United States shall not be liable for punitive damages; and that, where the law of the place provides "for damages only punitive in nature," the United States shall be liable for "actual or compensatory damages, measured by the pecuniary injuries resulting from such death." *Held:* The amount of damages recoverable from the United States as compensatory damages is not limited to the maximum amount recoverable under the Massachusetts Death Act. Pp. 128–134.

227 F. 2d 385, reversed.

John R. Kewer argued the cause for petitioners. With him on the brief were *John M. Hogan* and *Edward A. Crane.*

Paul A. Sweeney argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Herman Marcuse.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2674, to recover money damages from the United States on account of the death of one Crowley, caused by negligent operation of traveling cranes by various government employees in a federal

arsenal located in Massachusetts.[1] The Act makes the United States liable for the negligence of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b). That provision makes the law of Massachusetts govern the liability of the United States for this tort.

The Massachusetts Death Act, in relevant part, provides that a person, whose agents or servants by negligence cause the death of another not in his employment or service, "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants." Mass. Ann. Laws, 1955, c. 229, § 2C. The assessment of damages with reference to the degree of culpability of the tort-feasor, rather than with reference to the amount of pecuniary loss suffered by the next of kin, makes those damages punitive in nature. That has been the holding of the Supreme Judicial Court of Massachusetts. As stated in *Macchiaroli* v. *Howell,* 294 Mass. 144, 147, 200 N. E. 905, 906–907, "The chief characteristic of the statute is penal." And see *Arnold* v. *Jacobs,* 316 Mass. 81, 84, 54 N. E. 2d 922, 923; *Porter* v. *Sorell,* 280 Mass. 457, 460–461, 182 N. E. 2d 837, 838–839.

The Tort Claims Act, however, provides in 28 U. S. C. § 2674 that:

> "The United States shall be liable . . . in the same manner and to the same extent as a private indi-

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[1] Plaintiffs were the administratrix of Crowley and the insurer of Crowley's employer. The latter, having paid compensation to the decedent's dependents, was entitled to sue the tort-feasor under the Massachusetts Workmen's Compensation Act. Mass. Ann. Laws, 1949, c. 152, § 15.

vidual under like circumstances, but shall not be liable for interest prior to judgment or *for punitive damages.*

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, *for damages only punitive in nature,* the United States shall be liable *for actual or compensatory damages,* measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." (Italics added.)

The District Court accordingly held that, since the United States was liable for "actual or compensatory" damages and not for "punitive" damages, the minimum and maximum limits contained in the Massachusetts Death Act were not applicable. It entered judgment for the plaintiffs in the amount of $60,000. The Court of Appeals reversed, holding that the Massachusetts Death Act, though punitive, sets the maximum that may be recovered in compensatory damages under the Tort Claims Act. 227 F. 2d 385. The case is here on certiorari which we granted to review this important question of construction of the Tort Claims Act. 350 U. S. 980.

The provision of the Act, making the United States liable "for actual or compensatory damages" where the law of the place provides "for damages only punitive in nature," goes back to a 1947 amendment. Alabama [2] and Massachusetts [3] award only punitive damages for wrong-

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[2] Ala. Code, 1940, Tit. 7, § 123; *Southern R. Co.* v. *Sherrill,* 232 Ala. 184, 193, 167 So. 731, 739–740; *Louisville & N. R. Co.* v. *Davis,* 236 Ala. 191, 198, 181 So. 695, 699–700; *Jack Cole, Inc.* v. *Walker,* 240 Ala. 683, 200 So. 768.

[3] For the period from January 1, 1947, to December 31, 1949, Massachusetts provided for a $2,000 minimum and a $15,000 maxi-

ful deaths. Controversies soon arose in those two States in suits under the Act, the Government maintaining that, since local law assessed only "punitive damages," it was not liable. Several bills were introduced to remedy the situation.[4] But the solution agreed upon was in a proposal tendered by the Comptroller General. In reference to the Alabama and Massachusetts rule, the spokesman of the Comptroller General stated: [5]

> "Since in those two states compensatory damages are not allowed, all that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed. . . . It is believed that that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly in accord with the general rules followed in the other 46 states . . . ."

The Government seizes on this statement and like ones in the Committee Reports (see S. Rep. No. 763, 80th Cong., 1st Sess., p. 2; H. R. Rep. No. 748, 80th Cong., 1st Sess., p. 2) to argue that unless the ceiling provided in the Massachusetts law is respected, discrimination against the United States will be shown in Massachusetts,

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mum under a Death Act providing compensatory damages. Mass. Acts 1947, c. 506. See *Beatty* v. *Fox*, 328 Mass. 216, 102 N. E. 2d 781. But on January 1, 1950, Massachusetts reverted to its system of punitive damages. Mass. Acts 1949, c. 427. The ceiling on the recovery was raised to $20,000 in 1951. Mass. Acts 1951, c. 250.

[4] H. R. 3668, 80th Cong., 1st Sess., which would have made the United States liable for punitive damages where state law provided only for punitive damages; H. R. 3690, which in its original form would have repealed the prohibition against award of puntive damages.

[5] The hearings, excerpts of which are furnished us in the Government's brief, are not printed.

since over a dozen States have ceilings on compensatory damages. It is also argued that the sole purpose of the amendment was to permit recovery for wrongful death in the two States where punitive damages could be awarded, not to alter the measure of recovery in those States. It is true that Congress was not legislating as to ceilings. Congress was, however, legislating as to the *measure of the damages* that could be recovered against the United States. As a result of the 1947 amendment, the United States became liable not for "punitive damages" but for "actual or compensatory" damages, where the law of the place provides for damages "only punitive in nature." 28 U. S. C. § 2674. The measure of damages adopted was "the pecuniary injuries" resulting from the death.

It is argued that Massachusetts does not provide damages "only punitive in nature" within the meaning of the Act; that even punitive damages serve a remedial end, as recognized by the Massachusetts court under that State's Death Act. See *Sullivan* v. *Hustis,* 237 Mass. 441, 447, 130 N. E. 247, 249–250; *Putnam* v. *Savage,* 244 Mass. 83, 85, 138 N. E. 808, 809. It is said that Massachusetts law does not provide true punitive damages since the latter are never awarded for negligence alone and are generally imposed in addition to, not in lieu of, compensatory damages. These and related reasons are advanced for treating the Massachusetts measure of damages as the measure of "actual or compensatory" damages recoverable against the United States under the Act.

We reject that reasoning. The standard of liability imposed by the Congress is at war with the one provided by Massachusetts. The standard of liability under the Massachusetts Death Act is punitive—*i. e.*, "with reference to the degree" of culpability—not compensatory. The standard under the Tort Claims Act is "compensatory," *i. e.*, "measured by the pecuniary injuries" result-

ing from the death. There is nothing in the Massachusetts law which measures the damages by "pecuniary injuries." The Massachusetts law, therefore, cannot be taken to define the nature of the damages that can be recovered under the Tort Claims Act.

In those States where punitive damages only are allowed for wrongful death, a limitation on the amount of liability has no relevance to the policy of placing limits on liability where damages are only compensatory. By definition, punitive damages are based upon the degree of the defendant's culpability. Where a state legislature imposes a maximum limit on such a punitive measure, it has decided that this is the highest punishment which should be imposed on a wrongdoer. This limitation, based as it is on concepts of punishment, cannot control a recovery from which Congress has eliminated all considerations of punishment.

Nor can it be concluded that the amendment was designed to remove discrimination in Alabama and Massachusetts between the recoveries allowed in suits against the Government and in suits against individual defendants. The amendment, in fact, perpetuates those differences. In suits in those States, recovery against the Government and against a private defendant will not be the same in identical circumstances. Where the degree of fault is high, but the pecuniary injury slight, a large recovery will represent the degree of the individual defendant's culpability, but the Government will be liable only for the slight amount of damage actually done. On the other hand, where fault is slight, but the pecuniary injury great, the individual defendant's liability will similarly be less than that of the Government. These differences in recovery are inherent in the different measures of damages applicable in suits against the Government and against a private defendant where the State chooses

to provide a punitive measure of damages for wrongful death. By adopting in such a State a compensatory measure of damages in suits against the Government, Congress deliberately chose to permit these substantial differences in recovery to exist. We therefore cannot infer that Congress has, at the same time, provided that maximum recoveries be identical.

The solution that Congress chose was (a) the adoption of the local law—whether punitive or compensatory—to determine the existence of liability of the United States, and (b) the substitution of "compensatory" for "punitive" damages where local law provides only the latter. When Congress rejected liability for "punitive" damages, we conclude it went the whole way and made inoperative the rules of local law governing the imposition of "punitive" damages. When Congress adopted "actual or compensatory damages," measured by the "pecuniary injuries," as the measure of liability in those States that awarded damages "only punitive in nature," we conclude it did not preserve as a limitation on "compensatory" damages the limitation imposed by local law on "punitive" damages. It would require considerable tailoring of the Act to make it read that way. We refuse the invitation to achieve the result by judicial interpretation.

Reversed.

MR. JUSTICE HARLAN, concurring.

Although I join in the Court's opinion in this case, the importance of the question impels me to add a word to what MR. JUSTICE DOUGLAS has written. The problem is not an easy one, and I do not think that inquiry can stop with a literal reading of the terms of the statute, plain though they may appear to be. Taking, as I think we should, § 2674 (2) within the wider context of the purpose of the Tort Claims Act as a whole, I am still not convinced

that Congress intended the $20,000 limitation in the Massachusetts punitive statute to apply to recoveries under the Tort Claims Act.

In applying that limitation, the underlying reasoning of the Court of Appeals was that § 2674 (2) must not be read as subverting the overriding philosophy of the Tort Claims Act, that is, that the Government should be liable "in the same manner and to the same extent" as a private individual under state law would be liable. It therefore argued that although § 2674 (2) departed from this philosophy when it made recovery compensatory rather than punitive in instances where the state remedy was punitive, the section in every other respect should be construed harmoniously with this philosophy, and that therefore maxima in state statutes should apply to recoveries against the Government as well as private individuals, even though such a statute is punitive.

But it seems to me that the whole purpose and reason for the enactment of § 2674 (2) was to differentiate between the Government and private defendants in the "manner" and "extent" of recovery in the particular cases where it applied, and I can find no good reason for giving the section only partial effect. In no case in Alabama or Massachusetts will a plaintiff recover from the Government "in the same manner" as he would against an individual defendant, and in no case, except by fortuitous circumstance, will he recover to "the same extent." In both of these States if a highly culpable defendant causes small pecuniary injury, he will be "punished" at a high figure, whereas the Government will merely pay the small amount of compensation. Or if a merely careless defendant causes high pecuniary damage, he is punished at a low figure under state law, while the Government must pay for the heavy damage done. In both cases, the effect of the statute is to make the Government liable in a *different*

manner and to a *different* extent than a private individual under the same circumstances; this, indeed, was the very purpose of the amendment. I therefore do not see why this purposeful differentiation in "manner" and "extent" of recovery should stop at the problem of maximum recoveries. Since the Government is by the very statute made liable on a different basis than a private individual and will in every case pay a different amount than would a private individual, why does it offend the philosophy of the Act to make the Government liable for more than a private individual would pay? Thus, while it is true that in general the Tort Claims Act makes the United States *pro tanto* a private defendant, the very purpose of § 2674 (2) was to prevent this assimilation in States where recovery is punitive. It seems to me, therefore, that there is no reason to re-establish the assimilation on this one matter of maximum allowable recovery.

Furthermore, I find it unlikely that Congress would have intended to subject plaintiffs to a maximum which was established for reasons of policy irrelevant to litigation under the Tort Claims Act. Massachusetts has decided that for reasons of policy—possibly because of the danger of excessive jury verdicts in "punitive" cases—recovery under its punitive statute should be limited to $20,000. The statute being penal, it embodies the judgment of the legislature that the highest *punishment* that should be imposed for nonhomicidal death is this figure. But as soon as punishment has nothing to do with the lawsuit—as it does not in suits under § 2674 (2)—and as soon as recovery is for compensation of the victim rather than punishment, then the policy reasons on which the $20,000 limit are based vanish. Massachusetts might, of course, impose a limit on compensatory recoveries as well. It did so for a short time, but then repealed the statute. But it is clear that the limit embodied in *this*

statute has nothing to do with a compensatory suit; the factors which led to the imposition of *this* maximum are irrelevant when damages are not punitive. It would therefore seem to me just as artificial to take the $20,000 limit of this statute and impose it on a Tort Claims Act recovery as it would be to use as a limit a maximum figure taken from a state criminal statute imposing a fine for negligent homicide. The limitation in the Massachusetts penal statute was arrived at under penal concepts, and should not be artificially imposed on a recovery from which penal considerations have been eliminated by congressional mandate.

The Court of Appeals suggests that if the Massachusetts "punitive" maximum were not applicable, the Government would be put at a unique disadvantage in Massachusetts, since the death statutes of some twelve other States place limitations on recovery which concededly would be applicable to the United States under the provisions of the Tort Claims Act. But the limitations in these other States all relate to compensation statutes, and I do not, of course, suggest that such a limitation in Massachusetts would not also apply to the Government. The resulting lack of symmetry in the operation of the Act as between Massachusetts and the other States having death recovery maxima, seems to me no greater than it is as between such States and those which impose no monetary limitation on death recoveries. Moreover, symmetry in the first aspect can only be achieved at the expense of offending "the general scheme of the Tort Claims Act to refer questions of liability of the United States to the provisions of 'the law of the place where the act or omission complained of occurred,'" * since Massachusetts does not recognize compensatory actions.

*227 F. 2d 385, 391.

I think, therefore, that recovery of actual compensatory damages is, in this case, in full accord with the philosophy of the Tort Claims Act.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN join, dissenting.

The scope of this case, though involving a general Act of Congress, is geographically constricted; the holding is applicable only to actions under the Federal Tort Claims Act arising out of wrongful deaths in Massachusetts. The Court, finding the words of the Federal Tort Claims Act clear, reversed the judgment of the Court of Appeals, which has special responsibility for interpreting federal law in matters unique to its circuit.

Underlying the Court's reasoning is the belief that the language of the 1947 amendment is so clear that it would require creative reconstruction of the amendment to limit the amount of the judgment to the maximum recoverable under the Massachusetts Death Act. On more than one occasion, but evidently not frequently enough, Judge Learned Hand has warned against restricting the meaning of a statute to the meaning of its "plain" words. "There is no surer way to misread any document than to read it literally . . . ." *Guiseppi* v. *Walling,* 144 F. 2d 608, 624 (concurring opinion). Of course one begins with the words of a statute to ascertain its meaning, but one does not end with them. The notion that the plain meaning of the words of a statute defines the meaning of the statute reminds one of T. H. Huxley's gay observation that at times "a theory survives long after its brains are knocked out." One would suppose that this particular theory of statutory construction had had its brains knocked out in *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48.

The words of this legislation are as plain as the Court finds them to be only if the 1947 amendment is read in misleading isolation. An amendment is not a repeal. An amendment is part of the legislation it amends. The 1947 amendment to the Federal Tort Claims Act of 1946 must be read to harmonize with the central purpose of the original Act. The central purpose of the original Act was to allow recovery against the United States on the basis and to the extent of recoveries for like torts committed by private tortfeasors in the State in which the act or omission giving rise to the claim against the United States occurred. The 1947 amendment filled the gap, a very small gap, that was disclosed in the scheme formulated by the 1946 Act.

The gap was the situation revealed in two of the forty-eight States, Alabama and Massachusetts. When the Federal Tort Claims Act was passed, the Death Acts of both Alabama and Massachusetts provided for assessment of the defendant's liability for damages on a punitive basis. In Alabama, however, there was no maximum limitation on the recovery, and the problem of this case—whether a recovery in excess of the statutory maximum recoverable against a private employer can be had against the United States—is therefore unique to recovery against the United States under the Massachusetts Death Act. In filling the gap, Congress was concerned only to provide for recovery against the United States for wrongful deaths in Massachusetts and Alabama and to provide for recovery, as did the original Act, on a compensatory not a punitive basis. There is nothing to indicate, and it is unreasonable to suppose, that Congress meant a recovery in Massachusetts to be unlimited in amount in the face of the State's statutory limitation at the same time that recoveries in the dozen other States with statutory limitations would be restricted. Such a construction not only takes Massachusetts plaintiffs out of the general

scheme of the Federal Tort Claims Act. It does so by putting them in a better position than plaintiffs in the dozen other States with statutory ceilings. This imputes to Congress a desire to correct the inequity in the 1946 Act by creating an inequity in the 1947 amendment.

Of course the Massachusetts limitation is contained in a statute in which damages are related to a punitive rather than a compensatory basis. The purpose of the 1947 amendment was to allow recovery against the United States when the governing state statute measured damages on such a basis. With this sole exception that the state statute puts the recovery on a harsher basis, the state statute is the governing statute. It may well be that if Massachusetts were to enact a statute restricting recovery to compensatory damages, it would impose a different ceiling. But that is no reason for rejecting the ceiling in the present statute. It does not comport with good sense and reason to suppose that a State would impose a higher ceiling on a recovery based on compensatory damages than it does when it allows punitive damages. This common-sense assumption is supported by the fact that during the brief period from 1947 through 1949, when the Massachusetts statute did measure damages solely on a compensatory basis, the ceiling was fixed at $15,000. This was the same ceiling that was in the previous statute which measured damages on a combined punitive and compensatory basis and the same ceiling that was in the immediately subsequent statute which measured damages solely on a punitive basis. To deny effect to this common-sense assumption is to elevate the literal reading of the 1947 amendment above the central basis of the Federal Tort Claims Act, the assimilation of recovery under federal law to recovery under state law.

The Court of Appeals for the First Circuit, in an opinion by Chief Judge Magruder, construed the 1947

amendment in order to harmonize it with the central purpose of the Federal Tort Claims Act. Since elaboration of my reasons for agreeing with the interpretation of the Court of Appeals could only be a paraphrase of its opinion, I rest my dissent from the Court's judgment on what I regard as the substance of that opinion:

> "In the process of enactment of the foregoing amendment [the 1947 Act], the committee reports in both the House and Senate, after pointing out that under the scheme of the Federal Tort Claims Act each case is determined 'in accordance with the law of the State where the death occurred,' made the following comment:
>
> " 'This bill simply amends the Federal Tort Claims Act so that it shall grant to the people of two States the right of action already granted to the people of the other 46.
>
> " 'This bill, with the committee amendment, will not authorize the infliction of punitive damages against the Government, and as so amended, it is reported favorably by a unanimous vote.
>
> " 'Its passage will remove an unjust discrimination never intended, but which works a complete denial of remedy for wrongful homicide.' H. R. Rep. No. 748, Committee on the Judiciary, 80th Cong., 1st Sess.; Sen. Rep. No. 763, Committee on the Judiciary, 80th Cong., 1st Sess.
>
> . . . . .
>
> "Under the provisions of the Federal Tort Claims Act as they now appear in Title 28 of the Code, it is still true that Congress has not enacted a new comprehensive code of federal tort liability. It is still true that the Act in general calls for an application of the law of the state where the wrongful act or

404165 O—57——16

omission occurred. Also, the generalization is still in the law that the United States is to be held liable in tort 'in the same manner and to the same extent as a private individual under like circumstances.' The exceptional situation covered by the second paragraph of 28 U. S. C. § 2674 [that is, the 1947 amendment] applies only to two of the 48 states, for in 46 of the states recovery under their respective Death Acts rests upon a compensatory basis. In about a dozen of these 46 states, the local Death Act contains some maximum limit on the amount of recovery. . . . In these states, as the plaintiffs are bound to concede, the United States could not be liable for more than the statutory maximum permitted by state law in suits against private employers. Such is the clear mandate of the first paragraph of 28 U. S. C. § 2674.

. . . . . .

"As suggested above, the 1947 amendment to the Tort Claims Act did make a partial break in the original pattern of the Act in that, wherever the amendment was applicable, it became possible (1) that the United States might be held liable for a greater sum of damages, assessed on a compensatory basis, than might be assessed under the local Death Act against a private employer in cases in which the wrongdoer was deemed to have been guilty of the minimum degree of culpability, and (2) the United States might be liable for no substantial damages at all, where the plaintiff failed to prove any pecuniary injury to the next of kin . . . though under the local Death Act a private employer might be subject to large damages assessed on a punitive basis. Thus in either of these situations the United States would

not be liable 'to the same extent' as a private employer under like circumstances, which is the generally applicable standard in the first paragraph of 28 U. S. C. § 2674.

"But we think it is unnecessary to construe the 1947 congressional amendment, which was intended to remove what was deemed to be a discrimination in a very narrow situation, so as to effectuate a far greater discrimination and incongruity. If the contention of the plaintiffs were accepted, then in Massachusetts alone, of all the states whose respective Death Acts contain a maximum limit of recovery, the United States may be held liable in an amount in excess of the maximum limit of recovery permitted against a private employer. [Footnote omitted.]

"The plaintiffs would have us read literally, and in isolation, the language of the second paragraph of 28 U. S. C. § 2674 that, in lieu of punitive damages, 'the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought.' It is argued that since the damages, so computed, have been found to be $60,000, and since the Congress has imposed no maximum limit of recovery, then necessarily, by the very command of the Congress, the judgment against the United States here must be in the sum of $60,000.

"The trouble with the foregoing argument is that the Federal Tort Claims Act, as amended, must be read as an organic whole. In 1947, when the Congress enacted the amendment, it demonstrated no objection to that portion of the Massachusetts Death Act which contained a maximum limit of recovery. That was purely a matter of local legislative policy,

and if a private employer could not be held for more than $20,000, then the Congress, in waiving the governmental immunity of the United States, had no reason to impose a liability upon the United States in excess of the maximum limit applicable to a private employer. What the Congress did not want was to have damages assessed against the United States on a punitive basis. We give full effect to the language of the congressional amendment if we assess damages against the United States on a compensatory basis measured by the pecuniary injuries resulting to the next of kin. Having done that, and if the amount so computed is in excess of $20,000, it is in no way inconsistent to cut down the larger sum to $20,000, the maximum amount recoverable under the terms of the Massachusetts Death Act. All of the $20,000 to be recovered in such a case would be compensatory damages—not one cent of it would be punitive damages—and thus there would be achieved the congressional objective of preventing the infliction of punitive damages against the United States. In other words, except where Congress has clearly provided otherwise, it is the general scheme of the Tort Claims Act to refer questions of liability of the United States to the provisions of 'the law of the place where the act or omission complained of occurred.' Thus we must look to the local law to see who is entitled to sue, and for whose benefit; we must look to the local law on whether contributory negligence of the decedent, or a release by him during his lifetime, bars the action for wrongful death; and we must also apply the provision of the local law as to the maximum amount of recovery, for in none of these particulars is there any inconsistent provision in the federal Act." 227 F. 2d 385, 388–391.

LEEDOM ET AL., MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *v.* INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS.

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

No. 57. Argued November 14, 1956.—Decided December 10, 1956.

Section 9 (h) of the National Labor Relations Act provides that the Board shall make no investigation nor issue any complaint on behalf of a union unless there is on file with the Board a non-Communist affidavit of each officer of the union and of any national or international labor organization of which it is an affiliate; and that "The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." *Held:* The criminal sanction is the exclusive remedy for the filing of a false affidavit under this section; and the Board may not take administrative action and, on a finding that a false affidavit has been filed, enter an order withholding from the union the benefits of the Act until it is satisfied that the union has complied. Pp. 146–151.

(a) *Labor Board* v. *Highland Park Co.*, 341 U. S. 322, and *Labor Board* v. *Coca-Cola Bottling Co.*, 350 U. S. 264, distinguished. P. 149.

(b) The language of § 9 (h) and its legislative history preclude an additional sanction which in practical effect would run against the members of the union, not their guilty officers. Pp. 149–151.

96 U. S. App. D. C. 416, 226 F. 2d 780, affirmed.

Theophil C. Kammholz argued the cause for petitioners. With him on the brief were *Solicitor General Rankin, Dominick L. Manoli* and *Norton J. Come.*

Nathan Witt argued the cause for respondent. With him on the brief were *Joseph Forer* and *David Rein.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U. S. C. § 159 (h), provides that the Board shall make no investigation nor issue any complaint on behalf of a union unless there is on file with the Board a non-Communist oath of each officer of the union and of each officer of any national or international labor organization of which it is an affiliate or constituent unit.[1] Section 9 (h) further provides that "The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." Section 35 A of the Criminal Code applies a criminal sanction [2] to false affidavits filed under § 9 (h). The question in this case is whether criminal prosecution under that provision is the exclusive remedy for the filing of a false affidavit under § 9 (h) or whether the Board may take administrative action and, on a finding that a false affidavit has been filed, enter an order of decompliance,

[1] "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 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."

[2] Section 35 A provides a penalty of $10,000, or a prison term or both, for making, among other things, fraudulent statements "in any matter within the jurisdiction of any department or agency of the United States." 52 Stat. 197, 18 U. S. C. § 1001.

withholding from the union in question the benefits of the Act until it is satisfied that the union has complied. The court below held that the criminal sanction was the exclusive remedy for filing the false affidavit. 96 U. S. App. D. C. 416, 226 F. 2d 780. That decision is in conflict with a ruling of the Court of Appeals for the Sixth Circuit. *Labor Board* v. *Lannom Mfg. Co.,* 226 F. 2d 194. We granted the petitions for certiorari in each case in order to resolve the conflict. 351 U. S. 949; 351 U. S. 905.

The union involved in the present case is the International Union of Mine, Mill, and Smelter Workers. The union filed a complaint with the Board charging that the Precision Scientific Co. refused to bargain with it in violation of the Act. During the course of the hearing before the Board, the company challenged the veracity of affidavits filed by one Travis, an officer of the union, under § 9 (h). The Board, in accord with its practice,[3] refused to allow that issue to be litigated in the unfair labor practice proceeding. But later on, it issued an order directing an administrative investigation and hearing. A hearing was held before an examiner who found, among other things, that the § 9 (h) affidavit filed by Travis in August 1949 was false and that the union membership knew it was false and yet continued to re-elect him as an officer. The Board agreed with the trial examiner, held that the union was not and had not been in compliance with § 9 (h) of the Act, and ordered that the union be accorded no further benefits under the Act until it had complied. *Maurice E. Travis,* 111 N. L. R. B. 422. The Board, thereafter, dismissed the union's complaint against Precision Scientific Co., an action later vacated pursuant to a stay issued by the court below.

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[3] See *In the Matter of Lion Oil Co.,* 76 N. L. R. B. 565, 566; *Coca-Cola Bottling Co.,* 108 N. L. R. B. 490, 491.

The instant suit was brought in the District Court by the union, which prayed that the Board's order of decompliance be enjoined. Precision Scientific Co. intervened. The District Court denied a preliminary injunction. The Court of Appeals reversed, 96 U. S. App. D. C. 416, 226 F. 2d 780, on the authority of its prior decision in *Farmer* v. *International Fur & Leather Workers Union,* 95 U. S. App. D. C. 308, 221 F. 2d 862. It held that a false affidavit filed under § 9 (h) of the Act gave rise only to a criminal penalty against the guilty union officer and did not in any way alter the union's right to the benefits of the Act, even where its members were aware of the officer's fraud.

We agree with the court below that the Board has no authority to deprive unions of their compliance status under § 9 (h) and that the only remedy for the filing of a false affidavit is the criminal penalty provided in § 35 A of the Criminal Code. We start with a statutory provision that contains only one express sanction, *viz.,* prosecution for making a false statement. No other sections of the Act expressly supplement that one sanction.

The aim of § 9 (h) is clear. It imposes a criminal penalty for filing a false affidavit so as to deter Communist officers from filing at all. The failure to file stands as a barrier to the making of an investigation by the Board and the issuance of any complaint for the benefit of the union in question. The section, therefore, provides an incentive to the members of the union to rid themselves of Communist leadership and elect officers who can file affidavits in order to receive the benefits of the Act. The filing of the required affidavits by the necessary officers is the key that makes available to the union the benefits of the Act.

The Board is under a duty to determine whether a filing has been made by each person specified in § 9 (h), since its power to act on union charges is conditioned on

filing of the necessary affidavits. That was the extent of our rulings in *Labor Board* v. *Highland Park Co.*, 341 U. S. 322; *Labor Board* v. *Coca-Cola Bottling Co.*, 350 U. S. 264. The argument made by the Board would have us go further and read into the Act an implied power to determine not only whether the affidavit has been filed but also whether the affidavit filed is true or false. And for that position reliance is placed on general statements in cases like *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18–19, that the Board has implied power to protect its process from abuse.

We are dealing here with a special provision that has a precise history. Both the Senate and the House originally passed bills which, though the language differed one from the other, made the test of compliance the fact of nonmembership of union officers in the Communist Party. See 1 Leg. Hist., Labor Management Relations Act, 1947 (Nat. Labor Rel. Bd., 1948), pp. 190, 251. If those provisions had become the law, the Board would have been required to conduct an inquiry into whether the officers were in fact non-Communist, at least where the veracity of the affiant was challenged.[4] But a fundamental change in § 9 (h) was made by the Conference Committee. As stated in the Conference Report respecting the provisions in the two bills,

> "In reconciling the two provisions the conferees took into account the fact that representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation. The conference agreement provides that no certification

[4] See the colloquy between Senators Ferguson and McClellan in 2 Leg. Hist., Labor Management Relations Act, 1947 (Nat. Labor Rel. Bd., 1948), pp. 1434–1435.

> shall be made or any complaint issued unless the labor organization in question submits affidavits executed by each of its officers and officers of its national or international body, to the effect that they are not members or affiliates of the Communist Party or any other proscribed organization. The penal provisions of section 35 (a) of the Criminal Code (U. S. C., title 18, sec. 80) are made applicable to the execution of such affidavits." 2 Leg. Hist., *op. cit., supra,* p. 1542.

Senator Taft explained the change to the Senate:

> "This provision making the filing of affidavits with respect to Communist Party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification proceedings could have been infinitely delayed while it investigated and determined Communist Party affiliation. Under the amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required." *Id.,* at 1625; 93 Cong. Rec. 6860.

This explicit statement by the one most responsible for the 1947 amendments seems to us to put at rest the question raised by this case. If, in spite of the change in wording of § 9 (h) made by the Conference Committee, the Board could still investigate the truth or falsity of the affidavits filed, the unfair labor practice proceedings might be "infinitely delayed," to use Senator Taft's words. Under the construction presently urged by the Board, Senator Taft's assurance that "an affidavit is sufficient for the Board's purpose" would be disregarded.

Much argument is advanced that the contrary position is favored by policy considerations. For example, it is said that if the Board can look into the truth or falsity of all § 9 (h) affidavits and enter orders of decompliance in case they are found to be false, union members will have greater incentive to rid themselves of Communist leaders. But the rule written into § 9 (h) is for the protection of unions as well as for the detection of Communists. It is not fair to read it only against the background of a case where the members knew their officer was a Communist. We are dealing with a requirement equally applicable to all unions, whether the members are innocent of such knowledge or guilty. As Judge Bazelon stated in *Farmer* v. *United Electrical Workers,* 93 U. S. App. D. C. 178, 181, 211 F. 2d 36, 39, there is no indication that Congress meant to impose on a union the drastic penalty of decompliance "because its officer had deceived the union as well as the Board by filing a false affidavit." The penalty stated in § 9 (h) is one against the guilty officers. In view of the wording of § 9 (h) and its legislative history, we cannot find an additional sanction which in practical effect would run against the members of the union, not their guilty officers. That was the Board's original position,[5] and we think it is the correct one.

Affirmed.

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[5] *In the Matter of Craddock-Terry Shoe Corp.,* 76 N. L. R. B. 842, 843, a proceeding involving an unfair labor practice, the Board refused to entertain evidence that the affidavits filed under § 9 (h) were false, the Board saying: "In the instant case there is on file an affidavit identifying the officers of the Union, and non-Communist affidavits signed by each officer so identified. It is not the purpose of the statute to require the Board to investigate the authenticity or truth of the affidavits which have been filed. Persons desiring to establish falsification or fraud have recourse to the Department of Justice for a prosecution under Section 35 (a) of the Criminal Code. The evidence sought to be adduced under this allegation is

Footnote 5—Continued.

accordingly immaterial." And see *In the Matter of Alpert and Alpert,* 92 N. L. R. B. 806, 807.

On March 18, 1952, Paul M. Herzog, then Chairman of the Board, testified on § 9 (h) problems in Senate hearings. He reported that in the four years ending June 30, 1951, there had been filed with the Board 232,000 non-Communist affidavits. He reviewed the history of § 9 (h) and remarked how "intolerable and delaying" the administrative process would have been if the proposals originally contained in § 9 (h), and which we have discussed, had been enacted into law:

". . . Had this provision been enacted into law, the Board would have been inundated with litigation on an issue concerning which proof is singularly difficult to obtain, to the detriment of speedy disposal of cases which cry out for early employee recourse to the ballot box.

"Instead, Congress imposed an obligation on labor union 'officers'—without defining them in the statute—to take the affirmative step of forswearing Communist affiliation. The theory evidently was that if these officers' refusal to sign affidavits deprived their constituents of all the Board's facilities, the spotlighting of that refusal would soon generate pressure from below to remove them from office. It was apparent from the outset that the NLRB's sole function was to make certain that the necessary persons filed these affidavits, and that, once they had done so pursuant to the rules we adopted, we were to process their cases without inquiring into the truth or falsity of the affidavits themselves. Where such an issue arose, the Board's statutory duty was only to refer the affidavit to the Department of Justice for investigation and possible prosecution for perjury under the Criminal Code. We have made 55 such referrals since 1947."

Hearings, Senate Subcommittee of Committee on Labor and Public Welfare, Communist Domination of Unions and National Security, 82d Cong., 2d Sess., p. 91.

On November 10, 1953, the Board issued a Statement of Policy which overturned its previous position. The Board then concluded that a conviction for filing a false affidavit "would necessarily invalidate any certifications or other official action taken by the Board in reliance on the truth of such affidavits." The extent of this change in policy was underscored by the Board's further decision to hold in abeyance representation elections which concerned a union whose officers were under indictment for filing false affidavits. 18 Fed. Reg. 7185.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 40. Argued November 14, 1956.—Decided December 10, 1956.

The criminal penalty imposed by § 35 A of the Criminal Code, 18 U. S. C. § 1001, is the exclusive remedy for the filing of a false non-Communist affidavit under § 9 (h) of the National Labor Relations Act. *Leedom* v. *International Union, ante,* p. 145. Pp. 153–156.

226 F. 2d 194, reversed.

Harold I. Cammer argued the cause and filed a brief for petitioner.

Theophil C. Kammholz argued the cause for the National Labor Relations Board, respondent. With him on the brief were *Solicitor General Rankin, Dominick L. Manoli* and *Norton J. Come.*

Judson Harwood argued the cause for the Lannom Manufacturing Co., respondent. With him on the brief was *Cecil Sims.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Leedom* v. *International Union, ante,* p. 145, decided this day. International Fur and Leather Workers Union [1] filed a charge with the National Labor Relations Board alleging that respondent Lannom Mfg. Co. had interfered with the rights of its employees guaranteed by the Act. This charge was filed

[1] In February 1955 this union merged with Amalgamated Meat Cutters & Butcher Workers of North America, petitioner in this case.

in April 1951. A complaint was issued based on the charges in February 1952. At the hearing, Lannom sought to prove that certain § 9 (h) affidavits filed by officers of the union were false. The trial examiner ruled, in accordance with the Board's practice, that that issue could not be litigated in the proceeding. The trial examiner recommended that an appropriate remedial order issue to correct the unfair labor practice which he found to exist. The Board in general sustained the trial examiner and issued a remedial order against Lannom, 103 N. L. R. B. 847. Prior to this order, the Board had been enjoined from taking administrative action requiring the union's officers to reaffirm their § 9 (h) affidavits. *Farmer* v. *United Electrical Workers,* 93 U. S. App. D. C. 178, 211 F. 2d 36. Accordingly the Board ruled, "We are administratively satisfied that the Union was in compliance with Section 9 (h) at all times relevant hereto." 103 N. L. R. B., at 847, n. 2.

In August 1953 an indictment was returned against Ben Gold, an officer of the union, charging that the § 9 (h) affidavit which he filed with the Board on August 30, 1950, was false. In 1954 Gold was convicted for that offense.[2] Thereafter, the Board ordered the union to show cause why its compliance status under the Act should not be altered, unless Gold were removed from office. The union re-elected Gold as its president. Shortly thereafter the Board declared the union out of compliance with § 9 (h). 108 N. L. R. B. 1190, 1191. The union then obtained from the District Court for the District of Columbia a preliminary injunction enjoining the Board from altering or restricting the union's compliance status by reason of Gold's conviction. The Court of Ap-

[2] The judgment of conviction was affirmed by an equally divided Court of Appeals, sitting *en banc*. *Gold* v. *United States,* 99 U. S. App. D. C. 136, 237 F. 2d 764. We granted certiorari on October 8, 1956. 352 U. S. 819.

peals affirmed. *Farmer* v. *International Fur & Leather Workers Union,* 95 U. S. App. D. C. 308, 221 F. 2d 862.

The Board sought a stay of the preliminary injunction pending decision by the Court of Appeals in the *Farmer* case. When the stay was denied, the Board petitioned the court below, pursuant to § 10 (e) of the Act, for enforcement of the unfair labor practice order. Respondent Lannom Mfg. Co. moved for dismissal of the enforcement petition on the grounds of Gold's conviction for false filing under § 9 (h). The union intervened and opposed the motion to dismiss.

The court below granted the motion to dismiss, holding that, since the falsity of the affidavit had been proved, the requirements of § 9 (h) had not been met and no benefits should be accorded the union. We granted certiorari. 351 U. S. 905.

As noted, the complaint in the unfair labor practice proceeding was issued in February 1952, more than twelve months after the affidavit of August 30, 1950. Section 9 (h) provides that no investigation shall be made or complaint issued on behalf of a union unless there is on file with the Board a non-Communist affidavit of each officer "executed contemporaneously or within the preceding twelve-month period." There was no charge against Gold for filing a false affidavit in 1951. The Court of Appeals met that difficulty by presuming that a person who was a Communist in 1950 continued as such through 1951 and through the critical date of February 1952, in absence of evidence showing a change in the factual situation.[3] 226 F. 2d 194, 198–199.

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[3] It was on this phase of the case that Judge Stewart dissented: "A jury has found that in 1950 Gold was both a Communist and a liar, to put it bluntly. Yet to indulge in the presumption that he was therefore guilty of committing a criminal offense a year later in filing the 1951 affidavit is further than I can go on the record before us." 226 F. 2d, at 200.

The petitioner has also urged that Gold's conviction for filing a false affidavit could form no basis for holding the union in decompliance prior to the affirmance of Gold's conviction on appeal. At the time of the decision below, Gold's appeal was pending in the Court of Appeals for the District of Columbia. As noted,[4] we have granted certiorari to review the affirmance of his conviction.

For the reasons stated in *Leedom* v. *International Union, ante,* p. 145, we conclude that the sole sanction for the filing of a false affidavit under § 9 (h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union nor the withholding of the benefits of the Act that are granted once the specified officers file their § 9 (h) affidavits. Having so concluded, we find it unnecessary to reach the collateral phases of this controversy.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

I agree that decompliance of the union is not a sanction authorized by § 9 (h). But this case presents another consideration that cannot be overlooked in the due administration of justice and that, standing alone, would lead me to reverse the judgment of the Court of Appeals. As stated below in the dissenting opinion of Judge Stewart:

> "A court of competent jurisdiction has found that Gold's affidavit of August 30, 1950, was false. The critical date as to compliance with § 9 (h) of the National Labor Relations Act as amended was the date of issuance of the Board's complaint. N. L. R. B. v. Dant, 344 U. S. 375 . . . . If the complaint had issued during the twelve month period while this false affidavit was in effect, the question before us would be clear cut. That, however, is not the case.

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[4] Note 2, *supra.*

153 FRANKFURTER, J., concurring.

"In August of 1951 Gold filed a new non-Communist affidavit, and it was during the effective period of that affidavit that the complaint in this case issued. No court has found that affidavit to be false. It is true that the Board found in 1954 that the Union was not at that time in compliance with § 9 (h). Assuming the Board had power to make such a finding, and assuming further that it be considered a finding that the 1951 affidavit was false, it must, I should think, be supported, like any Board finding, by substantial evidence, considering the record as a whole. We have no such record before us. Indeed, it appears that the question of the truth or falsity of the 1951 affidavit has never been heard on the merits. [Footnote omitted.]

. . . . .

"A jury has found that in 1950 Gold was both a Communist and a liar, to put it bluntly. Yet to indulge in the presumption that he was therefore guilty of committing a criminal offense a year later in filing the 1951 affidavit is further than I can go on the record before us." 226 F. 2d 194, 199–200.

404165 O—57——17

UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 12. Argued October 11, 1956.—Decided December 17, 1956.

Since May 1, 1951, railroads serving the port of Norfolk, Va., have refused to pay an allowance to the Army for the wharfage and handling services the Army performs for itself on military export traffic passing through Army base piers. In their tariffs the railroads assumed the obligation to furnish such services for all shippers that complied with the tariffs, and accordingly furnished the services for commercial shippers at public sections of the same piers without additional charge. Because the Army provides these services itself, it claimed a right to the $1.00 per ton paid by the railroads on behalf of commercial shippers. A complaint charging the railroads with violating the Interstate Commerce Act was dismissed by the Interstate Commerce Commission, and the United States sued to set aside the order. *Held:* In the circumstances of this case, the refusal of the railroads to make the allowance to the Army did not subject the Government to unjust discrimination and did not constitute an unreasonable practice in violation of the Interstate Commerce Act. Pp. 160–176.

(a) The circumstances of Army shipments are markedly different from those of private shippers that received wharfage and handling services; and the Army was treated identically with those shippers who for business reasons did not care to comply with the tariff requirements. Pp. 168–169.

(b) Although the Army hired the same private company as did the railroads to operate the Army portion of the base, the Army's control was "absolute." Pp. 169–171.

(c) The method of handling government freight did not comply with the tariff requirements. P. 172.

(d) Any deviation from tariffs by carriers violates § 6 (7) of the Interstate Commerce Act, unless they grant a concession to the United States under § 22. P. 172.

(e) The Government was being treated just as any shipper who decides not to take advantage of the services offered in the tariff and takes deliveries of export rate traffic at private piers under his own control. Pp. 172–173.

(f) That the Government took control of the piers to meet a national emergency cannot convert the Government's operation of its private piers into a category different from that of private shippers. P. 173.

(g) The fact that the operations of the Government and the railroads are in the same pier area is immaterial. P. 174.

(h) If the railroads gave an allowance in these circumstances, excepting one given as a concession to the Government under § 22 of the Act, they would have to give it at all private piers where the shipper wanted to handle wharfage at its own discretion. P. 174.

(i) The Government has the right to have its shipments accorded the same privileges given others; in emergencies its traffic may have "preference or priority in transportation"; and it may be granted and may accept preferences in rates; but it cannot otherwise require extra services or allowances. P. 174.

(j) *United States* v. *United States Smelting Co.*, 339 U. S. 186, distinguished. P. 175.

(k) Whether circumstances and conditions are sufficiently dissimilar to justify differences in rates or charges is a question of fact for the Commission's determination. Pp. 175–176.

132 F. Supp. 34, affirmed.

Ralph S. Spritzer argued the cause for the appellant. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman.*

Robert W. Ginnane argued the cause for the Interstate Commerce Commission. With him on the brief was *B. Franklin Taylor, Jr.*

Windsor F. Cousins argued the cause for the railroad appellees. On the brief were *Charles P. Reynolds* and *James B. McDonough, Jr.,* for the Seaboard Air Line Railroad Co., *Richard B. Gwathmey* for the Atlantic Coast Line Railroad Co., *A. J. Dixon* and *William B. Jones* for the Southern Railway Co., *John P. Fishwick* for the Norfolk & Western Railway Co., *Martin A. Meyer, Jr.,* for the Virginian Railway Co., and *Hugh B. Cox* and *Mr. Cousins* for the Pennsylvania Railroad Co.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal requires a determination of whether railroads serving the port of Norfolk, Virginia, must grant the United States an allowance for the Government's performance of certain wharfage and handling services on its own export freight. For shippers who conform to the requirements of the tariff, the railroads assume these charges as a part of the rate. The United States, however, found it impractical to conform to the tariff requirements.

The present litigation was instituted pursuant to 28 U. S. C. § 2325 in a three-judge District Court of the District of Columbia by the United States, through its Department of the Army, against the Interstate Commerce Commission and the United States, to set aside the Commission's order in *United States* v. *Aberdeen & Rockfish R. Co.*, 289 I. C. C. 49. That order dismissed a complaint filed by the United States on November 20, 1951, against several named railroads charging them with violations of the Interstate Commerce Act. The District Court, one judge dissenting, dismissed the complaint. 132 F. Supp. 34. We noted probable jurisdiction. 350 U. S. 930.

Since May 1, 1951, the railroads have refused to pay an allowance to the Army for the wharfage and handling [1] services the Army performs on military export traffic passing through Army base piers in Norfolk, Virginia. The railroads have assumed in their tariffs the obligation to

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[1] "Wharfage refers to the provision of space on the docks for storage of freight pending transfer between freight cars and cargo vessels; handling refers to the unloading of goods from freight cars and placing them on the docks within reach of ship's tackle . . . ." *United States* v. *Interstate Commerce Commission*, 91 U. S. App. D. C. 178, at 182, 198 F. 2d 958, at 962. See *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 672.

furnish these accessorial services for all shippers that comply with their tariffs. And, in accordance with these tariffs, the railroads have furnished the services for commercial shippers at public sections of the same piers without additional charge. These services were performed for the Army and the railroads by the same private company—for the Army under contract to carry out its orders for terminal and storage services; for the railroads by contract to act as the carriers' agent in accordance with their tariffs.

The Army sought a determination that the railroads' refusal to make an allowance to it to the same extent that the railroads paid the private company, Stevenson & Young, for handling of private shipments subjected the Government to unjust discrimination and constituted an unreasonable practice in violation of §§ 1, 2, 3, and 6 of the Interstate Commerce Act.[2] The Army also requested

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[2] "It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs . . . which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." 49 U. S. C. § 1 (6).

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust

an order that the railroads cease and desist from such refusal in the future.[3]

The transfer of export freight from rail carriers to outbound water carriers is made on piers or wharves that allow the unloading of freight from railroad cars to within reach of ships' tackle. Railroads are under no statutory obligation to furnish such piers or to unload carlot freight, *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323.[4] In general the railroads have taken on the duty of wharfage and handling for freight consigned for overseas shipment.[5] In some instances railroads have charged for the use of the piers ("wharfage") and the necessary "handling" separately from their charge for

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discrimination, which is prohibited and declared to be unlawful." 49 U. S. C. § 2.

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject . . . any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 49 U. S. C. § 3 (1).

As §§ 1 (6), 2 and 3 (1) of the Act only are material on this appeal, they alone are quoted in pertinent part.

[3] No reparations were requested in this proceeding. However, as the Government indicates, if the railroads' refusal to pay for wharfage and handling is held to be a violation of the Act, the Government may deduct the prior "overpayments" from future sums due the railroads. See 49 U. S. C. § 66.

[4] See 289 I. C. C., at 61.

[5] They can assume such and similar accessorial services by tariffs approved by the Commission as fair. See *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507, 524. It is discrimination or unfairness in the tariffs that calls for correction. *United States* v. *United States Smelting Co.*, 339 U. S. 186, 194–197. Such determinations are on a case-by-case basis. See, *e. g.*, *United States* v. *Wabash R. Co.*, 321 U. S. 403.

line-haul transportation. In other cases there has been only a single factor export rate (one inclusive charge) providing for limited shipside delivery with the railroad furnishing these accessorial services pursuant to their tariffs at no extra charge to the shipper. The latter practice has been generally followed by railroads serving North Atlantic ports. Where railroads do not have their own piers, they have provided these services by contracting with commercial terminal operators.

I.

The Norfolk piers, involved in this matter, were managed by such operators. They were built by the United States after World War I and have been leased in part or in whole to a series of commercial operators since then. The leases were cancelled during World War II but they were leased to Stevenson & Young, a private terminal operator, at the end of that war. The railroads here involved, using the single factor shipside rate described above, contracted with Stevenson & Young, as their agent, to perform the wharfage and handling for 25¢ per ton for wharfage and 75¢ per ton for handling, on both commercial and military freight. But with the advent of the Korean hostilities, the Government again cancelled the leases and the Army took entire control of the piers. Apparently the military shipments require special handling and storage. To assure its complete satisfaction, the Army hired Stevenson & Young to perform those services under a general pier-operating contract for the Army.[6]

[6] It called for performance of "all terminal and pier warehouse intransit storage services excluding physical plant facilities (piers, warehouses, etc.); all checking and clerking services in connection therewith; all policing (sweeping and cleaning) services; and such other terminal services (excluding vessel checking and stevedoring; watchmen and guard service; utilities and maintenance of premises service) as may be designated herein, and, in connection therewith,

The unused portions of the piers were later released by the Government, by a contract dated December 28, 1951, for the commercial operations of Stevenson & Young. By that contract Stevenson & Young leased the unused parts for 1952 from the United States, for a public commercial maritime terminal. It was over these leased portions of the piers that the lessee carried on its public warehousing activities in accordance with the railroad tariffs.

A typical tariff arrangement appears in the note below. It is the basic exhibit in this case.[7] It was bottomed on

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. . . [the performance of] all the duties of a terminal operator in such areas of the Norfolk Army Base or at any pier in or about the Hampton Roads harbor area as may be designated by the Contracting Officer . . . ."

[7] "Statement of Excerpts from Penna. R.R. Tariff ICC 3007, Setting Forth the Regulations and the Compensation Which the Penna. R.R. Will Pay to the Norfolk Terminals Division of Stevenson & Young, Inc., for Wharfage Facilities Furnished and Handling Services Performed at Norfolk, Va.

"Rule 47

". . . wharfage and handling charges published in Norfolk and Portsmouth Belt Line Railroad Company Tariff No. 6–J, I.C.C. 105, will be included in the freight rate to or from Norfolk, Va., on Export, Import, Intercoastal and Coastwise freight traffic, any quantity, . . . subject to the following conditions:

. . . . . .

"(b) When receipt from or delivery to vessel is in rail service over wharf properties owned or leased by Norfolk Terminals Division of Stevenson & Young, Inc., and operated by Norfolk Terminals Division of Stevenson & Young, Inc., as a public terminal facility of the rail carriers.

[On January 1, 1952, the above rule (b) was changed. As the change strengthened the tariff in favor of the railroads, it is not quoted. See 289 I. C. C., at 59.]

. . . . . .

"Compensation

"The Pennsylvania Railroad Company will pay to Norfolk Terminals Division of Stevenson & Young, Inc., as its agent, for wharfage facilities furnished and handling services performed on traffic

a contract of April 5, 1947, between the Pennsylvania Railroad and Stevenson & Young. By that contract Stevenson & Young, as a public wharfinger, agreed to act "as directed by the Railroad" and as its agent for wharfage and handling of "export, import, coastwise and intercoastal freight" in accordance with the tariff upon the facilities it acquired on the Army base. The agent assumed responsibility for freight charges and care of freight in its charge. It agreed, paragraph 4, that:

> "The Terminal [Stevenson & Young] shall provide adequate facilities for the handling and storage of the freight subject to this agreement, shall provide access to the Railroad or its agent, the Norfolk and Portsmouth Belt Line Railroad, for the delivery of cars to and from shipside without interference or

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described and conforming to the conditions specified above, compensation in the following amounts in cents per 100 pounds, except as otherwise provided.

	Wharfage	*Handling*
"[Generally]	1¼	3¾ or 75 cents per ton

[There were exceptions.]

"(1)(a) Handling Charges will not be absorbed on freight in open cars, except on lumber, ...

"(b) When stowing in open cars is required, handling charge of ½ cent per 100 pounds or 10 cents per 2000 pounds will be absorbed on lumber, all kinds . . . .

"(2)(a) Wharfage and/or handling charges will not be absorbed on freight accorded literage, or on Grain or any other inbound or outbound traffic milled, mixed, malted or stored in transit at the wharf properties operated by Norfolk Terminals Division of Stevenson & Young, Inc., [or numerous other warehouses and terminals].

"(b) In all other respects on Export, Import, Intercoastal and Coastwise traffic, the wharfage, handling, storage and/or other charges applicable at the wharf properties operated by Norfolk Terminals Division of Stevenson & Young, Inc., [or numerous other warehouses and terminals] will be in addition to the rate to and from Norfolk, Va. or Portsmouth, Va., as the case may be, published in tariffs lawfully on file with the Interstate Commerce Commission."

> interruption, and shall load and unload cars promptly without delay of freight or railroad equipment."

Paragraph 13 said:

> "This agreement shall terminate absolutely and immediately whenever the Terminal ceases to operate the said facilities as a public wharfinger for the handling of freight, and in any event shall be terminable by either party on thirty days notice in writing."

A large amount of private commercial traffic continued over the released portions of the piers, and the railroads continued to absorb the cost of that wharfage and handling by paying Stevenson & Young $1.00 per ton of freight.

The result of the Army's insistence on operating its own pier facilities is that the Army pays the same export rates without receiving wharfage and handling services as commercial shippers do for whom the railroads provide those services at no additional charge. Because the Army provides these services itself, it claims a right to the $1.00 per ton payment paid by the railroads on behalf of the commercial shippers.

In terms of the Interstate Commerce Act, the Government bases its argument on two grounds:

> "The railroads' refusal to absorb wharfage and handling charges on Army freight to the same extent that they absorb such charges on civilian freight moving over the same piers under identical rates is unjustly discriminatory in violation of Section 2 of the Interstate Commerce Act."

and

> "The railroads' refusal to pay for wharfage and handling on Army freight was an unjust and unreasonable practice in violation of Section 1 (6) of the Act."

It should be noted that the United States is not attacking the form of the tariff, which provides for both line-haul service and the accessorial services in the single factor export rate.[8] Consequently, this case involves only charged discrimination and injustice. Cf. *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 437–438. In short, the United States seeks to be excepted from the tariff requirement that calls for the shipper to use a public wharfinger under contract to the railroads for performance of the wharfage and handling.[9]

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[8] See *United States* v. *Aberdeen & Rockfish R. Co.,* 289 I. C. C., at 61. It seems clear that such an attack could be made if present conditions justified a re-examination. The War Department attacked the practice in 1921 but its objection was overruled by the I. C. C. in 1929 after a thorough investigation in a 6–5 vote. *Wharfage Charges at Atlantic and Gulf Ports,* 157 I. C. C. 663, 678–686. Separation was sought largely to force the railroads to increase terminal charges so that competitive municipal and other nonrailroad wharfingers might expand to develop better port facilities. The Commission reached the conclusion that such separation was inadvisable, as there was no evidence of injury from such practice.

"The carriers afford port facilities in competition with each other at the ports and a competitive condition exists which can not be eliminated by the mere segregation of uniform port charges. If the port charges were uniform at all ports the carriers still could meet competition by shrinking their line-haul rates. If the port charges were different at each port the carriers having the larger charge could shrink their line-haul rates sufficiently to offset the larger port charge, and the real substance of the present ship-side rates, where they exist, would be reestablished." *Id.,* at 684.

It was the sensitivity of the foreign importers and domestic ports to rates so stated that led to this conclusion. In the highly competitive railway network, export traffic is an important factor to the carriers and the ports. Costs of port handling vary widely, 157 I. C. C., at 673. Such variations are now absorbed in the practice of quoting shipside delivery in tariffs.

[9] Such an exception is beyond the requirements of § 6 (8) of the Act that provides for preference and precedence for United States shipments in emergencies.

This controversy is similar to one that arose out of the Army's cancellation of the Norfolk pier leases during World War II, *United States* v. *Aberdeen & Rockfish R. Co.*, 269 I. C. C. 141. Interpreting railroad practices much like those now before this Court, the I. C. C. determined that the Army was not being discriminated against. However, on review, the Court of Appeals for the District of Columbia remanded the case to the I. C. C. for further exposition and clarification. 91 U. S. App. D. C. 178, 198 F. 2d 958. On remand the I. C. C. reaffirmed its earlier determination and no appeal has been taken from that order. 294 I. C. C. 203. Because the question of whether the Army was discriminated against following the Government's World War II lease cancellation has never been finally passed upon, the District of Columbia ruling is not inconsistent with the Commission's conclusion in this litigation.

II.

The Government asserts that it is charged more on its export shipments through the Norfolk Army Base than commercial shippers under substantially similar circumstances. Such an exaction would be, of course, an unjust and unreasonable practice of discrimination. But it seems apparent that the circumstances of Army shipments are markedly different from those of private shippers that receive wharfage and handling services. Moreover, it seems equally clear that the Army is treated identically with those shippers who for business reasons do not care to comply with the tariff requirements.

The Army routed its export shipments direct to itself at the Army base as consignee. As is shown by the contracts summarized above, the entire Army base property was under military control except for the commercial

operations of Stevenson & Young. The base included piers, bulkheads, railways and storage warehouses, and railroad switches, tracks and yards. The Commission found that the Army had determined "that ports of embarkation must be operated by personnel of the military service and civilian employees of the Government." 289 I. C. C., at 53.[10]

Although the Army hired the Stevenson company to operate the Army portion of the base, the Army's control was "absolute."

> "[An Army yardmaster] is on duty at all times to give instructions for disposition of cars of Army freight delivered at the base. When either the Belt Line or the Virginian has cars for delivery, the yard clerk at the base is notified by telephone. If placement at a pier or warehouse is ready for any of those cars, the carrier is told where to make delivery. These instructions are confirmed in writing and handed to the conductor when he arrives at the base. Cars for which placement orders are not ready are left in the pier No. 1 yard by the Belt Line and in the

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[10] This conclusion was amply supported by testimony of a Government witness, the Commanding Officer, Hampton Roads, Port of Embarkation:

"Only such personnel has the requisite training in the intricate nomenclature pertaining to the items and to the documentation required in connection with the proper loading and dispatching of vessels.

"A vast amount of pre-stowage planning of vessels in a port of embarkation must precede the labor of actual loading. Precise knowledge of overseas requirements must be available. Therefore, controls required to be exercised of all shipments must be absolute. These begin when freight is ordered shipped from points of origin and continue until the various commodities reach their final destination overseas."

uptown yard by the Virginian, in accordance with a general understanding as to the disposition of such cars." 289 I. C. C., at 54–55.

Such direction was necessary. As the Commanding Officer said, in regard to switching and placing by the carriers:

"The Witness: If you would let them switch themselves, they have to know what they are doing, we have to give them the switch list and know what to do with it.

. . . . . .

"Q. Will you permit them to do it at their own convenience, in an orderly manner?

"A. I don't know how any business can be run, if you run it at the convenience of someone else. They couldn't possibly do it at their own convenience, unless their convenience coincided with our requirement.

. . . . . .

"Q. And yet you couldn't permit the terminal operator to operate in a normal way.

"A. No, because that involves a management problem. You would have to have a management team in here to settle the accounts of the terminal operator. They don't work for nothing, as you quite well know. Somebody has to monitor all that, manage the whole thing, and direct the bringing in of the cargo. That is all in over-lay staff of ours, which is large enough."

This Army control over the movement of freight on those portions of the piers that were not leased to Stevenson & Young left the railroads serving the base without authority in those areas to direct the switching, spotting

and removal of the cars according to their own convenience. 289 I. C. C., at 64.

The fact that the Army controls its areas of the base, and the fact that the railroads handle their own wharfage and switching on their portions as they choose, are not mere formal differences. They are factors in traffic movement.

> "It is the right of every shipper including the Government as here concerned, to prohibit a carrier from performing switching upon private tracks, even though the carrier might be willing and able to perform the service. When so prohibited by the shipper, as was here done by the Army, the carrier's obligation to perform the service is discharged, and the payment of allowances to the shipper for its performance of the service, in whole or in part, would be unlawful, except as a voluntary concession of the carriers to the Government under section 22." 289 I. C. C., at 65.

The problems of the assumption by the carriers of the costs of wharfage and handling at ports have a long history. The Norfolk area has not been an exception, as has been heretofore indicated. See p. 168, *supra*. When the Government again in 1951 found it desirable to cancel the leases, it was familiar with the various facets of the controversy over wharfage and handling.[11]

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[11] The Government's request for export rates on its war shipments was granted by the railroads so that commercial and government export freight had the same rates. Cf. *War Materials Reparation Cases*, 294 I. C. C. 5. This was a substantial concession by the railroads, contrary to their tariffs, and done only because of § 22 of the Interstate Commerce Act, 49 U. S. C., allowing concessions to the United States. 289 I. C. C., at 63. The railroads have also spotted cars for the Army after delivery in the storage yards without

III.

It is obvious that the method of handling government freight does not comply with the tariff requirements. It does not move over wharf properties owned, leased and operated by the Stevenson company "as a public terminal facility of the rail carriers." Rule 47 (b), n. 7, *supra.*

> "At all times during that period, military traffic was stored on and handled over wharf and other properties on the Army Base which were under the exclusive control of the Army." 289 I. C. C., at 60.

Any deviation from tariffs by carriers violates § 6 (7) of the Act, 49 U. S. C., unless they grant a concession under § 22.[12]

IV.

The Government actually is being treated just as any shipper who decides not to take advantage of the services offered in the tariff. It seeks a preference over these other shippers who take deliveries of export rate traffic at piers under their own control, so-called private piers. The general practice at North Atlantic ports is to refuse to absorb handling charges at private piers, even though they are absorbed where the carriers have control of the facilities.

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extra charge. Other shippers would be charged for such service. 289 I. C. C., at 55. See *United States* v. *American Tin Plate Co.*, 301 U. S. 402. Such relaxation of possible additional charges by the railroads does not decide the Army's claim for allowances for handling. The Commission did take the concessions into consideration, however, as to the fairness of the refusal to grant the claimed allowances. 289 I. C. C., at 64.

[12] Although the Government seeks only an allowance of the published charge absorbed by the carriers of $1.00 per ton, the kind of service it requires in its area is illustrated by the fact that it pays $2.87 for handling. 289 I. C. C., at 61 *et seq.*

The record shows 84 private piers along the Atlantic Coast where the railroads make no allowance or compensation for handling or wharfage. It was testified:

> "One of the principal limitations on the port practices which I shall mention is the restriction of the loading practice to railroad or other public piers, as distinguished from private piers operated by shippers."

There was no evidence to the contrary and the Commission accepted that situation as a fact. 289 I. C. C., at 58, 61, 63. The difference between a public and a private pier under the tariffs is whether the railroads have control of the areas directly or through their agents, or whether the shipper or consignee has control.

There is no objection to such a practice generally, whether the line-haul rates and the handling rates are stated in a single factor rate or separately. To require the carriers to furnish such accessorial services at every private pier would disperse the traffic, cause the maintenance of more crews or watchmen, and thus add to the cost of transportation.

The Government contends that it is not in the same position as other shippers who control private piers, because it took control of the Norfolk piers to meet a national emergency. But we think that the emergency cannot convert the Government's operation of its private piers into a category different from that of private shippers.[13]

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[13] The Army's reliance on *Atchison, T. & S. F. R. Co.* v. *United States*, 232 U. S. 199, is misplaced. There this Court sustained the Commission in granting a shipper of fruit the right to precool the car and contents, although the carriers were in a position to refrigerate, though not in the better way. As the carriers were not in a position to perform the service properly, they could not by a tariff deny the consignor such right.

404165 O—57——18

And, the fact that the operations of the Government and the railroads are in the same pier area seems to us immaterial. If the railroads gave an allowance here, excepting one given under § 22 of the Act, they would have to give it at all private piers where the shipper wanted to handle wharfage at its own discretion. Cf. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501; *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.,* 229 I. C. C. 463.

The Government has the right to have its shipments accorded the same privileges given others. Moreover, in emergencies its traffic may have "preference or priority in transportation," 49 U. S. C. § 1 (15) (d), and it may be granted and may accept preferences in rates.[14] But the Government cannot otherwise require extra services or allowances. In the situation here presented, it could have used the same facilities as commercial shippers and obtained the benefits of the tariff. The evidence to this effect is uncontradicted.[15] The Commission accepted it as a fact. 289 I. C. C., at 58, 60–61, 63.

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[14] "Nothing in this chapter shall prevent the . . . handling of property free or at reduced rates for the United States . . . ." 49 U. S. C. § 22.

[15] "If it were not for the fact that the Government has reasons for handling its water-borne traffic differently from commercial shippers, there would be no reason why the Government should not use public piers like other shippers. There is no question but that a private shipper operating his own pier and handling his own traffic in a manner similar to the operation of the Norfolk Army Base today would not be entitled to the port rates."

289 I. C. C., at 63: "Evidence presented by the defendants supports their position that it is not unreasonable to refuse to extend wharfage and handling services to traffic handled over private piers when the shipper does not wish to use adequate facilities of the defendants. The defendants serving the Norfolk port area have had available port facilities more than ample to handle all the military traffic moving over the Army Base at Norfolk, at least on and since May 1, 1951."

V.

The Commission drew from the above circumstances a conclusion that the tariffs and conduct of the railroads are not shown to have been unlawful.

The United States argues that carriers cannot perform accessorial services in such a way that "some shippers would pay an identical line-haul rate for less service than that required by other industrial plants." *United States* v. *United States Smelting Co.*, 339 U. S. 186, 197. To do so would indeed violate § 2 of the Interstate Commerce Act.[16] But the *Smelting* case is not apposite. We affirmed a Commission order enjoining intra-plant car switching and spotting services after termination of the line haul. It terminated at a "convenient point" on a siding at consignee's plant. Our decision there turned on and upheld the Commission's power to determine the end point of the line haul. Because the line-haul tariffs included only car movement to and from that convenient point, some shippers received more service than others for the line-haul rate. P. 197.[17] Thus our determination was based on the unlawful preference allowed some shippers by the tariffs since those discriminated against could not get the same service as other shippers.

Furthermore, whether the circumstances and conditions are sufficiently dissimilar to justify differences in rates

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[16] 49 U. S. C. § 2, n. 2, *supra.*

[17] A typical tariff reads:

"Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company." 339 U. S., at 196. See also *United States Smelting & Refining Co.*, 266 I. C. C. 476, 478.

or charges is a question of fact for the Commission's determination.[18]

The District Court dismissed the complaint on the record before the Commission, and we affirm.

Affirmed.

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

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

From the very beginning the Interstate Commerce Act has made it unlawful for railroads to discriminate by charging some shippers more than others for carrying the same kind of freight the same distance. The provisions of the Act make it clear that the ban on such discrimination cannot be evaded by any contrivance or guise that

[18] *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7: "Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination. Hence its conclusion that in view of all the relevant facts and circumstances a rate or practice either is or is not unjustly discriminatory within the meaning of § 2 of the Act will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute."

For the same reasons, in *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507, 526, dealing with storage of goods in transit, and *United States* v. *American Tin Plate Co.*, 301 U. S. 402, 407–408, dealing with post-line-haul switching practices, this Court has upheld the Commission's determination of unfairness vis-à-vis other shippers and its prohibitory orders. See *Seaboard Air Line R. Co.* v. *United States*, 254 U. S. 57; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 410.

accomplishes the prohibited end. In the present case the undisputed evidence, as well as the Interstate Commerce Commission's findings, convinces me beyond doubt that the railroads are subjecting the United States, as a shipper, to precisely the kind of discrimination which the Act prohibits. When the mass of verbiage which has befogged this case is stripped away, the issues are not complex and no expert guidance is needed for their proper resolution.

The Government owns several piers at Norfolk, Virginia which are connected by tracks with the main lines of certain major railroads. Storage space is provided on the piers for freight. For many years the piers were leased to a private terminal operator. This operator has a contract with the railroads hauling to the piers to perform handling and wharfage services with respect to their freight. The railroads pay the operator $1 per ton for these services. They do not charge shippers separately for this handling and wharfage but instead include the cost with the transportation charges in a single line-haul rate.

Shipments by the United States through the piers were handled exactly the same as any other shipment. The operator, acting under contract with the railroads, performed the necessary unloading and storage; the railroads paid it $1 per ton for these services; and the Government paid the railroads the single rate covering both transportation and pier services. The Government was not required to pay anything in addition to this single rate.

In 1951, however, with the outbreak of the Korean conflict, the Government found it necessary to operate directly certain portions of the piers in order to facilitate the shipment of military supplies. The Government hired the same operator who was acting for the railroads to perform the same services in handling government shipments as he had before. The sole difference was that the operator acted under contract with the Government and

was paid by it rather than by the railroads. The railroads continued to charge the same line-haul rate as before, however, on government shipments. The Government requested that the railroads continue to pay the $1 per ton for handling and wharfage of its shipments. The railroads refused. The net result is that the Government receives less services from the railroads than other shippers although it pays the same rate. Or stated in a more familiar manner it is compelled to pay more than other shippers for the same transportation even though they all ship the same kind of freight from the same points to the same pier.

Nothing in the record below or in the arguments presented to us justifies this plain discrimination. There is no finding, nor even any indication, that it costs the railroads one penny more to transport freight to the portions of the pier operated by the Government than to the immediately adjacent parts of the pier operated by their agent. And the mere fact that a discriminatory rate is embedded in a tariff does not make it legal.

It is claimed that the railroads can establish a general rule that they will not pay for wharfage and handling costs at private piers. This is undoubtedly true, but it does not follow that they can include within the line-haul rate charges for handling services at such piers that the railroads do not perform. Under any realistic appraisal, the railroads' costs for handling and wharfage services in the present situation are included as a part of their line-haul rate and are in no sense a "free service." The Government is compelled to pay this rate to get its goods transported. But, as the Interstate Commerce Commission expressly found, wartime conditions make it wholly impractical for the Government in shipping certain military goods to use the wharfage and handling services provided by the railroads under this rate. The Government is entitled to recover that portion of the "line-haul"

rate which it is charged for services that it cannot use. That is all it claims. There is no reason why the railroads should be allowed to operate in a manner that exacts a transportation charge from all shippers for benefits that some can enjoy and others, although in exactly the same situation, cannot. As this Court said in *Union Pacific R. Co.* v. *Updike Grain Co.*, 222 U. S. 215, 220, "A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail himself."

I would reverse the judgment below.

BROWNELL, ATTORNEY GENERAL, *v.* TOM WE SHUNG.

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

No. 43. Argued November 13, 1956.—Decided December 17, 1956.

Under § 10 of the Administrative Procedure Act, an alien whose exclusion has been ordered administratively under the Immigration and Nationality Act of 1952, and who neither claims citizenship nor holds a certificate of identity issued under § 360 (b) of that Act, may obtain judicial review of such order by an action in a federal district court for a declaratory judgment. Pp. 181–186.

1. Unless the Immigration and Nationality Act of 1952 is to the contrary, exclusion orders may be challenged either by habeas corpus proceedings or by declaratory judgment actions under the Administrative Procedure Act. Pp. 182–184.

2. The provision of § 236 (c) of the Immigration and Nationality Act of 1952 that the decision of a special inquiry officer excluding an alien from admission into the United States "shall be final unless reversed on appeal to the Attorney General" refers only to administrative finality, and it does not limit challenges of such decisions to habeas corpus proceedings. Pp. 184–185.

3. The conclusion here reached is in full accord with reports made to Congress by those sponsoring and managing the Immigration and Nationality Act of 1952 on the floor of each house of Congress. Pp. 185–186.

4. Whether an alien seeks judicial review of an exclusion order by a habeas corpus proceeding or by an action for a declaratory judgment, the scope of the review is that of existing law. P. 186.

97 U. S. App. D. C. 25, 227 F. 2d 40, affirmed.

Oscar H. Davis argued the cause for petitioner. On the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello.*

Andrew Reiner argued the cause for respondent. With him on the brief was *Jack Wasserman. David Carliner* entered an appearance for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

In *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), we held that an alien, ordered deported by the Attorney General under the provisions of the Immigration and Nationality Act of 1952, might test the legality of such order in a declaratory judgment action brought under § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009. The sole question to be determined here is whether the legality of an exclusion order entered under the relevant provisions of the same 1952 Act must be challenged by habeas corpus, or whether it may also be reviewed by an action for declaratory judgment under § 10 of the Administrative Procedure Act. The Court of Appeals held the latter to be an appropriate remedy. 97 U. S. App. D. C. 25, 227 F. 2d 40. We granted certiorari, 351 U. S. 905, because of the importance of the question in the administration of the immigration law. We conclude that either remedy is available in seeking review of such orders. This makes it unnecessary for us to pass upon other questions raised by the parties.

Shung, a Chinese alien, presented himself at San Francisco on November 28, 1947, claiming admission to the United States under the provisions of the War Brides Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. (1946 ed.) § 232. He testified under oath that he was the blood son of an American citizen who served in the United States armed forces during World War II. In January 1948 and again in February 1949, Boards of Special Inquiry held Shung inadmissible on the ground that he had not established the alleged relationship. The Board of Immigration Appeals affirmed. Shung first sought judicial review of this order by a declaratory judgment action instituted before the effective date of the Immigration and Nationality Act of 1952. His complaint was dismissed on the ground that the order was valid. *Tom We Shung* v.

McGrath, 103 F. Supp. 507, aff'd *sub nom. Tom We Shung* v. *Brownell,* 93 U. S. App. D. C. 32, 207 F. 2d 132. We vacated the judgment and remanded the cause to the District Court with directions to dismiss it for lack of jurisdiction, 346 U. S. 906, on the authority of *Heikkila* v. *Barber,* 345 U. S. 229 (1953), which held that habeas corpus was the only available remedy for testing deportation orders under the Immigration Act of 1917. After the passage of the 1952 Act, Shung filed this suit seeking review of his exclusion by a declaratory judgment action. He asserts that our ruling in *Pedreiro* permitting deportation orders under the 1952 Act to be challenged by declaratory action requires a similar result as to exclusion orders. However, the Government contends that the *Pedreiro* rule does not apply in exclusion cases because of the basic differences between those actions and deportation cases. The Government also urges that the language, statutory structure, and legislative history of the 1952 Act support its contention.

I.

At the outset the Government contends that constitutionally an alien seeking initial admission into the United States is in a different position from that of a resident alien against whom deportation proceedings are instituted.[1] This, it contends, precludes general judicial re-

[1] Since *Ekiu* v. *United States,* 142 U. S. 651 (1892), this Court has held that in exclusion cases involving initial entry "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." At p. 660. Nevertheless, due process has been held in cases similar in facts to the one here involved to include a fair hearing as well as conformity to statutory grounds. On the other hand, "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment." *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 596 (1953).

view. Shung admits these substantive differences but counters that such a distinction should be without significance when all that is involved is the form of judicial action available, not the scope of review. We do not believe that the constitutional status of the parties requires that the form of judicial action be strait-jacketed. Nor should the fact that in one action the burden is on the alien while in the other it must be met by the Government afford basis for discrimination. Admittedly, excluded aliens may test the order of their exclusion by habeas corpus. Citizenship claimants who hold "certificates of identity" are required by § 360 (c) of the 1952 Act [2] to test the validity of their exclusion by habeas corpus only. Respondent here neither claims citizenship nor did he hold a certificate of identity, and § 360 (c) has no bearing on this case. For a habeas corpus proceeding the alien must be detained or at the least be in technical custody, as the Government puts it. On the other hand, a declaratory judgment action requires no such basis and the odium of arrest and detention is not present. It does not follow that the absence of this condition would enlarge the permissible scope of review traditionally permitted in exclusion cases. The substantive law governing such actions would remain the rule of decision on the merits but the form of action would be by declaratory

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[2] Section 360 (c), 66 Stat. 273, 8 U. S. C. § 1503, provides in part:

"A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise."

judgment rather than habeas corpus.[3] We conclude that unless the 1952 Act is to the contrary, exclusion orders may be challenged either by habeas corpus or by declaratory judgment action.

II.

The Government insists that Congress has limited such challenges to habeas corpus actions by certain language in the 1952 Act. It argues that the finality clause of the Act with respect to exclusion [4] limits judicial review to habeas corpus only. The gist of that clause as to deportation cases is that "the decision of the Attorney General shall be final," [5] while in exclusion proceedings "the decision of a special inquiry officer [is] final unless reversed on appeal to the Attorney General." The Government reasons that the latter clause limits review to administrative appeal to the Attorney General and that no other form of review was intended, aside from habeas corpus, to test the alien's exclusion. It points to exceptions that even withhold administrative review in certain classes of cases as bolstering its position. It is true that subsections (b) and (d) of § 236 of the 1952 Act deny any administra-

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[3] We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad.

[4] Section 236 (c), 66 Stat. 200, 8 U. S. C. § 1226 (c):

"(c) Except as provided in subsections (b) or (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General."

[5] Section 242 (b), 66 Stat. 210, 8 U. S. C. § 1252 (b) provides in part:

"In any case in which an alien is ordered deported from the United States under the provisiors of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. . . ."

tive appeal on temporary exclusion in security cases as well as in those where the alien suffers a medical affliction of certain types. But to darken the meaning of the word "final" as used by Congress by giving it chameleonic characteristics is to indulge in choplogic. In fact, the regulations of the Attorney General seem to give "final" the same connotation with respect to deportation as does the Act with respect to exclusion. See 8 CFR, Rev. 1952, § 242.61 (e). Furthermore, as we pointed out in *Pedreiro,* such a "cutting off" of judicial review "would run counter to § 10 and § 12 of the Administrative Procedure Act." 349 U. S., at 51. "Exemptions from the . . . Administrative Procedure Act are not lightly to be presumed," *Marcello* v. *Bonds,* 349 U. S. 302, 310 (1955), and unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified. We therefore conclude that the finality provision of the 1952 Act in regard to exclusion refers only to administrative finality.

III.

The Government also points to certain testimony at hearings on the bill, as well as statements made on the floor in debate at the time of passage of the 1952 Act, as supporting its position. We believe, however, that Senate Report No. 1137, 82d Cong., 2d Sess.,[6] and the statement of the managers on the part of the House which accom-

[6] "*Exclusion procedures* In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. The omission of the language is not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." At p. 28.

panied the Conference Report,[7] reflect the intention of the Congress in this regard. The Senate Report, after reciting that a provision limiting "judicial review only through the writ of habeas corpus" had been stricken from the bill, stated that such action was not intended to "*expand* [the scope of] judicial review in immigration cases beyond that under existing law." (Emphasis supplied.) The House managers reported that after careful consideration of "the problem of judicial review" they were satisfied that the "procedures provided in the bill . . . remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings." We believe that our interpretation of the Act is in full accord with these significant reports made by those sponsoring and managing the legislation on the floor of each house of the Congress.

It may be that habeas corpus is a far more expeditious remedy than that of declaratory judgment, as the experience of Shung may indicate.[8] But that fact may be weighed by the alien against the necessity of arrest and detention after which he may make his choice of the form of action he wishes to use in challenging his exclusion. In either case, the scope of the review is that of existing law.

Affirmed.

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[7] "(2) Having extensively considered *the problem of judicial review,* the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, *remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.*" (Emphasis supplied.) H. R. Rep. No. 2096, 82d Cong., 2d Sess., at 127.

[8] The original complaint in the former action was filed January 19, 1950.

LESLIE MILLER, INC., *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 51. Argued December 5–6, 1956.—Decided December 17, 1956.

Section 3 of the Armed Services Procurement Act of 1947 provides that awards on advertised bids "shall be made . . . to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . . ." Appellant was awarded a contract under this section and commenced construction of facilities at an Air Force base in Arkansas over which the United States had not acquired jurisdiction pursuant to 54 Stat. 19, 40 U. S. C. § 255. Appellant was convicted under Ark. Stat., 1947, §§ 71–701 through 71–721, for submitting a bid, executing a contract, and commencing work as a contractor in the State of Arkansas without having obtained a license for such activities from the State Contractors Licensing Board. *Held:* The state statute is in conflict with the federal statute and the regulations thereunder, and the state statute cannot constitutionally be applied to appellant. *Johnson* v. *Maryland,* 254 U. S. 51. Pp. 187–190.

225 Ark. 285, 281 S. W. 2d 946, reversed and remanded.

Leffel Gentry argued the cause and filed a brief for appellant.

By special leave of Court, *John F. Davis* argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter.*

William J. Smith argued the cause for appellee. With him on the brief were *Tom Gentry,* Attorney General of Arkansas, and *Thorp Thomas,* Assistant Attorney General.

PER CURIAM.

Appellant submitted a bid in May 1954 for construction of facilities at an Air Force Base in Arkansas over

which the United States had not acquired jurisdiction pursuant to 54 Stat. 19, 40 U. S. C. § 255. The United States accepted appellant's bid, and in June appellant began work on the project. In September, the State of Arkansas filed an information accusing appellant of violation of Ark. Stat., 1947, §§ 71–701 through 71–721, for submitting a bid, executing a contract, and commencing work as a contractor in the State of Arkansas without having obtained a license under Arkansas law for such activity from its Contractors Licensing Board. The case was tried on stipulated facts. Appellant was found guilty and fined. The trial court's judgment was affirmed by the Arkansas Supreme Court, 225 Ark. 285, 281 S. W. 2d 946, and the case came here on appeal. 351 U. S. 948. Appellant and the United States as *amicus curiae* contend that the application of the Arkansas statute to this contractor interferes with the Federal Government's power to select contractors and schedule construction and is in conflict with the federal law regulating procurement.

Congress provided in § 3 of the Armed Services Procurement Act of 1947, 62 Stat. 21, 23, 41 U. S. C. § 152, that awards on advertised bids "shall be made . . . to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered . . . ." The report from the Committee on Armed Services of the House of Representatives indicated some of the factors to be considered: "The question whether a particular bidder is a 'responsible bidder' requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors." H. R. Rep. No. 109, 80th Cong., 1st Sess. 18; see S. Rep. No. 571, 80th Cong., 1st Sess. 16. The Armed Services Procurement Regulations,

promulgated under the Act, set forth a list of guiding considerations, defining a responsible contractor as one who

> "(a) Is a manufacturer, construction contractor, or regular dealer . . . .
>
> "(b) Has adequate financial resources, or ability to secure such resources;
>
> "(c) Has the necessary experience, organization, and technical qualifications, and has or can acquire the necessary facilities (including probable subcontractor arrangements) to perform the proposed contract;
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> "(d) Is able to comply with the required delivery or performance schedule (taking into consideration all existing business commitments);
>
> "(e) Has a satisfactory record of performance, integrity, judgment, and skills; and
>
> "(f) Is otherwise qualified and eligible to receive an award under applicable laws and regulations." 32 CFR § 1.307; see also 32 CFR § 2.406–3.

Under the Arkansas licensing law similar factors are set forth to guide the Contractors Licensing Board:

> "The Board, in determining the qualifications of any applicant for original license . . . shall, among other things, consider the following: (a) experience, (b) ability, (c) character, (d) the manner of performance of previous contracts, (e) financial condition, (f) equipment, (g) any other fact tending to show ability and willingness to conserve the public health and safety, and (h) default in complying with the provisions of this act . . . or any other law of the State. . . ." Ark. Stat., 1947, § 71–709.

Mere enumeration of the similar grounds for licensing under the state statute and for finding "responsibility" under the federal statute and regulations is sufficient to

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indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of "responsibility" and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder. In view of the federal statute and regulations, the rationale of *Johnson* v. *Maryland,* 254 U. S. 51, 57, is applicable:

> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. . . ."

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

Reversed and remanded.

FIKES *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 53. Argued December 6, 1956.—Decided January 14, 1957.

In an Alabama state court, petitioner, an uneducated Negro of low mentality or mentally ill, was convicted of burglary with intent to commit rape and was sentenced to death. Two confessions admitted in evidence at his trial were obtained while he was held in a state prison far from his home, without the preliminary hearing required by Alabama law and without advice of counsel, friends or family. The first confession was obtained after five days of intermittent questioning by police officers for several hours at a time and the second five days later after more such questioning. *Held:* The circumstances of pressure applied against the power of resistance of this petitioner, who was weak of will or mind, deprived him of due process of law contrary to the Fourteenth Amendment. Pp. 191–198.

263 Ala. 89, 81 So. 2d 303, reversed and remanded.

Jack Greenberg argued the cause for petitioner. With him on the brief were *Peter A. Hall* and *Orzell Billingsley.*

Robert Straub, Special Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *John Patterson,* Attorney General.

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

Petitioner is under sentence of death for the crime of burglary with intent to commit rape. He seeks reversal of the judgment through a writ of certiorari to the Supreme Court of Alabama, which sustained the conviction. 263 Ala. 89, 81 So. 2d 303. Petitioner raised three issues in support of his position that he had been denied due process of law. He alleged:

1. Admission into evidence of two confessions extracted from him under circumstances demonstrating that the statements were coerced or involuntary.

2. Denial by the trial judge of petitioner's request to testify about the manner in which the confessions were obtained without subjecting himself to unlimited cross-examination as to the facts of the crime charged.

3. Selection of the grand jury which indicted him by a method that systematically discriminated against members of his race.

We granted certiorari to determine whether the requirements of due process under the Fourteenth Amendment had been satisfied in these aspects of petitioner's conviction. 350 U. S. 993. The judgment must be reversed because of the admission of the confessions. Therefore, it is unnecessary at this time to decide or discuss the other two issues raised by petitioner.

The facts essential to the present decision are as follows:

During the early months of 1953, a number of housebreakings, some involving rape or attempted rape, were committed in the City of Selma, Alabama. The present trial concerned one of these crimes.[1] On the night of April 24, 1953, an intruder broke into the apartment of the daughter of the city's mayor. She awoke to find a Negro man sitting on her with a knife at her throat. A struggle ensued which carried the woman and her assailant through the bedroom, hall, and living room, where she finally was able to seize the knife, at which point he fled. These rooms were all lighted. The victim testi-

[1] Petitioner apparently was indicted for six of the burglary incidents. See 263 Ala., at 96, 81 So. 2d, at 310. At the oral argument, counsel stated that shortly before the present trial petitioner had been convicted of another of these burglaries, one which had resulted in a rape, and sentenced to imprisonment for 99 years. It appears that no appeal was taken.

fied that the attacker "had a towel draped over his head" throughout the incident; she did not identify petitioner as the attacker in her testimony at the trial. However, two other women testified to similar housebreakings (one of which resulted in rape), and they each identified petitioner as the burglar. This testimony was admitted at the present trial "solely on the question of intent and identity of defendant and his motive on the occasion then on trial." 263 Ala., at 99, 81 So. 2d, at 313. This, with the challenged confessions, was substantially all the evidence concerning the crime at the trial.

About midnight on May 16, 1953, petitioner was apprehended in an alley in a white neighborhood in Selma by private persons, who called the police. The officers jailed him "on an open charge of investigation." The next day, a Sunday, the questioning that led to the challenged confessions began. It is, of course, highly material to the question before this Court to ascertain petitioner's character and background. He is a Negro, 27 years old in 1953, who started school at age eight and left at 16 while still in the third grade. There was testimony by three psychiatrists at the trial, in connection with a pleaded defense of insanity, to the effect that petitioner is a schizophrenic and highly suggestible. His mother testified that he had always been "thick-headed." Petitioner worked in a gas station in his home town of Marion, some 30 miles from Selma. So far as appears, his only prior involvement with the law was a conviction for burglary of a store in November 1949; he was released on parole in January 1951.

The questioning of petitioner was conducted principally by Captain Baker of the Selma police. His testimony that he repeatedly advised petitioner "that he was entitled to counsel and his various rights" must be viewed in the light of the facts concerning petitioner's mentality and experience just outlined.

The interrogation began on Sunday, May 17, with a two-hour session in the morning in Captain Baker's office. That afternoon, petitioner was questioned for two and a half or three hours, during part of which time he was driven around the city to some of the locations of the unsolved burglaries. During this ride, petitioner also talked to the sheriff of his home county, who had been called to Selma at petitioner's request, according to Captain Baker's testimony.

On Monday, petitioner talked with his employer. Captain Baker continued questioning for two hours in the morning. He testified that a warrant was served on petitioner in jail, but that petitioner did not request a preliminary hearing. In fact, he was not taken before any judicial officer prior to the confessions.[2] That afternoon, petitioner was driven to Kilby State Prison, which is located in another county, about 55 miles from Selma and some 80 miles from petitioner's home in Marion. The testimony of the responsible officers was that this

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[2] Alabama law specifically required bringing petitioner promptly before a magistrate:

"It is the duty of any private person, having arrested another for the commission of any public offense, to take him without unnecessary delay before a magistrate, or to deliver him to some one of the officers specified in section 152 of this title [police officers], who must forthwith take him before a magistrate." Code of Ala., 1940, Tit. 15, § 160.

Under the cases of that State, violation of this requirement does not render inadmissible a confession secured during such detention. See *Ingram* v. *State,* 252 Ala. 497, 42 So. 2d 36. Nevertheless, such an occurrence is "relevant circumstantial evidence in the inquiry as to physical or psychological coercion." *Stein* v. *New York,* 346 U. S. 156, 187.

Petitioner was admitted to Kilby Prison on an order or letter from a State Circuit Judge. The nature of this procedure does not clearly appear from the record, but it is conceded that petitioner was not taken before the judge.

removal was done for petitioner's protection, although no specific threat against him had been made.

At Kilby Prison, petitioner was kept in the "segregation unit," out of contact with other prisoners. He saw only the jailers and Selma officers who drove over to question him. Petitioner was interrogated in an office in the prison. On Monday, there was questioning there for "several hours" in the afternoon and "a little while" after supper. The next interrogation was on Wednesday. It lasted "several hours" in the afternoon and into the evening. The following day petitioner was questioned for two hours in the afternoon and about an hour and a half in the evening. That day his father came to the prison to see him, but was refused admittance.

On Thursday evening, the first confession occurred. It was introduced at the trial through a tape recording. The confession consists of an interrogation by Captain Baker. Petitioner responded chiefly in yes-or-no answers to his questions, some of which were quite leading or suggestive.

Petitioner was questioned again for three hours on Saturday, May 23. That day, a lawyer who came to the prison to see him was turned away. On Sunday, petitioner's father was allowed to visit his son. This was the only contact petitioner had during the entire period in question with family or friend, or for that matter with anyone he knew, except the talks at the beginning of the week with the sheriff of his own county, in the presence of Selma officers, and with his employer.

In the second week of his incarceration, on Tuesday afternoon, petitioner was questioned for about two and a half hours. At this time, the second confession was made. Like the other, it consists of responses to questions. The second confession was taken down by a prison stenographer and signed by petitioner after it was read to him.

This outline of the facts surrounding the taking of the confessions comes entirely from the testimony of the State witnesses, who under the circumstances were the only ones who could testify at the trial on this subject other than the prisoner himself. He did not testify, because of the trial judge's ruling that he would be subject to unlimited cross-examination concerning the offense charged against him.[3] Standing alone, the State's evidence establishes that the confessions in the present case were not voluntary within the meaning of the decisions of this Court.

Here the prisoner was an uneducated Negro, certainly of low mentality, if not mentally ill. He was first arrested by civilians, lodged in jail, and then removed to

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[3] The issue was raised at the trial in this colloquy:

"Solicitor Hare: The State offers in evidence the recording heretofore testified to by the witness presently on the stand [Captain Baker].

"Attorney Hall: If the Court please, the defendant objects to what purports to be a recording made by this witness, on the ground that sufficient predicate has not been laid.

"The Court: Over-rule the objection.

"Attorney Hall: We except, sir, and we would like to make another motion. We would like to make an offer to put this defendant on the stand for the purpose of refuting certain allegations by the State with reference to the voluntary nature of what purports to be certain extra judicial admissions, and for no other purpose.

"Solicitor Hare: Now, may it please the Court, if the defendant takes the stand, I insist that he be subject to cross-examination on any and every item that is in evidence. I am not willing to make any agreement of limitation.

"The Court: And you are only offering the testimony of the defendant for the purpose of refuting the voluntary nature of this recording?

"Attorney Hall: Just that, sir.

"The Court: I sustain the State. If the State is not willing to reach a stipulation or agreement on that, but insists that you open defendant for cross-examination of any and every nature, I over-rule the motion." [R. 230–231.]

a state prison far from his home. We do not criticize the decision to remove the prisoner before any possibility of violence might mature, but petitioner's location and the conditions of his incarceration are facts to be weighed in connection with the issue before us. For a period of a week, he was kept in isolation, except for sessions of questioning. He saw no friend or relative. Both his father and a lawyer were barred in attempts to see him. The protections to be afforded to a prisoner upon preliminary hearing were denied him, contrary to the law of Alabama.[4] He was questioned for several hours at a time over the course of five days preceding the first confession, and again interrogated at length before the written confession was secured.

There is no evidence of physical brutality, and particular elements that were present in other cases in which this Court ruled that a confession was coerced do not appear here. On the other hand, some of the elements in this case were not present in all of the prior cases. The objective facts in the present case are very much like those that were before the Court in *Turner* v. *Pennsylvania,* 338 U. S. 62, while the present petitioner was a weaker and more susceptible subject than the record in that case reveals Turner to have been. And cf. *Johnson* v. *Pennsylvania,* 340 U. S. 881. The totality of the circumstances that preceded the confessions in this case goes beyond the allowable limits. The use of the confessions secured in this setting was a denial of due process.

Neither *Stein* v. *New York,* 346 U. S. 156, nor any of the other cases relied on by respondent stands in the way of this conclusion. In *Stein,* the Court said:

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would

[4] See note 2, *supra.*

> be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." 346 U. S., at 185.

That is the same standard that has been utilized in each case, according to its total facts. Cf., *e. g.*, *Watts* v. *Indiana*, 338 U. S. 49, 53; *Lyons* v. *Oklahoma*, 322 U. S. 596, 602–605. We hold that the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law. So viewed, the judgment of conviction in this case cannot stand.

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

Reversed and remanded.

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

In joining the Court's opinion I should like to add a few words. A case like this is not easy for one who believes very strongly that adequate power should accompany the responsibility of the States for the enforcement of their criminal law. But the Due Process Clause of the Fourteenth Amendment has placed limitations upon the discretion, unbridled for all practical purposes, that belonged to the States prior to its adoption, and, more particularly, confines their freedom of action in devising criminal procedure. It is, I assume, common ground that if this record had disclosed an admission by the police of one truncheon blow on the head of petitioner a confession following such a blow would be inadmissible because of the Due Process Clause. For myself, I cannot see the difference, with respect to the "voluntariness" of a confession, between the subversion of freedom of the will through physical punishment and the sapping of the will appropriately to be inferred from the circumstances

of this case—detention of the accused virtually incommunicado for a long period; failure to arraign him in that period; [1] horse-shedding of the accused at the intermittent pleasure of the police until confession was forthcoming. No single one of these circumstances alone would in my opinion justify a reversal. I cannot escape the conclusion, however, that in combination they bring the result below the Plimsoll line of "due process."

A state court's judgment of conviction must not be set aside by this Court where the practices of the prosecution, including the police as one of its agencies, do not offend what may fairly be deemed the civilized standards of the Anglo-American world.[2] This record reveals a course of conduct that, however conscientiously pursued, clearly falls below those standards. Such conduct is not only not consonant with our professions about criminal justice, as against authoritarian methods that we denounce. It derives from an attitude that is inimical, if experience is any guide, to the most enduring interests of law.

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

The setting aside of this conviction, in my opinion, oversteps the boundary between this Court's function under the Fourteenth Amendment and that of the state

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[1] Flouting of the requirement of prompt arraignment prevailing in most States is in and of itself not a denial of due process. Cf. *McNabb* v. *United States,* 318 U. S. 332. But it is to disregard experience not to recognize that the ordinary motive for such extended failure to arraign is not unrelated to the purpose of extracting confessions.

[2] "Ours is the accusatorial as opposed to the inquisitorial system." *Watts* v. *Indiana,* 338 U. S. 49, 54. An analysis of the particular phase of the judicial process involved in applying the Due Process Clause to state convictions secured on the basis of confessions has been attempted in my opinions in *Malinski* v. *New York,* 324 U. S. 401, 412; *Haley* v. *Ohio,* 332 U. S. 596, 601; *Watts* v. *Indiana, supra.*

courts in the administration of state criminal justice. I recognize that particularly in "coerced confession" cases the boundary line is frequently difficult to draw. But this Court has recognized that its corrective power over state courts in criminal cases is narrower than that which it exercises over the lower federal courts. *Watts* v. *Indiana,* 338 U. S. 49, 50.

In this instance I do not think it can be said that the procedures followed in obtaining petitioner's confessions violated constitutional due process. The elements usually associated with cases in which this Court has been constrained to act are, in my opinion, not present here in constitutional proportions, separately or in combination. Concededly, there was no brutality or physical coercion. And psychological coercion is by no means manifest. While the total period of interrogation was substantial, the questioning was intermittent; it never exceeded two or three hours at a time, and all of it took place during normal hours; "relay" tactics, such as were condemned in *Turner* v. *Pennsylvania,* 338 U. S. 62, and other cases,[1] were not employed. True, petitioner's mental equilibrium appears to have been less than normal, but these facts were before the trial judge and the jury. The absence of arraignment, much as that practice is to be deprecated, loses in significance in light of the State's representation at the oral argument that this was not an unusual thing in Alabama. As this Court recognizes, it did not of itself make the confessions inadmissible. Petitioner's removal to Kilby Prison, after authorization by a state circuit judge, stands on quite a different footing from the episode in *Ward* v. *Texas,* 316 U. S. 547. And I am not satisfied that there was any deliberate purpose to keep the petitioner incommunicado, such as existed in

[1] See, for example, *Watts* v. *Indiana, supra; Haley* v. *Ohio,* 332 U. S. 596; *Harris* v. *South Carolina,* 338 U. S. 68.

Watts v. *Indiana, supra; Turner* v. *Pennsylvania, supra;* and *Harris* v. *South Carolina, supra.* Before the first confession, petitioner, at his own request, was permitted to see the sheriff of his home county, and his employer. His father, although not permitted to see petitioner on the day of the first confession,[2] was allowed to see him before the second confession. The lawyer who sought to see petitioner was refused permission because, having no authority from petitioner or his family to represent him, the prison authorities evidently thought he was trying to solicit business.

The Supreme Court of Alabama, after reviewing the record, has sustained the conviction. 263 Ala. 89, 81 So. 2d 303. I find nothing here beyond a state of facts upon which reasonable men might differ in their conclusions as to whether the confessions had been coerced. In the absence of anything in the conduct of the state authorities which "shocks the conscience" or does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically," *Rochin* v. *California,* 342 U. S. 165, 172, I think that due regard for the division between state and federal functions in the administration of criminal justice requires that we let Alabama's judgment stand.

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[2] The record is silent as to why the father did not gain admittance on this first visit.

UNITED STATES *v.* PLESHA ET AL.

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

No. 39. Argued November 8, 1956.—Decided January 14, 1957.

Under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as it stood prior to the 1942 Amendment, former servicemen are not obligated personally to reimburse the United States for its payment of defaulted premiums on their commercial life insurance policies pursuant to requests made by them before the 1942 Amendment that their policies be protected under the Act against lapse during their time of military service and for one year thereafter. Pp. 203–211.

1. The 1940 Act contained no provision which required reimbursement for premiums paid by the Government on a lapsed policy. Pp. 204–205.

2. A right of the Government to reimbursement is not to be inferred from the Act or from the common-law doctrine that a guarantor who pays the debt of another is entitled to reimbursement. P. 204, n. 4.

3. The Government's claim for reimbursement is refuted by the legislative history. Pp. 205–208.

4. The administrative interpretation of the 1918 and 1940 Acts does not support the Government's claim for reimbursement. Pp. 208–211.

5. A serviceman's liability under the 1940 Act must be determined under that Act, not under the 1942 Act. P. 209, n. 17.

227 F. 2d 624, affirmed.

Lester S. Jayson argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *David A. Turner.*

Lawrence A. Schei argued the cause for respondents. With him on the brief was *Philip C. Wilkins.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 provided a plan under which men inducted into the armed forces would continue to receive the protection of previously purchased commercial life insurance while in the service without paying premiums.[1] Insurance companies were required to keep the policies of servicemen who elected to come under the Act in effect until one year after their military service ended even though these men made no further payments. The Government assured the insurance companies that the premiums would eventually be paid by giving its promissory certificates to the companies. The respondents, Plesha, Mabbutt, and Kern, who entered the Army in 1941, had previously purchased commercial life insurance. They invoked the benefits of the Act by filing proper applications with their companies and the Veterans' Administration. They made no further payment of premiums but the policies were kept in effect by government certificates. After leaving the Army, they were notified by the Veterans' Administration that unless they paid back premiums with interest their policies would lapse. Respondents allowed the policies to lapse and the Government paid the insuring companies the back premiums after first deducting the cash surrender value of the policies. In this case, the Government contends that it has a legal right to be reimbursed for these payments.[2] The District Court agreed with this contention. 123 F. Supp. 593. The Court of Appeals reversed, hold-

[1] 54 Stat. 1183, 50 U. S. C. App. (1940 ed.) § 540.

[2] Plesha brought suit against the Government to recover a dividend declared on his National Service Life Insurance policy. The Government attempted to offset the amount it had paid on his commercial insurance. The other respondents intervened to litigate the same basic issue.

ing servicemen had no statutory or contractual obligation to the Government to repay the premiums. 227 F. 2d 624.[3] We affirm the judgment below because the language of the 1940 Act, its legislative history and its administrative interpretation demonstrate that Congress intended that ex-soldiers would not have to reimburse the Government.

1. *The Act.*—As the Government concedes, the 1940 Act contained no express provision which required reimbursement for premiums paid by the Government on a lapsed policy.[4] But significantly it did contain specific provisions to reduce any losses the Government might incur in administering the insurance plan by giving the Government certain other rights. Under § 408 the United States had a lien upon the policy from the time it came under the protection of the Act. When a soldier died the insurance company was authorized by § 409 to deduct unpaid premiums from the proceeds payable under the policy. If after leaving the service the insured desired to maintain his policy, § 410 required him to pay the unpaid premiums to the insurance company. If he chose not to pay these premiums, § 410 further provided

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[3] We granted certiorari, 350 U. S. 1013, because this holding was in conflict with *United States* v. *Hendler*, 225 F. 2d 106.

[4] The Government contends that such an obligation should be implied from the Act and from general principles of the common law—particularly the doctrine that a guarantor who pays the debt of another is entitled to reimbursement. In regard to the common-law right of a guarantor, we are not persuaded from the record that the insured servicemen were indebted to the insurance companies for the wartime premiums either under the Act or the terms of their policies. Where no debt exists there is no basis for applying the common-law rules of guaranty. In any event, we would be very hesitant to infer a right to reimbursement from these servicemen in favor of the Government based on a common-law doctrine which was not referred to in the Act or in its congressional history. Cf. *United States* v. *Gilman*, 347 U. S. 507.

that the policy would lapse. And if a policy lapsed, § 411 provided that the United States should be given credit for the policy's cash surrender value as an offset against the Government's promise to pay the back premiums. There was nothing that indicated that an ex-soldier had to reimburse the Government for any balance that it paid.

2. *The legislative history.*—The Government's claim for reimbursement is refuted by the legislative history. Article IV of the 1940 Act substantially reenacted the insurance provisions of the Soldiers' and Sailors' Civil Relief Act of 1918 [5] and had little independent legislative history. We agree with the Administrator of Veterans' Affairs that this scant history "is of little, if any, help" in interpreting the 1940 Act.[6] We must therefore examine the history of the 1918 bill.[7] During the Senate Committee hearings on this bill, Senator Reed, who was the principal critic of its insurance provisions, interpreted them as permitting a soldier to let his policy lapse without any obligation to restore the premiums paid by the Govern-

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[5] 40 Stat. 444. "The only change in this article [insurance] relates to method of administration." H. R. Rep. No. 3001, 76th Cong., 3d Sess. 4.

[6] Decisions of the Administrator of Veterans' Affairs, No. 742 (April 1947), Vol. 1, Supp. 1, pp. 93, 98. The Government relies here on a discussion between Congressmen Voorhis and Arends during the House debates on the 1940 Act. 86 Cong. Rec., Part 12, 13132–13133. Apparently these gentlemen were not familiar with the specific provisions of the Act. This is not surprising since neither was a sponsor of the measure. Moreover, since the 1940 Act was a substantial reenactment of the 1918 Act, there were no committee hearings to inform congressmen of the precise scope and effect of the Act. As neither Mr. Voorhis nor Mr. Arends were lawyers, it cannot be assumed that they were aware of the technical common-law theory of guaranty which the Government relies on here. We think the Veterans' Administrator was correct in concluding that the legislative history, which includes the Voorhis-Arends colloquy, "is of little, if any, help" to the Government's claim.

[7] See *Boone* v. *Lightner*, 319 U. S. 561, 565.

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ment.[8] He objected to the Government's bearing any part of the cost and even suggested that the bill should be amended to authorize the Government to deduct the premiums from the soldier's monthly pay. Professor John H. Wigmore, who as a major representing the Army had a dominant part in drafting the bill and presenting it to Congress, strongly objected to Senator Reed's suggestions. Professor Wigmore pointed out that this benefit would be in keeping with the many new benefits which were being conferred on servicemen at that critical war period. When directly asked whether a soldier could be made to pay, he called attention to the fact that the Government had a lien on the policy and could recover the cash surrender value. He admitted, however, that the cash surrender value would not in all cases pay the entire amount of back premiums but predicted that the loss to the Government would be very slight.[9] The

[8] "If he comes back and wants to keep his insurance in effect, I take it the proposition here is that he must then pay the Government; but if he does not want to keep this policy in effect he still has the option to walk away and leave it." Hearings before the Subcommittee of the Senate Committee on the Judiciary on S. 2859 and H. R. 6361, 65th Cong., 1st and 2d Sess. 135.

[9] In closing the argument over requiring the soldiers to pay, the following colloquy took place between Major Wigmore and Senator Reed:

"Senator Reed: . . . Now, do you think that would be undesirable, Major, or do you think it would be greatly to be preferred that the Government just carry the risk?

"Maj. Wigmore: I can only speak for myself in that respect; but, speaking from my own judgment, it would seem to me that that is going further than this Nation ought to wish to go against its soldiers and sailors. . . .

"Senator Reed: . . . You really think it is desirable that the Government should carry it, regardless of the attempt to reimburse itself out of the man's pay?

"Maj. Wigmore: I only want to point out the fact that the Government, in the war-risk insurance bill . . . has offered to give Government insurance to soldiers and sailors at a rate of, I think, $8 a

Committee accepted Professor Wigmore's position and reported the bill in the form he urged.

The House Judiciary Committee made a comprehensive report on the 1918 bill.[10] It referred to the insurance sections as providing a method for the Government to "carry" the premiums upon servicemen's policies in private companies. The Committee recognized that carrying this insurance would cost the Government money, but expressed the hope that this burden would not be large because:

> "In the first place the Government only guarantees the payment of the premiums. If the soldier dies the insurance company will get its premiums out of the policy and the Government's guaranty will not be called upon. If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse the Government will be subrogated to his rights." [11]

Thus, the Committee apparently thought that the Government must look to the cash surrender value to mitigate its loss where a policy was allowed to lapse.

In 1942, the 1940 Act was amended to require ex-servicemen to reimburse the Government for back premiums paid by it on their lapsed policies.[12] The Government

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thousand, which I am told means that the Government pays the entire expenses of administration of that insurance . . . . They have therefore contributed that already to soldiers and sailors in providing insurance. If the Government has gone that far, it seems to me it would be inconsistent with that, in principle, not to go this far." *Id.*, at 137–138.

[10] H. R. Rep. No. 181, 65th Cong., 1st Sess.

[11] *Id.*, at 8.

[12] "The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, *as amended,* shall become a debt due to the United States by the insured on whose account payment was made . . . ." (Emphasis added.) 56 Stat. 775.

contends that this 1942 Amendment was to clarify and reaffirm the meaning of the 1940 Act. However it appears that the Veterans' Administration requested the 1942 Amendment to ". . . eliminate the possibility of requiring the Government to pay premiums on insurance which the insured does not intend to carry except during his period of active service . . . ." [13] And during a hearing before the House Committee on Military Affairs a Veterans' Administration representative testified, "[t]he insured is liable for all of the premiums of the $5,000 policy, the Government acting really as a guarantor. However, if there is a default [by the ex-serviceman], there would not be any liability for the whole amount, in excess of the cash [surrender] value under present construction of existing law." [14] If the legislative history of the 1942 Act indicates anything, it is that Congress thought that it was changing the law by changing the language of the Act.[15]

3. *The administrative interpretation.*—The administration of the 1918 and 1940 Acts does not support the Government's claim for reimbursement. The Govern-

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[13] Letter of the Veterans' Administrator to the President of the Senate, appended to S. Rep. No. 716, 77th Cong., 1st Sess. 6.

[14] Hearings before the House Committee on Military Affairs on H. R. 7029, 77th Cong., 2d Sess. 38.

[15] Even the Veterans' Administration stated in a formal decision in 1947 that:

"Fairness compels admission that the legislative history of the 1942 act reflects a probable belief, though an incorrect one, on the part of the Seventy-seventh Congress that the 1940 act (passed by the Seventy-sixth Congress) had been construed as not giving rise to a debt owing by the insured to the Government upon the latter's payment to the insurer of the amount by which the premiums with interest exceeded the cash surrender value." Decisions of the Administrator of Veterans' Affairs, No. 742 (April 1947), Vol. 1, Supp. 1, pp. 93, 103.

ment relies on the fact that a few soldiers who invoked the protection of the 1918 Act and allowed their policies to lapse were later required to reimburse it. However these collections were so sporadic and so insignificant that instead of supporting the Government's position they contradict it.[16] Under the 1940 Act, § 401 (2) required the Veterans' Administration to issue notices explaining the Act. None of the notices promulgated prior to 1943 suggested any duty on the part of servicemen to reimburse the Government.[17] But public statements of Veterans' Administration officials gave the Act a squarely contrary construction.[18]

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[16] According to the Government's figures, 7,745 policies were brought within the protection of the 1918 Act; 476 of these policies were allowed to lapse. The total amount of back premiums paid by the Government on these policies was less than $20,000 or approximately $42 per policy, showing that Major Wigmore's prophecy as to the smallness of the Government's losses was a correct one. The Government sought reimbursement on only 10 of these 476 lapsed policies and total collections were $484.42. Records submitted show that all collections were obtained from soldiers who were still in the Army at the time they were called on to pay. The demands for payment went through regular military channels.

[17] Apparently the first time the Veterans' Administration ever officially interpreted the Act as authorizing the Government to be reimbursed for its payment of premiums on lapsed policies was in Administrator's Decision No. 513, March 1, 1943. This decision held that the Government's agreement to carry policies under the 1940 Act was a "gratuitous assumption of liability" which had been retroactively changed by the 1942 Amendment. Decisions of the Administrator of Veterans' Affairs, No. 513 (March 1943), Vol. 1, 781. However we agree with the view expressed in a later Administrator's Decision, No. 742, that a serviceman's liability under the 1940 Act must be determined under it and not under the 1942 Act. And see *Lynch* v. *United States*, 292 U. S. 571.

[18] Less than two months after the 1940 Act was passed, the Director of Insurance for the Veterans' Administration replying to a telegraphic inquiry stated that "No provision is made in the Act for

Section 401 (1) required soldiers seeking the benefit of the 1940 Act to file applications on forms prepared in accordance with the regulations of the Veterans' Administration. The respondents here filed such an application which included within its terms the following agreement:

> "In consideration hereof, I hereby consent and agree that the United States shall be protected in the amount of any premiums and interest guaranteed on the above numbered policy in the event of its maturity as a claim, or out of the cash surrender value of the policy, at the expiration of the period of protection under the Act."

This contract, prepared by the Veterans' Administration, contained no suggestion to soldiers that they would be expected to reimburse the Government for its payment of premiums if they permitted their policies to lapse. Had the Veterans' Administration construed the Act as imposing such a liability on soldiers, we think it would have mentioned the obligation in the contract that it asked them to sign.

Congress passed the 1918 and 1940 Acts at a time when men were being called from civilian life into the Army in the face of impending war. Great efforts were made to ease the burden on these men and their dependents.

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collecting from insured the amount paid by Government to insurer." Shortly afterwards the Director made a similar statement to an insurance company representative.

In the meantime the Assistant Director made the following statement for publication in an insurance journal: "There is no provision in the Act at this time for collecting from the insured the amount that the premium with interest may exceed the cash surrender value at the time of termination." This same interpretation was given by the Assistant Director when testifying before the House Committee on Military Affairs in favor of the 1942 Amendment. See text at n. 14, *supra*.

Among these, the Government generously provided family allotments, disability payments, and low-cost government insurance. Similarly the provisions under consideration here were adopted to assist soldiers who had bought insurance before entering the Army and did not require them to reimburse the Government.

Affirmed.

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON and MR. JUSTICE HARLAN dissent for the reasons given by Circuit Judge Huxman in *United States* v. *Hendler,* 225 F. 2d 106.

UNITED STATES *v.* HOWARD, TRADING AS STOKES FISH CO.

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

No. 52. Argued December 6, 1956.—Decided January 14, 1957.

The Federal Black Bass Act makes it unlawful for any person to deliver black bass or other fish for transportation from any State if such transportation is contrary to the "law of the State." Rule 14.01 of the regulations of the Florida Game & Fresh Water Fish Commission prohibits the transportation of certain fresh fish out of the State; and § 372.83 of the Florida Statutes makes it a misdemeanor to violate any rule, regulation or order of the Commission. *Held:* Rule 14.01 of the Commission's regulations, as enforced by § 372.83 of the Florida Statutes, is a "law of the State" within the meaning of the Federal Act. Pp. 213–219.

(a) *United States* v. *Eaton,* 144 U. S. 677, distinguished. Pp. 215–217.

(b) By Fla. Stat., § 372.83, the Florida Legislature intended to and did make infraction of any commission regulation a violation of state law, punishable as a misdemeanor. Pp. 216–217.

(c) The record does not show that the rules of the Florida Commission are of such a temporary nature and so unaccompanied by the procedural niceties of rule making as to require that Rule 14.01 be considered not the "law of the State" for the purposes of the Federal Act. Pp. 217–218.

(d) That Congress intended to extend the enforcement guarantees of the Black Bass Act to such regulations as those of the Florida Commission is the most reasonable interpretation of the Act, and it is supported by the legislative history of the 1947 amendment to the Act. Pp. 218–219.

Reversed and remanded.

Leonard B. Sand argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry.*

Clarence L. Thacker argued the cause and filed a brief for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

A federal criminal information was filed by the United States against Ludenia Howard, trading as Stokes Fish Company, appellee, in the United States District Court for the Southern District of Florida, charging her with a violation of the Federal Black Bass Act of May 20, 1926, as amended, c. 346, 44 Stat. 576, 46 Stat. 845, 61 Stat. 517, 66 Stat. 736, 16 U. S. C. §§ 851–854. The Act provides:

> "It shall be unlawful for any person to deliver . . . for transportation . . . from any State . . . any black bass or other fish, if (1) such transportation is contrary to the law of the State . . . from which such . . . fish . . . is to be transported . . . ." 16 U. S. C. § 852.

The information stated that appellee delivered fish for transportation across the Florida border contrary to the "laws of the State of Florida." The relevant fishing provisions consisted of the rules and regulations of the Florida Game and Fresh Water Fish Commission and a criminal penalty imposed by the legislature for violation of the rules. The District Court, however, held that the rules and regulations do not constitute the "law of" Florida within the meaning of the Black Bass Act and on appellee's motion quashed the information. An appeal was brought here by the United States pursuant to 18 U. S. C. § 3731. We noted probable jurisdiction. 351 U. S. 980.

Florida's Game Commission was created by a 1942 constitutional amendment (Art. IV, § 30, Constitution of Florida) which provides that:

> "after January 1, 1943, the management, restoration, conservation, and regulation, of the . . . fresh-water fish, of the State of Florida . . . shall be vested in [the] Commission . . . ."

It was empowered by the same amendment

> "to fix bag limits and to fix open and closed seasons, on a state-wide, regional or local basis, as it may find to be appropriate, and to regulate the manner and method of taking, transporting, storing and using . . . fresh-water fish . . . ."

The amendment further provides:

> "The Legislature may enact any laws in aid of . . . the provisions of this amendment . . . . All laws fixing penalties for the violation of the provisions of this amendment . . . shall be enacted by the legislature from time to time."

Pursuant to this amendment, the Florida Legislature authorized the Commission to exercise

> "the powers, duties and authority granted by § 30, article IV, of the constitution of Florida, by the adoption of rules, regulations and orders . . . ." Fla. Stat. Ann., 1943, § 372.021.

Another statute makes it a misdemeanor to violate

> "any rule, regulation or order of the game and fresh water fish commission . . . ." Fla. Stat., 1955, § 372.83.

Rule 14.01 of the Commission's rules prohibits the transportation of certain fresh fish outside the State; it is this regulation that Ludenia Howard is accused of breaking.[1] Because the information was quashed for failure to state a federal crime, we assume the alleged acts of appellee

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[1] "No person . . . shall . . . transport, transport for sale, or transport out of the State of Florida any large or small mouth black bass, speckled perch, jack, shell cracker, warmouth perch, red breast, pike, stump knocker, sun fish, or Canadian sunfish, or any other species of bream; . . . ."

occurred and that she is subject to criminal prosecution in Florida pursuant to § 372.83 of the Florida Statutes, as set out above.

The sole question presented is whether Rule 14.01 of the Commission's regulations, as enforced by § 372.83 of the Florida Statutes, is a "law" of the State of Florida as that term is used in the Federal Act.

This Court has repeatedly ruled, in other circumstances, that orders of state administrative agencies are the law of the State. In *Grand Trunk R. Co.* v. *Indiana R. Comm'n,* 221 U. S. 400, 403, the Court stated, citing *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 226:

> "the order [of the Indiana Railroad Commission] . . . is a law of the State within the meaning of the contract clause of the Constitution . . . ."

And, in *Lake Erie & W. R. Co.* v. *Public Utilities Comm'n,* 249 U. S. 422, 424, it was said that an order of the state public utilities commission "being legislative in its nature . . . is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." A similar statement may be found in *Arkadelphia Co.* v. *St. Louis S. W. R. Co.,* 249 U. S. 134, 141.

It was suggested that the action of the court below is supported by *United States* v. *Eaton,* 144 U. S. 677. We believe the case is inapposite. It involved the regulation of manufacturers and dealers in oleomargarine under 24 Stat. 209. Section 18 of the Act provided a criminal penalty for the knowing or willful failure "to do, or cause to be done, any of the things required by law." Section 5 required manufacturers to keep certain records. A similar requirement was imposed upon wholesalers by a regulation made by the Commissioner of Internal Revenue pursuant to § 20. The defendant in the *Eaton* case, a

wholesaler, failed to keep the proper records, but this Court held he had not committed a crime under § 18:

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence." *Id.*, at 688.

The Court made particular mention of the fact that the Act expressly required manufacturers to keep certain books, but made no such requirement of wholesalers. *Id.*[2] In *Singer* v. *United States,* 323 U. S. 338, 345, we said:

> "*United States* v. *Eaton* turned on its special facts, as *United States* v. *Grimaud,* 220 U. S. 506, 518–519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute."

See also *Caha* v. *United States,* 152 U. S. 211, 219. Here, it is beyond question that the Florida Legislature, in Fla. Stat., § 372.83, intended to and did make infraction

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[2] The Court also paid special note to the fact that subsequent to the alleged acts of Eaton, but prior to its decision, Congress amended the Oleomargarine Act to expressly require the keeping of books by wholesalers. 144 U. S., at 685–686, 688. The Court noted this factor in *Eaton* when discussing the *Eaton* case in *Caha* v. *United States,* 152 U. S. 211, 220.

of any commission regulation a violation of state law, punishable as a misdemeanor.

Appellee argues that the rules of the Florida Commission are so subject to change that they lack sufficient substance and permanence to be the "law" of Florida. We need not decide now whether a state agency could make a rule of such a temporary nature and so unaccompanied by the procedural niceties of rule making that the declaration should not be considered the law of the State for purposes of a statute such as the Black Bass Act. These considerations formed no part of the opinion below. Moreover appellee has not demonstrated that the rule here involved is of such a character.

Commission promulgation of orders is regulated by § 372.021 of 14 Fla. Stat. Ann., a legislative enactment. It provides that no regulation or amendment to a regulation is effective until 30 days after the filing of a certified copy of such provisions with the secretary of state. The statute also directs that any change in the type of regulation involved here is to be filed in the office of each county judge and that changes must be published in each county in a newspaper of general circulation.[3] We are advised by the Government's brief that the Commission compiles its rules in a code book which is circulated without cost to all county judges, as is directed by statute, and also to principal sporting goods and license dealers. In fact they seem to be available to anyone requesting them from the Commission. We are also told that it is the Commission's practice to conduct public hearings to give

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[3] Most fishermen must secure a fishing license (they may be obtained at the office of any county judge) and a statute provides that the "license shall contain on the back thereof a synopsis of the . . . fresh water fishing laws of the state." Fla. Stat., 1955, § 372.69. Whether the rule here involved is printed on appellee's license, indeed, whether appellee even has a license, is not shown by the record at this stage of the proceedings.

everyone an opportunity to air his own views on proposed changes in the rules. None of these assertions is challenged by appellee.

We recognize that not all the above-described procedures are mandatory and that whether any of them was employed with the enactment of Rule 14.01 cannot be ascertained from the record at this time. However, the fact that it is the asserted practice of the Commission to comply with them suggests a potent answer to appellee's charge of impermanence. Moreover, it is not inappropriate for us to note that transportation of some species of fish covered by this information has been prohibited in Florida since 1927. Fla. Stat. Ann., 1943, § 372.29, Florida Laws, 1929, c. 13644, § 35.

The State of Florida prefers to entrust the regulation of its wild life conservation program to a Game Commission. Such a preference is in accordance with the practice of 28 States that have vested full regulatory authority in commissions. Only 6 States reserve that full authority to their legislatures. Sport Fishing Institute Bulletin, No. 26, p. 60 (January 1954). Moreover, a document prepared by the Department of the Interior and submitted to us by the Government at our request shows that even in 1926, the year the Black Bass Act was first passed, significant rule-making power was entrusted to game commissions or commissioners in some 20 States.[4]

That the congressional purpose was to extend the enforcement guarantees of the Black Bass Act to these regulations is the most reasonable interpretation of the Act and is an interpretation supported by the legislative history of the 1947 amendment to the Act. The amend-

[4] See, *e. g.*, Supplement to the Codes and General Laws of California, 1925–1927, Act of May 23, 1925, § 3 (Act 2895); Laws of Maine, 1917, c. 219, § 2; New York Laws, 1912, c. 318.

ment, which made the provisions of the Act applicable to all game fish, was accompanied by Senate and House reports containing the following language:

> "The bill is intended to supplement State laws applying to protection of game fish. . . . State laws become ineffectual when fish taken in violation of the law cross the State line. If we are to protect game fish, an important natural resource, the Federal Government must collaborate in the enforcement of protective laws and regulations at the point where State jurisdiction ends." S. Rep. No. 288, 80th Cong., 1st Sess. 2; H. R. Rep. No. 986, 80th Cong., 1st Sess.

Accordingly we hold that the phrase "law of the State," as used in this Act, is sufficiently broad to encompass the type of regulation used in Florida.

Reversed and remanded.

LEITER MINERALS, INC., *v.* UNITED STATES ET AL.

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

No. 26. Argued November 6–7, 1956.—Decided January 14, 1957.

Petitioner filed a petitory action in a Louisiana state court against respondent mineral lessees of the United States, seeking to have itself declared owner of the mineral rights under land owned by the United States, and an accounting for oil and other minerals removed by respondent lessees under their lease from the United States. Petitioner's claim was founded on a Louisiana statute, which allegedly made "imprescriptible" a reservation of mineral rights in a deed to the United States by its predecessor in title. The United States then brought suit against petitioner and other interested parties in the Federal District Court for the Eastern District of Louisiana to quiet title in the mineral rights and for a preliminary injunction to restrain petitioner from prosecuting its action in the state court. The District Court issued the injunction and the Court of Appeals affirmed. *Held:*

1. 28 U. S. C. § 2283, which restricts the granting of injunctions by federal courts to stay proceedings in state courts, is inapplicable to stays sought by the United States. Pp. 224–226.

2. In the circumstances of this case, the granting of the injunction was proper. *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, distinguished. Pp. 226–228.

3. The judgment of the Court of Appeals is modified to permit an interpretation of the state statute to be sought with every expedition in the state court. Pp. 228–230.

224 F. 2d 381, modified and affirmed.

Samuel W. Plauché, Jr. argued the cause and filed a brief for petitioner.

Assistant Attorney General Morton argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Roger P. Marquis* and *Fred W. Smith.*

Charles D. Marshall argued the cause for the California Company et al., respondents. With him on the brief was *Eugene D. Saunders.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case presents for decision important questions regarding the applicability to the United States of the restrictions against stay of state court proceedings contained in 28 U. S. C. § 2283 and the propriety of the injunction decreed by the District Court and sustained by the Court of Appeals. Petitioner in 1953 had filed a petitory action in a Louisiana state court against respondent-mineral-lessees of the United States. In that action, a suit by one out of possession claiming title to, and possession of, immovables, petitioner sought to have itself declared owner of the mineral rights under land owned by the United States, and it also sought an accounting for oil and other minerals removed by respondent-lessees under their lease from the United States. Petitioner founded its claim on Louisiana Act No. 315 of 1940, La. Rev. Stat., 1950, § 9:5806, which, it alleged, made "imprescriptible" a reservation of mineral rights in a deed of December 21, 1938, to the United States by its predecessor in title.[1]

[1] The reservation, in its pertinent portion, provided: "The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America, 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors

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Respondent-lessees filed exceptions in the state court proceedings, urging that under Louisiana law the lessor should be made a party and the lessees discharged from the suit, that this was essentially a suit against the United States, which had not consented to be sued, that the United States was an indispensable party, and that no cause of action had been stated. The state trial court found that a cause of action had been stated, and it overruled the exceptions.

At this point the United States, joining petitioner and other interested parties as defendants, brought the present

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shall have paid to the United States of America, the sum of $25,000, being the purchase price paid by said United States of America for the aforedescribed properties.

. . . . . .

"Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.

"The reservation of the oil and mineral rights herein made for the original period of ten (10) years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above . . . set forth, remain vested in the vendors."

Act No. 315 provides: ". . . when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible." See also the prior Act No. 151 of 1938 providing that prescription should not run against a reservation of mineral rights in real estate acquired by the United States or the State of Louisiana.

suit in the District Court for the Eastern District of Louisiana to quiet title to the mineral rights; it also sought a preliminary injunction to restrain petitioner from prosecuting its action in the state court. The United States based its claim of ownership on the provision in the 1938 deed from petitioner's predecessor in title that the reservation of mineral rights would expire on April 1, 1945, subject to certain conditions not material to this case. The United States claimed that irreparable injury in the form of loss of royalties would result from any temporary, wrongful dispossession of its lessees by the state court proceedings. Affidavits were also submitted in support of the claim that permanent loss of wells currently producing oil would probably result from any temporary cessation of production. The petitioner moved to dismiss the United States' complaint on the ground that the state court had already assumed jurisdiction over the property in question; in the alternative, petitioner moved to stay the federal proceedings pending determination of the state court action because questions of state law were involved.

The District Court held that, since the United States was not a party to the state court suit, the title of the United States could be tried only in the federal court action and that an injunction against prosecution of the state proceedings should issue to protect its jurisdiction pending determination of the ownership of the property. 127 F. Supp. 439. The Court of Appeals affirmed, holding that the preliminary injunction was proper because "the district court under the clear provisions of the statute, 28 U. S. C. § 1345, became vested with exclusive jurisdiction to determine the title of the United States to the mineral rights claimed by appellant." 224 F. 2d 381, 383–384. Because of the presence of important and difficult questions of federal-state relations, questions

more difficult than the Government appears to have found them, we granted certiorari. 350 U. S. 964.

28 U. S. C. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It must first be decided whether this section applies to stays sought by the United States because different answers to this question will put different aspects on other issues in the case. An analogous problem was presented in *United States* v. *United Mine Workers,* 330 U. S. 258, where the Court held that the provisions of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101, that no federal court had jurisdiction, subject to qualifications, to issue an injunction in labor disputes to prohibit certain acts, did not apply to the United States. The Norris-LaGuardia Act, like 28 U. S. C. § 2283, effected, in general language, a limitation on the jurisdiction of the federal courts. Furthermore, since it was largely the diversity jurisdiction which spawned the substantive problems that the Norris-LaGuardia Act removed from the federal courts, the limitations on the federal courts imposed by the Norris-LaGuardia Act, like those of 28 U. S. C. § 2283, were in an area of federal-state relations calling for particular circumspection in adjudication.

In interpreting the general language of the Norris-LaGuardia Act, the Court relied heavily on "an old and well-known rule," albeit a rule of construction, "that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." 330 U. S., at 272.

While, strictly speaking, any "pre-existing" rights would have to be found in the 1789–1793 pre-statute period,[2] the rationale of the rule requires not that the rights be "pre-existing" but rather that they would exist apart from the statute. There can be no doubt, apart from the restrictions of 28 U. S. C. § 2283, of the right of the United States to enjoin state court proceedings whenever the prerequisites for relief by way of injunction be present. Treating the rule invoked in the *United Mine Workers* case merely as an aid to construction, it would by itself lead us to hold that the general language of 28 U. S. C. § 2283 did not apply to the United States in the absence of countervailing considerations, such as significant legislative history pointing toward its inclusion or inferences clearly to be drawn from relevant presuppositions for so including it.

In *United Mine Workers,* the Court did not rely entirely on the rule of construction because its reading of the Act as a whole and the legislative history supported the conclusion that the United States was not to be included. In this case, there is no legislative material to support or to gainsay the applicability of the rule of construction. There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a

[2] The basic provisions of 28 U. S. C. § 2283 go back to 1793, 1 Stat. 335.

national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U. S. C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U. S. C. § 2283 alone. It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager, but the interpretation excluding the United States from the coverage of the statute seems to us preferable in the context of healthy federal-state relations.[3]

The question still remains whether the granting of an injunction was proper in the circumstances of this case. We start with one certainty. The suit in the federal court was the only one that could finally determine the basic issue in the litigation—whether the title of the United States to the mineral rights was affected by Louisiana Act No. 315 of 1940. The United States was not a party to the state suit and, under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States. See *United States* v. *Lee,* 106 U. S. 196. Although the state court might mould peti-

[3] Most of the lower federal courts that have considered this problem have, without much discussion, reached the same result. *E. g., United States* v. *Taylor's Oak Ridge Corp.*, 89 F. Supp. 28; *United States* v. *Cain,* 72 F. Supp. 897; *United States* v. *Phillips,* 33 F. Supp. 261, reversed on other grounds, 312 U. S. 246; *United States* v. *McIntosh,* 57 F. 2d 573; *United States* v. *Babcock,* 6 F. 2d 160, reversed for modification, 9 F. 2d 905; *United States* v. *Inaba,* 291 F. 416. But see *United States* v. *Land Title Bank & Trust Co.,* 90 F. 2d 970; *United States* v. *Certain Parcels of Land,* 62 F. Supp. 1017, appeal dismissed by stipulation, 151 F. 2d 1022.

tioner's suit to try title into a suit for possession or might merely order respondent-lessees to account for minerals removed, nevertheless such proceedings could not settle the basic issue in the litigation and might well cause confusion if they resulted in a judgment inconsistent with that subsequently rendered by the federal court.

Petitioner relies heavily on *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463. There, in a federal district court proceeding, the United States was claiming by assignment certain funds of three Russian insurance companies that were being held in the custody of a state court, in connection with the liquidation of the companies, subject to court orders concerning distribution to claimants under the state insurance laws. On the basis of this claim, the United States sought to enjoin distribution of the funds and to require payment of them to it. This Court, affirming dismissal of the complaints and denial of the injunction, held that the state court had obtained jurisdiction over the funds first and that the litigation should be resolved in that court. The Court also noted that there were numerous other claimants, indispensable parties, who had not been made parties to the federal court suit. In remitting the United States to the state court, the Court saw no "impairment of any rights" of the United States or "any sacrifice of its proper dignity as a sovereign." *Id.*, at 480–481.

The situation in the present case is different. All the parties in the state court proceeding have been joined in the federal proceeding. Moreover, the *Bank of New York* case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed and that were in the hands of depositaries appointed by the state court. In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of

persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state litigation has the elements of an action characterized as *quasi in rem*. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in the federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment.

One further aspect of the case remains to be considered. The District Court advanced this additional ground for its decision:

> "Moreover, if the state court suit is allowed to proceed to final judgment, the rights of the United States to the property in question will actually be determined 'behind its back' . . . for the reason that, since ownership of these mineral rights will turn on an interpretation of a state statute . . . this court and the appellate federal courts may be required, under Erie Railroad Co. v. Tompkins . . . to follow that judgment in spite of the fact that the United States is not a party to those proceedings. . . ." 127 F. Supp., at 444.

But the fact that the United States is not a party to the state court litigation does not mean that the federal court should initiate interpretation of a state statute. In fact, where questions of constitutionality are involved—and the Government contends that an application of the state statute adverse to its interests would be unconstitutional—our rule has been precisely the opposite: "as questions of federal constitutional power have become more

and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, 105; see *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 383; *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, 498–502.

The Government contends that Act No. 315 of 1940 does not apply when the parties themselves have contracted for a reservation of specific duration and that if the statute is construed to apply to this situation, it would impair the obligation of the Government's contract. Petitioner disagrees. The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, La. Rev. Stat., 1950, 13:4231 *et seq.,* and the United States of course may appear to urge its interpretation of the statute. See *Stanley* v. *Schwalby,* 147 U. S. 508, 512–513. It need hardly be added that the state courts in such a proceeding can decide definitively only

questions of state law that are not subject to overriding federal law.

We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion.

Modified and affirmed.

MR. JUSTICE DOUGLAS, dissenting in part.

I agree that the state action was properly enjoined; and so I concur in the opinion of the Court to that extent. But I dissent from the direction to the District Court to hold the case while the parties repair to the state court to get an interpretation of the Louisiana statute around which this litigation turns.

That procedure is an advisable one where private parties question the constitutionality of a state statute. An authoritative construction of the state law may avoid the constitutional issue or put it in new perspective. See *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, 104–105. In the *Spector* case, the plaintiff's claim was within the jurisdiction of the federal court solely because of the attack on the constitutionality of a state statute. Under 28 U. S. C. § 1331, the federal district court has jurisdiction where the matter in controversy exceeds the jurisdictional amount "and arises under the Constitution, laws or treaties of the United States." In litigation in the federal courts under that statute, the necessity of construing state law arises because of the federal court's duty to avoid if possible a federal constitutional question. *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175. In the *Spector* case, then, matters of state law were only ancillary to the primary responsibility of the federal court to resolve the constitutional issues.

But here, although potential constitutional questions may lurk in the background, this litigation primarily concerns not federal questions but title to land claimed by the United States. It is litigation which Congress by 28 U. S. C. §§ 1345, 1346, has entrusted to the federal district court. Those sections allow civil litigation of the United States—whether it involves federal or state law questions—to be conducted in the federal courts. In that situation it is the duty of the federal court to decide all issues in the case—those turning on state law as well as those turning on federal law. In *Meredith* v. *Winter Haven,* 320 U. S. 228, a case in the federal courts by reason of diversity of citizenship, we refused to remit the parties to the state court for decision of difficult state law questions. We held that it was the duty of the federal court to decide all issues in the case—state or federal, difficult or easy. And see *Propper* v. *Clark,* 337 U. S. 472. There have been exceptions to this policy, notably in bankruptcy proceedings where trustees are sometimes sent into state courts to obtain adjudications on local law questions pertinent to the administration of the bankrupt's estate. See *Thompson* v. *Magnolia Co.,* 309 U. S. 478. It is peculiarly inappropriate to follow that course here. Congress has decided that the United States should have the benefit of the protection of its own courts in this type of litigation. We properly hold that the District Court, not the state court, has jurisdiction of the controversy. But we beat the devil around the bush when, having taken the litigation out of the state court, we send the parties back to the state court for its construction of Louisiana law which is the most significant issue in the case. The problem is not only to construe the state statute but to construe it constitutionally. The federal court can make that construction as readily as the state court. That is the congressional scheme and we should not change it by judicial fiat.

DELLI PAOLI *v.* UNITED STATES.

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

No. 33. Argued October 18, 1956.—Decided January 14, 1957.

Petitioner is one of five co-defendants convicted in a joint trial in a federal court on a federal charge of conspiring to deal unlawfully in alcohol. Without deleting references to petitioner, the court admitted in evidence a confession of another co-defendant, made after termination of the conspiracy; but the court stated clearly at the time, on several other occasions, and in its charge to the jury, that the confession was to be considered only in determining the guilt of the confessor and not that of any of the other defendants. The conspiracy was simple; the separate interests of each defendant were emphasized throughout the trial; admission of the confession was postponed to the end of the Government's case; in the main, the confession merely corroborated what the Government had already established; its references to petitioner were largely cumulative; and there was nothing in the record indicating that the jury was confused or failed to follow the court's instructions. *Held:* Petitioner's conviction is sustained. Pp. 233–243.

1. The evidence admitted against petitioner was sufficient to sustain his conviction. Pp. 234–236.

2. Under the circumstances of this case, the court's instructions to the jury provided petitioner with sufficient protection, so that the admission of his co-defendant's confession, strictly limited to use against the confessor, did not constitute reversible error against petitioner. *Krulewitch* v. *United States,* 336 U. S. 440, distinguished. Pp. 236–243.

(a) The court's instructions to the jury were sufficiently clear. Pp. 239–241.

(b) On the record in this case, it is fair to assume that the jury followed the court's instructions. Pp. 241–242.

229 F. 2d 319, affirmed.

Daniel H. Greenberg argued the cause and filed a brief for petitioner.

J. F. Bishop argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

MR. JUSTICE BURTON delivered the opinion of the Court.

A joint trial in this case resulted in the conviction of five co-defendants on a federal charge of conspiring to deal unlawfully in alcohol. Only the petitioner, Orlando Delli Paoli, appealed. The principal issue is whether the trial court committed reversible error, as against petitioner, by admitting in evidence a confession of a co-defendant, made after the termination of the alleged conspiracy. The trial court declined to delete references to petitioner from the confession but stated clearly that the confession was to be considered only in determining the guilt of the confessor and not that of other defendants. For the reasons hereafter stated, we agree that, under the circumstances of this case, such a restricted admission of the confession did not constitute reversible error.

In the United States District Court for the Southern District of New York, the jury convicted petitioner and four co-defendants, Margiasso, Pierro, Whitley and King, of conspiring to possess and transport alcohol in unstamped containers and to evade payment of federal taxes on the alcohol.[1] The Government's witnesses testified that they had observed actions of the defendants which disclosed the procedure through which Margiasso, Pierro and petitioner supplied unstamped alcohol to their customers, such as King and Whitley. The Government also offered, for use against Whitley alone, his written confession made in the presence of a government agent and of his own counsel after the termination of the conspiracy.[2] The court postponed the introduction of Whit-

[1] In violation of 18 U. S. C. § 371, and I. R. C., 1939, §§ 2803 (a), 2806 (e), and 2913. Margiasso and King were also indicted and convicted for the substantive crime of possession of 19 5-gallon cans of unstamped alcohol, and Margiasso of another 113 of such cans.

[2] The confession appears as an appendix to the dissenting opinion below in 229 F. 2d, at 324–326. It is also printed as an appendix to this opinion, *post*, p. 243.

ley's confession until the close of the Government's case. At that time, the court admitted it with an emphatic warning that it was to be considered solely in determining the guilt of Whitley and not in determining the guilt of any other defendant. The court repeated this admonition in its charge to the jury.

The Court of Appeals affirmed petitioner's conviction, with one judge dissenting. 229 F. 2d 319. We granted certiorari especially to consider the admissibility of Whitley's post-conspiracy confession. 350 U. S. 992.

I.

Petitioner first attacks the sufficiency of the evidence connecting him with the conspiracy. The Government's evidence, exclusive of Whitley's confession, showed that the defendants' conspiracy to deal in unstamped alcohol centered around a garage used for storage purposes in a residential district of the Bronx in New York City and a gasoline service station, also in the Bronx. The service station was used by Margiasso, Pierro and petitioner as a place to meet customers and transfer alcohol.

In December 1949, petitioner, using the alias of "Bobbie London," was associated with Margiasso and Pierro in inspecting the garage and in negotiating for its purchase. For $2,000 in cash, title to the garage and an adjacent cottage was taken in the name of Pierro's sister. In 1950, the garage was repaired, its windows boarded up and its doors strengthened and padlocked. Petitioner lived not far away, in the Bronx, and was observed, from time to time, at the garage or using a panel truck which was registered under a false name. During the daytime, this truck generally was parked near petitioner's home or the garage but neighbors testified that it was in use late at night. In it petitioner transported various articles to the garage or elsewhere. On one occasion, petitioner, with Margiasso, loaded it with bundles of cartons suited to

the packing of 5-gallon cans. Late in 1951, petitioner used an additional truck, also registered under a false name. In addition, he frequently drove to the service station in a Cadillac car. On December 18, 1951, he used this car in making delivery of a large package to a near-by bar.

During December 1951, the service station often was used as a meeting place for Margiasso, Pierro and petitioner. Margiasso and petitioner were there on the evening of December 28.[3] At about 7 and 10 p. m., respectively, King and Whitley arrived. Each turned over his car to Margiasso. Margiasso drove King's car to the garage and returned with it heavily loaded. King then drove it away. Government agents followed him until he stopped in Harlem. There they arrested him and took possession of 19 5-gallon cans of unstamped alcohol found in his car. Later in the evening, Margiasso took Whitley's car to the garage and was arrested in it when leaving the still open garage. The agents thereupon seized 113 5-gallon cans of unstamped alcohol they found in the garage. Whitley, who had been waiting for Margiasso at the service station with $1,000 in a paper bag, was arrested on the agents' return with Margiasso.

Petitioner's presence at the service station on the evening of December 28 was closely related to these events. He waited there with King for Margiasso to return with King's car containing the 19 cans of alcohol.

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[3] On that occasion, the procedure followed closely the pattern observed by government agents on December 18 when, at 9 p. m., Margiasso and petitioner had been at the service station. A Pontiac car, with two occupants, drove up. The occupants got out. Margiasso drove away in their car and, half an hour later, returned with it heavily loaded. When the two men drove it away, government agents tried to follow it. However, they lost it in traffic and no arrests were made. The agents noted the car's license number, found it registered under a false name, and, on December 28, recognized it as the one in which Whitley then came to the service station.

He was there again with Margiasso at about 10 p. m. but left shortly before Whitley came. He returned while Margiasso, Whitley and the agents were there and was arrested while attempting to drive away.

Petitioner contends that the above evidence shows merely that he was a friend and associate of Pierro and Margiasso. We conclude, however, from the record as a whole, that the jury could find, beyond a reasonable doubt, that petitioner was associated with Pierro and Margiasso in the purchase of the garage and the use of the panel truck, that he knew that unstamped alcohol was stored in the garage, that he had access to it and that he was an active participant in the transfers of alcohol to Whitley and King. Accordingly, we agree with Circuit Judge Learned Hand's statement made for the court below, following his own summary of the evidence of petitioner's participation in the conspiracy:

> "Not only was all this enough to connect him with the business, but the jurors could hardly have failed to find that he was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margiasso would have associated [with] him to the extent we have mentioned is too remote for serious discussion." 229 F. 2d, at 320.[4]

II.

In considering the admissibility of the Whitley confession, we start with the premise that the other evidence against petitioner was sufficient to sustain his conviction.

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[4] Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. See, *e. g., Blumenthal* v. *United States,* 332 U. S. 539, 557; *Glasser* v. *United States,* 315 U. S. 60, 80; *Direct Sales Co.* v. *United States,* 319 U. S. 703; *United States* v. *Manton,* 107 F. 2d 834, 839.

If Whitley's confession had included no reference to petitioner's participation in the conspiracy, its admission would not have been open to petitioner's objection. Similarly, if the trial court had deleted from the confession all references to petitioner's connection with the conspiracy, the admission of the remainder would not have been objectionable. The impracticality of such deletion was, however, agreed to by both the trial court and the entire court below and cannot well be controverted.

This Court long has held that a declaration made by one conspirator, in furtherance of a conspiracy and prior to its termination, may be used against the other conspirators. However, when such a declaration is made by a conspirator *after the termination of the conspiracy, it may be used only against the declarant and under appropriate instructions to the jury.*

> ". . . Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party. *Clune* v. *United States,* 159 U. S. 590, 593. See *United States* v. *Gooding,* 12 Wheat. 460, 468–470. But such declaration can be used against the co-conspirator only when made in furtherance of the conspiracy. *Fiswick* v. *United States,* 329 U. S. 211, 217; *Logan* v. *United States,* 144 U. S. 263, 308–309. There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended. That is the teaching of *Krulewitch* v. *United States, supra* [336 U. S. 440], and *Fiswick* v. *United States, supra.* Those cases dealt only with declarations of one conspirator after the conspiracy had ended. . . .

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"Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the *declarant's* participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch.* Such declaration is inadmissible as to all but the declarant. . . .

". . . These declarations [*i. e.,* those admissible only as to the declarant] must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose. While these difficulties have been pointed out in several cases, *e. g., Krulewitch* v. *United States, supra,* at 453 (concurring opinion); *Blumenthal* v. *United States,* 332 U. S. 539, 559–560; *Nash* v. *United States,* 54 F. 2d 1006, 1006–1007, the rule has nonetheless been applied. *Blumenthal* v. *United States, supra; Nash* v. *United States, supra; United States* v. *Gottfried,* 165 F. 2d 360, 367." *Lutwak* v. *United States,* 344 U. S. 604, 617–618, 619. See also, *Opper* v. *United States,* 348 U. S. 84, 95.

Petitioner contends that *Krulewitch* v. *United States,* 336 U. S. 440, requires the exclusion of a post-conspiracy confession of a co-conspirator. That case dealt with the scope of the co-conspirators' exception to the hearsay rule. This Court held that the utterance of a co-conspirator made after the termination of the conspiracy was inadmissible against other co-conspirators. Unlike the instant case, the declarant was not on trial and the question whether his utterance, implicating other alleged conspirators, could be admitted in a joint trial solely against the declarant, under proper limiting instructions, was neither presented nor decided.

The issue here is whether, under all the circumstances, the court's instructions to the jury provided petitioner with sufficient protection so that the admission of Whitley's confession, strictly limited to use against Whitley, constituted reversible error. The determination of this issue turns on whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them.[5]

When the confession was admitted in evidence, the trial court said:

> "The proof of the Government has now been completed except for the testimony of the witness Greenberg as to the alleged statement or affidavit of the defendant Whitley. This affidavit or admission will

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[5] For long-standing recognition that possible prejudice against other defendants may be overcome by clear instructions limiting the jury's consideration of a post-conspiracy declaration solely to the determination of the guilt of the declarant, see also, *Cwach* v. *United States,* 212 F. 2d 520, 526–527; *United States* v. *Simone,* 205 F. 2d 480, 483–484; *Metcalf* v. *United States,* 195 F. 2d 213, 217; *United States* v. *Leviton,* 193 F. 2d 848, 855–856; *United States* v. *Gottfried,* 165 F. 2d 360, 367; *United States* v. *Pugliese,* 153 F. 2d 497, 500–501; *Johnson* v. *United States,* 82 F. 2d 500; *Nash* v. *United States,* 54 F. 2d 1006, 1007; *Waldeck* v. *United States,* 2 F. 2d 243, 245.

be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants.

"The reason for this distinction is this: An admission by defendant after his arrest of participation in alleged crime may be considered as evidence by the jury against him, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant after his arrest implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence."

The substance of this admonition was repeated several times during the cross-examination of one of the government agents before whom the confession was made and a final warning to the same effect was included in the court's charge to the jury.[6] Nothing could have been

[6] "Before you make those motions—I will again advise the jury that any admissions by the defendant Whitley after the date of his arrest can be considered by you in connection with the determination of the guilt or innocence of the defendant Whitley together with the other testimony. But any admissions by the defendant Whitley are not to be considered as proof in connection with the guilt or innocence of any of the other defendants. The reason for that I explained before to you, that the admission by a defendant after his arrest of participation in an alleged crime may be considered as evidence by the jury against him with the other evidence because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after his arrest implicates other defendants in such admission it is not evidence against them, because as to those defendants it is nothing more than hearsay evidence. I advise you of that in connection with the testimony of the last witness [Greenberg] as to any oral statements made by Whitley or any written statements made by Whitley."

more clear than these limiting instructions. Petitioner, who made no objection to these instructions at the trial, concedes their clarity.

We may also fairly proceed on the basis that the jury followed these instructions. Several factors favor this conclusion: (1) The conspiracy was so simple in its character that the part of each defendant in it was easily understood. There was no mass trial and no multiplicity of evidentiary restrictions. (2) The separate interests of each defendant were emphasized throughout the trial. Margiasso and petitioner were represented by one attorney. Each of the other defendants was represented by a separate attorney. Throughout the trial, the separate interests of each defendant were repeatedly emphasized by his attorney and recognized by the court.[7] A separate trial never was requested on behalf of any defendant. (3) The trial court postponed the introduction of Whitley's confession until the rest of the Government's case was in, thus making it easier for the jury to con-

[7] Safeguarding the separate interests of the defendants, the court also said:

"The existence of the conspiracy and each defendant's connection with it must be established by individual proof based upon reasonable inference to be drawn from such defendant's own actions, his own conduct, his own declarations, and his own connection with the actions and conduct of the other alleged co-conspirators.

. . . . . .

"To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy.

. . . . . .

". . . if you find that every circumstance relied upon as incriminating is susceptible of two interpretations, each of which appears to be reasonable, and one of which points to a defendant's guilt, the other to his innocence, it is your duty to accept that of innocence and reject that which points to guilt."

sider the confession separately from the other testimony. This separation was pointed out by the trial court. Neither side thereafter introduced any evidence. (4) In the main, Whitley's confession merely corroborated what the Government already had established. In the light of the Government's uncontradicted testimony implicating petitioner in the conspiracy, the references to petitioner in the confession were largely cumulative. (5) There is nothing in the record indicating that the jury was confused or that it failed to follow the court's instructions.

It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.

> "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. The record contains substantial competent evidence upon which the jury could find petitioner guilty." *Opper* v. *United States,* 348 U. S. 84, 95. See also, *Lutwak* v. *United States,* 344 U. S. 604, 615–620; *Blumenthal* v. *United States,* 332 U. S. 539, 552–553.

There may be practical limitations to the circumstances under which a jury should be left to follow instructions but this case does not present them. As a practical matter, the choice here was between separate trials and a joint trial in which the confession would be admitted under appropriate instructions. Such a choice turns on the circumstances of the particular case and lies largely within the discretion of the trial judge. Accordingly, we conclude that leaving petitioner's case to the jury under the instructions here given was not reversible error and the judgment of the Court of Appeals is

Affirmed.

[For dissenting opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 246.]

APPENDIX TO OPINION OF THE COURT.

"Whitley's confession reads as follows:

"UNITED STATES OF AMERICA,
"SOUTHERN JUDICIAL DISTRICT OF NEW YORK,
"*ss.:*

"JAMES WHITLEY, being duly sworn, deposes and says:

"I reside at 65 West 133rd Street, Apartment 4E, New York, N. Y. I make this statement in the presence of my attorney, Mr. Bertram J. Adams of 299 Broadway, New York, N. Y., after being fully advised that under the Constitution of the United States I have the privilege and right of not saying anything at all; that if I answer any question anything I say could be used against me in any criminal proceeding. Being fully aware of my rights, I make this statement of my own free will to Special Investigators Albert Miller and William Greenberg in the office of the Alcohol and Tobacco Tax Division, 143 Liberty Street, New York, N. Y.

"Sometime around Thanksgiving of 1949, a friend of mine introduced me to a man known to me as Tony. This man asked me if I wanted to buy some alcohol and I told him I did. The meeting occurred on 126th Street in Harlem. The man then told me to meet him the next day at a candy store on the south side of 119th Street, just east of First Avenue. When I got there, Tony introduced me to a man whose name I do not know. This man told me to meet him that night on 100th Street and Second Avenue. I met him there. He took my car and drove away. A little while later he came back and told me that the car was parked on 103rd Street and Second Avenue. I had purchased two 5-gallon cans of alcohol on that occasion and paid him just before he drove away in my car. Thereafter, I would meet this man around the candy store about twice a week and the same procedure would be followed. This continued until about June or July of 1950.

"Tony was about 5′ 4″ in height, about 55 years of age, had a dark complexion and stocky build and, I believe, had brown eyes. He was apparently of Italian extraction. The other man who sold me the alcohol was apparently also of Italian descent, and he had a dark complexion. He spoke in broken English. He had black hair and was about 27 or 28 years of age and was about 5′ 9″ in height. (Sometime in 1950, Investigator Whited of the Alcohol and Tobacco Tax Division asked me about him and showed me his picture.)

"At about that time, this man sent me to Carl. He introduced Carl to me and told me that Carl would take care of me from then on. I would meet Carl on Second Avenue between 121st Street and 122nd Street in a seafood restaurant and would purchase the alcohol from him.

"Carl is about 5′ 10″ in height, has blond hair, blue eyes, light complexion and is about 30 years of age. He is apparently of Italian descent. He is about 160 pounds.

Carl would usually come to my home to see me and ask me if I needed anything.

"Just before Carl went to jail in 1950, he introduced me to Bobby. I have been shown a photograph bearing ATU 3643 N. Y. dated 12/29/51 of Orlandi Delli Paoli, and I identify it as that of the man known to me as Bobby. This was sometime in the summer of 1951. Bobby would come to my house to see me. If I placed an order with him he would set the date and the time for seven or eight o'clock in the evening when I was to pick up the alcohol. The first time I met him at 138th Street and Bruckner Boulevard, in the Bronx. He took my car and was gone about one-half hour and then returned with the alcohol. The second time I met him on the corner of Bruckner Boulevard and Soundview Avenue. From then on he would alternate the procedure: I would meet him one night on 138th Street and the next time at Soundview Avenue.

"About two months ago, I began meeting Bobby at the Shell gasoline station known as the Bronx River Service Station on Bruckner Boulevard just past the bridge crossing over to Bronx River. I would usually leave my car parked on the street near the gas station and meet Bobby outside of the gas station. He told me not to go into the gas station as the attendant might not like it.

"About a month ago, Bobby introduced me to another man whose name I do not know. I have been shown a photograph marked ATU 3642 N. Y., dated 12/29/51 of Carmine Margiasso, and identify it as that of the man to whom Bobby introduced me. Bobby also told me that if he was not present when I met Margiasso, I was not to give Margiasso any money but was to pay him (Bobby) the next time I saw him. Margiasso also followed the same procedure: He would take my car, would be gone about 20 minutes, and then return with the alcohol. Margiasso picked up my car about four times.

"My purchases from Bobby would consist of two or three 5-gallon cans of alcohol at a time and were made once or twice a week. The last two times I paid Bobby $38 a can.

"On the evening of Friday, December 28, 1951, I had ordered two cans, and when Margiasso took my car I waited in the lunch room near the gas station. When I thought it was time for Margiasso to return, I went over to the gas station and waited in the office after purchasing a package of cigarettes. Two officers who were Federal officers came in and placed me and William Hudson under arrest. Shortly after that happened, Bobby drove up and was arrested by the Federal officers.

"I have read the above statement consisting of three pages and it is true to the best of my knowledge and belief.

"(Signed) JAMES WHITLEY
"James Whitley

"Sworn to before me
this 5th day of January 1952.

"(Signed) WILLIAM GREENBERG
"William Greenberg, Spec. Inv.

"WITNESS:
"(Signed) ALBERT MILLER
"Albert Miller, Spec. Inv."

229 F. 2d 319, 324–326.

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

Prosecutions for conspiracy present difficulties and temptations familiar to anyone with experience as a federal prosecutor. The difficulties derive from observance of the rules governing evidence admissible against some but not all defendants in a criminal case. The tempta-

tions derive from the advantages of prosecuting in one trial two or more persons collaborating in a criminal enterprise. One of the most recurring of the difficulties pertains to incriminating declarations by one or more of the defendants that are not admissible against others. The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. While enforcing the rule of admitting the declaration solely against a declarant and admonishing the jury not to consider it against other defendants, Judge Learned Hand, in a series of cases, has recognized the psychological feat that this solution of the dilemma demands of juries. He thus stated the problem:

> "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." *Nash* v. *United States,* 54 F. 2d 1006, 1007.

It may well be that where such a declaration only glancingly, as it were, affects a co-defendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's statement is so damning to another against whom it is inadmissible, as is true in this case,

the difficulty of introducing it against the declarant without inevitable harm to a co-conspirator, the petitioner in this case, is no justification for causing such harm. The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by not trying all the co-conspirators in a single trial.

It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best of reasons for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him. In any event, it is not for an appellate tribunal to know how the jury's mind would have operated if powerfully improper evidence had not in effect been put in the scale against petitioner.

In substance, I agree with the dissenting opinion of Judge Frank, below, 229 F. 2d 319, 322, and would therefore reverse.

Syllabus.

LA BUY, UNITED STATES DISTRICT JUDGE, *v.* HOWES LEATHER CO., INC., ET AL.

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

No. 27. Argued October 17–18, 1956.—Decided January 14, 1957.

Petitioner is a Federal District Judge who had pending before him two civil antitrust actions brought by private parties. Over a period of years, he had ruled upon many preliminary pleas and motions, requiring, in several instances, the hearing of oral arguments, the consideration of briefs and the writing of opinions and memoranda. Confronted with motions to set the cases for trial and a statement that it would take six weeks to try one of them, he *sua sponte* entered orders under Rule 53 (b) of the Federal Rules of Civil Procedure referring both cases to a master for hearings and the preparation of findings of fact and conclusions of law. As exceptional conditions requiring the references, he cited "an extremely congested calendar," the complexity of the cases and the fact that they would take considerable time to try. The Court of Appeals issued writs of mandamus requiring petitioner to vacate his orders of reference. *Held:* The Court of Appeals properly issued the writs of mandamus. Pp. 250–260.

1. Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it had discretionary power under the All Writs Act, 28 U. S. C. § 1651 (a), in proper circumstances to issue writs of mandamus reaching them. Pp. 254–255.

2. In the exceptional circumstances of these cases, the Court of Appeals properly exercised its discretionary power to issue the writs of mandamus, since it was justified in finding that the orders of reference were an abuse of petitioner's power under Rule 53 (b), amounting to little less than an abdication of the judicial function and depriving the parties of trials before the court on the basic issues involved in the litigation. *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379, and *Parr* v. *United States,* 351 U. S. 513, distinguished. Pp. 255–260.

(a) The use of masters is to aid judges in the performance of specific duties as they arise in the progress of a cause—not to displace the court. P. 256.

(b) Congestion of the calendar in itself is not such an exceptional circumstance as to warrant reference to a master. P. 259.

(c) That the cases referred had unusually complex issues of fact and law is not justification for reference to a master but rather an impelling reason for trial before a regular experienced judge. P. 259.

(d) Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds for reference to a master. P. 259.

(e) The detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master after the court has determined the over-all liability of defendants, provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation. P. 259.

3. Supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system; and the All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here. Pp. 259–260.

226 F. 2d 703, affirmed.

James A. Sprowl argued the cause for petitioner. With him on the brief was *Edward R. Johnston.*

Jack I. Levy argued the cause for respondents. On the brief were *Mr. Levy* for Howes Leather Co., Inc., and *David L. Dickson* and *John F. McClure* for Montgomery Ward & Co., Inc., respondents.

Mr. Justice Clark delivered the opinion of the Court.

These two consolidated cases present a question of the power of the Courts of Appeals to issue writs of mandamus to compel a District Judge to vacate his orders entered under Rule 53 (b) of the Federal Rules of Civil Procedure referring antitrust cases for trial before a master. The petitioner, a United States District Judge sitting in the Northern District of Illinois, contends that the Courts of Appeals have no such power and that, even if they did, these cases were not appropriate ones for its exercise. The

Court of Appeals for the Seventh Circuit has decided unanimously that it has such power and, by a divided court, that the circumstances surrounding the references by the petitioner required it to issue the mandamus about which he complains. 226 F. 2d 703. The importance of the question in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals, led to our grant of a writ of certiorari. 350 U. S. 964. We conclude that the Court of Appeals properly issued the writs of mandamus.

History of the Litigation.—These petitions for mandamus, filed in the Court of Appeals, arose from two antitrust actions instituted in the District Court in 1950.[1] *Rohlfing*[2] involves 87 plaintiffs, all operators of independent retail shoe repair shops. The claim of these plaintiffs against the six named defendants—manufacturers, wholesalers, and retail mail order houses and chain operators—is identical. The claim asserted in the complaint is a conspiracy between the defendants "to monopolize and to attempt to monopolize" and fix the price of shoe repair supplies sold in interstate commerce in the Chicago area, in violation of the Sherman Act. The allegations also include a price discrimination charge under the Robinson-Patman Act. *Shaffer*[3] involves six plaintiffs, all wholesalers of shoe repair supplies, and six defendants, including manufacturers and wholesalers of such supplies

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[1] *Rohlfing* v. *Cat's Paw Rubber Co.*, No. 50 C 229, U. S. D. C. N. D. Ill., and *Shaffer* v. *U. S. Rubber Co.*, No. 50 C 844, U. S. D. C. N. D. Ill.

[2] The figures indicated refer to the number of parties at the time of the petition for mandamus. When the action was originally filed there were 87 plaintiffs and 25 defendants.

[3] The figures indicated refer to the number of parties at the time of the petition for mandamus. When the action was originally filed there were 10 plaintiffs and 20 defendants.

and a retail shoe shop chain operator. The allegations here also include charges of monopoly and price fixing under the Sherman Act and price discrimination in violation of the Robinson-Patman Act. Both complaints pray for injunctive relief, treble damages, and an accounting with respect to the discriminatory price differentials charged.

The record indicates that the cases had been burdensome to the petitioner. In *Rohlfing* alone, 27 pages of the record are devoted to docket entries reflecting that petitioner had conducted many hearings on preliminary pleas and motions. The original complaint had been twice amended as a result of orders of the court in regard to misjoinders and severance; 14 defendants had been dismissed with prejudice; summary judgment hearings had resulted in a refusal to enter a judgment for some of the defendants on the pleadings; over 50 depositions had been taken; and hearings to compel testimony and require the production and inspection of records were held. It appears that several of the hearings were extended and included not only oral argument but submission of briefs, and resulted in the filing of opinions and memoranda by the petitioner. It is reasonable to conclude that much time would have been saved at the trial had petitioner heard the case because of his familiarity with the litigation.

The References to the Master.—The references to the master were made under the authority of Rule 53 (b) of the Federal Rules of Civil Procedure.[4] The cases were called on February 23, 1955, on a motion to reset them

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[4] Rule 53 (b) provides:

"(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

for trial. *Rohlfing* was "No. 1 below the black line" on the trial list, which gave it a preferred setting. All parties were anxious for an early trial, but plaintiffs wished an adjournment until May. The petitioner announced that "it has taken a long time to get this case at issue. I remember hearing more motions, I think, in this case than any case I have ever sat on in this court." The plaintiffs estimated that the trial would take six weeks, whereupon petitioner stated he did not know when he could try the case "if it is going to take this long." He asked if the parties could agree "to have a Master hear" it. The parties ignored this query and at a conference in chambers the next day petitioner entered the orders of reference *sua sponte*.[5] The orders declared that the court was "confronted with an extremely congested calendar" and that "exception [*sic*] conditions exist for this reason" requiring the references. The cases were referred to the master "to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law." It was further ordered in each case that "the Master shall commence the trial of this cause" on a certain date and continue with diligence, and that the parties supply security for costs.

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[5] The fact that the master is an active practitioner would make the comment of Chief Justice Vanderbilt with regard to the effect of references appropriate here. In his work, Cases and Materials on Modern Procedure and Judicial Administration (1952), at pages 1240–1241, he states:

"There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee. Only a drastic administrative rule, rigidly enforced, strictly limiting the matters in which a reference may be had and requiring weekly reports as to the progress of each reference will put to rout this inveterate enemy of dispatch in the trial of cases."

404165 O—57——23

While the parties had deposited some $8,000 costs, the record discloses that all parties objected to the references and filed motions to vacate them. Upon petitioner's refusal to vacate the references, these mandamus actions were filed in the Court of Appeals seeking the issuance of writs ordering petitioner to do so. These applications were grounded on 28 U. S. C. § 1651 (a), the All Writs Act.[6] In his answer to the show cause orders issued by the Court of Appeals, petitioner amplified the reasons for the references, stating "that the cases were very complicated and complex, that they would take considerable time to try," and that his "calendar was congested." Declaring that the references amounted to "a refusal on his [petitioner's] part, as a judge, to try the causes in due course," the Court of Appeals concluded that "in view of the extraordinary nature of these causes" the references must be vacated "if we find that the orders were beyond the court's power under the pertinent rule." 226 F. 2d, at 705, 706. And, it being so found, the writs issued under the authority of the All Writs Act. It is not disputed that the same principles and considerations as to the propriety of the issuance of the writs apply equally to the two cases.

The Power of the Courts of Appeals.—Petitioner contends that the power of the Courts of Appeals does not extend to the issuance of writs of mandamus to review interlocutory orders except in those cases where the review of the case on appeal after final judgment would be frustrated. Asserting that the orders of reference were in exercise of his jurisdiction under Rule 53 (b), petitioner urges that such action can be reviewed only on appeal and not by writ of mandamus, since by congres-

[6] "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

sional enactment appellate review of a District Court's orders may be had only after a final judgment. The question of naked power has long been settled by this Court. As late as *Roche* v. *Evaporated Milk Association,* 319 U. S. 21 (1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, the Court held that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Id.,* at 25. The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651 (a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379, 382–383 (1953). Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them. *Roche, supra,* at 25, and cases there cited. This is not to say that the conclusion we reach on the facts of this case is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders. We pass on, then, to the only real question involved, *i. e.,* whether the exercise of the power by the Court of Appeals was proper in the cases now before us.

The Discretionary Use of the Writs.—It appears from the docket entries to which we heretofore referred that the petitioner was well informed as to the nature of the antitrust litigation, the pleadings of the parties, and the gist of the plaintiffs' claims. He was well aware of the theory of the defense and much of the proof which necessarily was outlined in the various requests for discovery, admissions, interrogatories, and depositions. He heard arguments on motions to dismiss, to compel testimony on depositions, and for summary judgment. In fact, peti-

tioner's knowledge of the cases at the time of the references, together with his long experience in the antitrust field, points to the conclusion that he could dispose of the litigation with greater dispatch and less effort than anyone else. Nevertheless, he referred both suits to a master on the general issue. Furthermore, neither the existence of the alleged conspiracy nor the question of liability *vel non* had been determined in either case. These issues, as well as the damages, if any, and the question concerning the issuance of an injunction, were likewise included in the references. Under all of the circumstances, we believe the Court of Appeals was justified in finding the orders of reference were an abuse of the petitioner's power under Rule 53 (b). They amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.

The use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," *Ex parte Peterson,* 253 U. S. 300, 312 (1920), and not to displace the court. The exceptional circumstances here warrant the use of the extraordinary remedy of mandamus. See *Maryland* v. *Soper,* 270 U. S. 9, 30 (1926). As this Court pointed out in *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, 706 (1927): ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him]. . . ." The *Los Angeles Brush Corp.* case was cited as authority in 1940 for a *per curiam* opinion in *McCullough* v. *Cosgrave,* 309 U. S. 634, in which the Court summarily

ordered vacated the reference of two patent cases to a master. The cases arose from the same District Court in which the *Los Angeles Brush Corp.* case originated and the grounds for the references largely followed that case. It is to be noted that the grounds there are much more inclusive than those set out here, alleging all of those claimed by the petitioner and, in addition, the prolonged illness of the regular judge and the fact that no other judge was available to try the cases. It appears to us *a fortiori* that these cases were improperly referred to a master.

It is claimed that recent opinions of this Court are to the contrary. Petitioner cites *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379 (1953), and *Parr* v. *United States,* 351 U. S. 513 (1956). The former case did not concern rules promulgated by this Court but, rather, an Act of Congress, the venue statute. Furthermore, there we pointed out that the ". . . All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . . ." 346 U. S., at 383. Certainly, as the Court of Appeals found here, there was a clear abuse of discretion. In the *Parr* case, the District Court had not exceeded or refused to exercise its functions. It dismissed an indictment because the Government had elected to prosecute Parr in another district under a new indictment. The effect of the holding was merely that the dismissal of the first indictment was not an abuse of the discretion vested in the trial judge.

It is also contended that the Seventh Circuit has erroneously construed the All Writs Act as "conferring on it a 'roving commission' to supervise interlocutory orders of the District Courts in advance of final decision." Our examination of its opinions in this regard leads us to the conclusion that the Court of Appeals has exercised commendable self-restraint. It is true that mandamus should

be resorted to only in extreme cases, since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers. However, there is an end of patience and it clearly appears that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making references "does not commend itself" and ". . . should seldom be made, and if at all only when unusual circumstances exist." *In re Irving-Austin Building Corp.*, 100 F. 2d 574, 577 (1938). Again, in 1942, it pointed out that the words "exception" and "exceptional" as used in the reference rule are not elastic terms with the trial court the sole judge of their elasticity. "Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown." *Adventures in Good Eating, Inc.* v. *Best Places to Eat, Inc.*, 131 F. 2d 809, 815. Still the Court of Appeals did not disturb the reference practice by reversal or mandamus until this case was decided in October 1955. Again, Chief Judge Duffy in *Krinsley* v. *United Artists Corp.*, 235 F. 2d 253, 257 (1956), in which there was an affirmance of a case involving a reference, called attention to the fact that the practice of referring cases to masters was ". . . all too common in the Northern District of Illinois . . . ." The record does not show to what extent references are made by the full bench of the District Court in the Northern District; however, it does reveal that petitioner has referred 11 cases to masters in the past 6 years. But even "a little cloud may bring a flood's downpour" if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials. This is not to say that we are neither aware of nor fully appreciative of the unfortunate congestion of the court calendar in many of our District Courts. The use of procedural devices in the heavily congested districts has proven to be most helpful in reducing docket congestion. Illus-

trative of such techniques are provision for an assignment commissioner to handle the assignment of all cases; the assignment of judges to handle only motions, pleas, and pretrial proceedings; and separate calendars for civil and criminal trials in cases that have reached issue. We enumerate these merely as an example of the progress made in judicial administration through the use of enlightened procedural techniques. It goes without saying that they can be used effectively only where adaptable to the specific problems of a district. But, be that as it may, congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception. Petitioner realizes this, for in addition to calendar congestion he alleges that the cases referred had unusual complexity of issues of both fact and law. But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds. The final ground asserted by petitioner was with reference to the voluminous accounting which would be necessary in the event the plaintiffs prevailed. We agree that the detailed accounting required in order to determine the damages suffered by each plaintiff might be referred to a master after the court has determined the over-all liability of defendants, provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation.

We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper

judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here. Its judgment is therefore

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, dissenting.

The issue here is not whether Judge La Buy's order was reviewable by the Court of Appeals. The sole question is whether review should have awaited final decision in the cause or whether the order was reviewable before final decision by way of a petition under the All Writs Act for the issuance of a writ of mandamus addressed to it. I do not agree that the writ directing Judge La Buy to vacate the order of reference was within the bounds of the discretionary power of the Court of Appeals to issue an extraordinary writ under the All Writs Act.[1] Only last Term, in *Parr* v. *United States,* 351 U. S. 513, this Court restated those bounds:

> "The power to issue them is discretionary and it is sparingly exercised. . . . 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 ex-

[1] "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

traordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn., supra,* at p. 30." 351 U. S., at 520.[2]

The action of the Court of Appeals for the Seventh Circuit here under review is outside these limitations. The case before the Court of Appeals was "not a case where a court has exceeded or refused to exercise its jurisdiction. . . ." Rule 53 (b) of the Federal Rules of Civil Procedure vested Judge La Buy with discretionary power to make a reference if he found, and he did, that "some exceptional condition" required the reference.[3] Here also "the most that could be claimed is that the district [court] . . . erred in ruling on matters within [its] jurisdiction." If Judge La Buy erred in finding that there was an "exceptional condition" requiring the reference or did not give proper weight to the caveat of the Rule that a "reference to a master shall be the exception and not the rule," that was mere error "in ruling on matters within [the District Court's] jurisdiction." Such mere error does not bring into play the power of the Court of Appeals to issue an extraordinary writ. Nor did Judge

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[2] Cf. *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379; *Ex parte Fahey,* 332 U. S. 258.

[3] It should be noted that the objection to references stated by Chief Justice Vanderbilt, as quoted in footnote 5 of the majority opinion, is reflected in New Jersey Revised Rules 4:54–1, which provides as follows: "No reference for the hearing of a matter shall be made to a master, except under extraordinary circumstances, *upon approval of the Chief Justice,* or for the taking of a deposition, or as to matters heard by a standing master appointed by the Supreme Court." (Emphasis added.) If the federal rule required a like consent by a chief judge, a reference without such consent would be outside the jurisdiction of the District Court, and, therefore, subject to correction by writ of mandamus. The vital distinction is that the federal rule as presently framed vests discretion in the District Courts.

La Buy's order of reference present the Court of Appeals with a case "where appellate review will be defeated if a writ does not issue." The litigants may suffer added expense and possible delay in obtaining a decision as a consequence of the reference, but *Roche* settles that "that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable." [4]

But, regrettable as is this Court's approval of what I consider to be a clear departure by the Court of Appeals from the settled principles governing the issuance of the extraordinary writs, what this Court says in reaching its result is reason for particularly grave concern. I think this Court has today seriously undermined the long-standing statutory policy against piecemeal appeals. My brethren say: "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them. . . . This is not to say that the conclusion we reach on the facts of this case is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders." I understand this to mean that proper circumstances are present for the issuance of a writ in this case because, if the litigants are not now heard, the Court of Appeals will not have an opportunity to relieve them of the burden of the added expense and delay of decision alleged to be the consequence of the reference. But that bridge was crossed by this Court in *Roche* and *Alkali,* where this very argument was rejected: "Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of

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[4] 319 U. S., at 30. Cf. *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 202–203.

the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct." 319 U. S., at 31.

What this Court is saying, therefore, is that the All Writs Act confers an independent appellate power in the Courts of Appeals to review interlocutory orders. I have always understood the law to be precisely to the contrary. The power granted to the Courts of Appeals by the All Writs Act is not an appellate power but merely an auxiliary power in aid of and to protect the appellate jurisdiction conferred by other provisions of law, *e. g.,* the power to review final decisions granted by 28 U. S. C. § 1291,[5] and to review specified exceptional classes of interlocutory orders granted by 28 U. S. C. § 1292.[6] This holding that an independent appellate power is given by the All Writs Act not only discards the constraints upon the scope of the power to issue extraordinary writs restated in *Parr,* but, by the very fact of doing so, opens wide the crack in the door which, since the Judiciary Act of 1789, has shut out from intermediate appellate review all interlocutory actions of the District Courts not within the few exceptional classes now specified by the Congress in § 1292.

The power of the Courts of Appeals to issue extraordinary writs stems from § 14 of the Judiciary Act of 1789.[7] Chief Judge Magruder, in *In re Josephson,* 218 F. 2d 174, provides us with an invaluable history of this power and

[5] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U. S. C. § 1291.

[6] Section 1292, in substance, confers upon the Courts of Appeals jurisdiction of appeals from interlocutory orders of the District Courts relating to injunctions, receivership, and certain admiralty and patent infringement cases.

[7] 1 Stat. 81, substantially re-enacted in § 262 of the Judicial Code of 1911, 36 Stat. 1162.

of the judicial development of its scope. He demonstrates most persuasively that "[t]he all writs section does not confer an independent appellate power; the power is strictly of an auxiliary nature, in aid of a jurisdiction granted in some other provision of law, as was sharply pointed out in Roche v. Evaporated Milk Ass'n, 1943, 319 U. S. 21, 29–31 . . . ." 218 F. 2d, at 180.

The focal question posed for a Court of Appeals by a petition for the issuance of a writ is whether the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision. That was *Josephson*, where the Court of Appeals for the First Circuit held that an order of a District Court in the circuit transferring a case to the District Court of another circuit was within the reach of the Court of Appeals' power under the All Writs Act because "the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to this court by appeal from a 'final decision'." [8] 218 F. 2d, at 181. In contrast, a District Court order denying a transfer would not come under the umbrella of power under the All Writs Act, since retention of the cause by the District Court can hardly thwart or tend to defeat the power of the Court of Appeals to review that order after final decision of the case. The distinction between the grant and denial of transfer was recognized in *Carr* v. *Donohoe*, 201 F. 2d 426, where the Court of Appeals for the Eighth Circuit denied a petition for writ of mandamus directed to an order of a District Court transferring the

[8] Accord, *Wiren* v. *Laws*, 90 U. S. App. D. C. 105, 194 F. 2d 873; *Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457.

cause to another District Court within the same circuit. The Court of Appeals properly noted that the order was merely a nonappealable interlocutory order in nowise impairing its actual or potential jurisdiction to review that and any other action after final decision, observing: "It seems obvious that the transfer of the . . . action . . . to [another district in the same circuit] cannot in any way impair or defeat the jurisdiction of this Court to review any appealable order or judgment which eventually may be entered in the case." [9] 201 F. 2d, at 428–429.

This Court's reliance upon *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, and *McCullough* v. *Cosgrave,* 309 U. S. 634, is, in my opinion, misplaced. Those cases involved the power, not of the Courts of Appeals, but of this Court, to issue extraordinary writs. In *Josephson,* Chief Judge Magruder took pains to emphasize the "caution that decisions of the Supreme Court of the United States, at least prior to 1948, supporting the issuance, *by that Court,* of a writ of mandamus directed to a lower federal court, may not safely be relied upon by an intermediate court of appeals as authority for the issuance by the latter court of a writ of mandamus directed to a district court within the circuit. The reason is that the Supreme Court might have been exercising a different sort of power from the strictly auxiliary power given to us under the all writs section." 218 F. 2d, at 179. This "different sort of power" derived from § 13 of the Judiciary

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[9] In the *Josephson* case, Chief Judge Magruder said much the same thing:

"If the district judge had held on to the case, *i. e.,* had denied the motion for transfer, such action would have preserved, not frustrated, any potential appellate jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying a transfer, on the pretense that such a review would be in 'aid' of our appellate jurisdiction." 218 F. 2d, at 181.

Act of 1789, granting the Supreme Court power to issue writs of mandamus "in cases warranted by the principles and usages of law." [10] This provision, unlike the All Writs Act, was not restricted in its use to aiding the jurisdiction of the appellate court, and therefore might be deemed to have granted a broader power to this Court than that conferred on the Courts of Appeals by the latter statute.

Furthermore, *Los Angeles Brush Corp.* was a case where a reference was made, not because a district judge decided that the particular circumstances of the particular case required a reference, but pursuant to an agreement among all the judges of that District Court always to appoint masters to hear patent cases regardless of the circumstances of particular cases. The *McCullough* situation was much the same. As that case was delimited in *Roche,* this Court was there confronted by a case of "the persistent disregard of the Rules of Civil Procedure prescribed by this Court." 319 U. S., at 31.

The key to both *Los Angeles Brush Corp.* and *McCullough* is found in the language in the former in 272 U. S., at 706:

> ". . . we think it clear that where the subject concerns the enforcement of the Equity Rules which by law it is the duty *of this Court to formulate and put in force,* and in a case in which this Court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them." (Emphasis added.)

In other words, neither of those cases can be accepted as supporting what the Court of Appeals undertook to do here, both because of the absence in old § 234 of the "in aid of" jurisdiction limitation now contained in § 1651,

[10] 1 Stat. 80, 81, substantially re-enacted in § 234 of the Judicial Code of 1911, 36 Stat. 1156.

and of anything approaching a wholesale disregard of the rules prescribed by this Court, such as was involved there. I subscribe fully to Chief Judge Magruder's conclusion in *Josephson:*

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U. S. C. § 1651 [the All Writs Act] grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice." 218 F. 2d, at 177.

The view now taken by this Court that the All Writs Act confers an independent appellate power, although not so broad as "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders," in effect engrafts upon federal appellate procedure a standard of interlocutory review never embraced by the Congress throughout our history, although it is written into the English Judicature Act [11] and is followed in varying degrees in some of the States.[12] That standard allows interlocutory appeals by leave of the appellate court. It is a compromise between conflicting viewpoints as to the extent that interlocutory appeals should be allowed.[13] The federal policy of limited interlocutory

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[11] Judicature Act, 1925, 15 & 16 Geo. 5, c. 49, § 31 (1) (i).

[12] *E. g.*, Miss. Code Ann., 1942, § 1148; N. J. Rev. Rules 2:2–3.

[13] See, *e. g.*, the discussion by Mr. Justice Jacobs in *Appeal of Pennsylvania R. Co.*, 20 N. J. 398, 120 A. 2d 94; Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539; Note, 50 Col. L. Rev. 1102; Note, 58 Yale L. J. 1186; Report, Special Meeting of Judicial Conference of the United States, p. 7 (March 20–21, 1952); Report, Regular Annual Meeting of Judicial Conference of the United States, p. 27 (1953).

review stresses the inconvenience and expense of piecemeal reviews and the strong public interest in favor of a single and complete trial with a single and complete review. The other view, of which the New York practice of allowing interlocutory review as of right from most orders is the extreme example, perceives danger of possible injustice in individual cases from the denial of any appellate review until after judgment at the trial.[14]

The polestar of federal appellate procedure has always been "finality," meaning that appellate review of most interlocutory actions must await final determination of the cause at the trial level. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States,* 309 U. S. 323, 324–325. The Court's action today shatters that statutory policy. I protest, not only because we invade a domain reserved by the Constitution exclusively to the Congress,[15] but as well because the encouragement to interlocutory appeals offered by this decision must necessarily aggravate further the already bad condition of calendar congestion in some of our District Courts and also add to the burden of work of some of our busiest Courts of Appeals. More petitions for interlocutory review, requiring the attention of the Courts of Appeals, add, of course, to the burden of work of those courts. Meanwhile final decision of the cases concerned is delayed while the District Courts mark time awaiting action upon the petitions. Rarely does determination upon interlocutory review terminate the litigation. Moreover, the District Court calendars become longer with the addition of new cases before older ones

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[14] N. Y. Civ. Prac. Act, § 609.

[15] U. S. Const., Art. III, § 1.

are decided. This, then, interposes one more obstacle to the strong effort being made to better justice through improved judicial administration.[16]

The power of the Court of Appeals to correct any error in Judge La Buy's reference is found exclusively in the power to review final decisions under § 1291. The Court of Appeals erred by assuming a nonexistent power under the All Writs Act to review this interlocutory order in advance of final decision. Insofar as the Court approves this error, I must respectfully dissent.

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[16] The seriousness of the problem of calendar congestion in both federal and state courts prompted the Attorney General of the United States, in May 1956, to call a conference on court congestion and delay. This conference resulted in the appointment of a distinguished committee to formulate a frontal attack upon the problem. Rogers, Towards Eliminating Delayed Justice, an address prepared for delivery before the Mid-Atlantic Regional Meeting of the American Bar Association, October 11, 1956.

404165 O—57——24

SORIANO *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 49. Argued December 5, 1956.—Decided January 14, 1957.

Petitioner, a resident of the Philippines, sued in the Court of Claims to recover just compensation for the requisitioning by Philippine guerrilla forces of certain equipment and supplies during the Japanese occupation of the Philippine Islands. The suit was filed more than six years after the last alleged requisition. *Held:* The suit was barred by the six-year statute of limitations. Pp. 270–277.

(a) The period of limitation applicable to petitioner's case in the Court of Claims was not affected by his having filed a claim with the Army Claims Service. Pp. 273–275.

(b) The existence of hostilities during the Japanese occupation of the Philippines did not toll the statute of limitations in petitioner's case. *Hanger* v. *Abbott,* 6 Wall. 532, distinguished. Pp. 275–276.

(c) Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. P. 276.

(d) Petitioner's suit was not filed within three years after the cessation of hostilities, and would be barred even if the three-year limitation of the statute were applicable. Pp. 276–277.

133 Ct. Cl. 971, affirmed on other grounds.

Prew Savoy and *George W. Foley* argued the cause for petitioner. On the brief were *Mr. Savoy* and *Jay Pfotenhauer.*

Roger D. Fisher argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *William W. Ross.*

Mr. Justice Clark delivered the opinion of the Court.

This suit was filed in the Court of Claims by petitioner, a resident of the Philippines, to recover just compensation for the requisitioning by Philippine guerrilla forces

of certain foodstuffs, supplies, equipment, and merchandise during the Japanese occupation of the Philippine Islands. While decision on the merits would require a determination of the status of Philippine guerrillas as a unit operating in the service of the United States, we do not reach that question. We have determined that the Court of Claims lacks jurisdiction because the claim was not filed within the period provided by the statute, 62 Stat. 976, 28 U. S. C. § 2501.[1]

On July 26, 1941, pursuant to the Philippine Independence Act,[2] President Roosevelt ordered the Philippine Army into the service of the armed forces of the United States.[3] After the fall of Bataan and Corregidor in 1942, elements of this Philippine Army fled to the hills

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[1] 62 Stat. 976, 28 U. S. C. § 2501, the pertinent part of which reads:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

. . . . . .

"A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

[2] The Philippine Independence Act of March 24, 1934, 48 Stat. 456 *et seq.*, provides in pertinent part:

"(12) The Philippine Islands recognizes the right of the United States to expropriate property for public uses, to maintain military and other reservations and armed forces in the Philippines, and, upon order of the President, to call into the service of such armed forces all military forces organized by the Philippine government." *Id.*, at 457.

[3] Military Order of President Roosevelt, dated July 26, 1941, 6 Fed. Reg. 3825, which provides in pertinent part:

". . . I hereby call and order into the service of the armed forces of the United States for the period of the existing emergency, and place under the command of a General Officer, United States Army, to be designated by the Secretary of War from time to time, all of the organized military forces of the Government of the Commonwealth of the Philippines . . . ."

and continued military resistance against the Japanese as guerrilla units. These units, from time to time, requisitioned and commandeered supplies from Philippine civilians. Petitioner contends that these units were part of the United States Army having implied authority to bind the United States to pay for such supplies. He alleges that from September 1942 until the last requisition in January 1945 he delivered supplies to these guerrilla units of the value of $119,765.75. He filed a claim for this amount with the United States Army Claims Service on March 30, 1948. This claim was denied on June 21, 1948.

Thereafter on April 26, 1951, more than six years after the last alleged requisition, this action was filed in the United States Court of Claims. The Government moved to dismiss on several grounds, including (1) that the statutory limitation period had run, and (2) that the units were part of the Philippine forces for which the United States was in no manner responsible. In a *per curiam* order, 133 Ct. Cl. 971, after issue was drawn on the pleadings, the Court of Claims dismissed the suit on the authority of *Logronio* v. *United States,* 132 Ct. Cl. 596, 133 F. Supp. 395 (1955). In effect, this reaffirmed its earlier holdings that members of the guerrilla units of the Philippine Army were *not* part of the Army of the United States.[4] The limitation question was not passed upon.

We granted certiorari, 351 U. S. 917, to determine the validity of the claims of the petitioner and others in like position. After issuance of the writ in this case, the Court of Claims in *Compania Maritima* v. *United States,* 136 Ct. Cl. ——, 145 F. Supp. 935 (1956), held that a Philippine resident seeking redress against the United States was under a legal disability while hostilities

[4] *Victorio* v. *United States,* 91 F. Supp. 748 (1950), vacated, 122 Ct. Cl. 708, 106 F. Supp. 182 (1952); *Logronio* v. *United States,* 132 Ct. Cl. 596, 133 F. Supp. 395 (1955), overruling the second *Victorio* opinion, *supra.*

between Japan and the United States continued. The court further held that the claim of such a person must be filed within three years "after the disability ceases," *i. e.,* by September 2, 1948. Apprehensive that this rule might be applied to his case, petitioner requested and we granted permission to argue the limitation question which, as we have said, had been raised but not considered at the time of the dismissal by the Court of Claims.

Petitioner urges that his suit was timely filed because he was first required to present his claim to the Army Claims Service before he could prosecute the action in the Court of Claims. This administrative procedure, he points out, was not exhausted until June 21, 1948, and this suit was filed on April 26, 1951, less than three years thereafter. But, if he should fail with this contention, he argues that the war suspended the running of the statute and it was, therefore, tolled until September 2, 1945, when hostilities ceased with Japan. We cannot agree with either contention.

It has been settled since *Kendall* v. *United States,* 107 U. S. 123 (1883), that the Congress in creating the Court of Claims restricted that court's jurisdiction. In *Kendall* this Court held that the Congress in the Act creating the Court of Claims gave the Government's consent to be sued therein only in certain classes of claims and that no others might be asserted against it, including "claims which are declared barred if not asserted within the time limited by the statute." *Id.,* at 125. As to the latter cases, jurisdiction was given only over those filed "within six years after such claim *first* accrues," unless the claimant was "under legal disability or beyond the seas at the time the claim accrues," in which event suit must "be filed within three years after the disability ceases." 62 Stat. 976, 28 U. S. C. § 2501. As was said in *Kendall, supra,* "The court cannot superadd to those enumerated . . . ," it having "no more authority to engraft [another] dis-

ability upon the statute than a disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed." *Id.*, at 125.

Petitioner asserts that his action did not accrue until the denial of the claim by the Army Claims Service. At the same time, he admits that the claim filed there was based on the alleged delivery of supplies, etc., on the promise of future payment. The claim, if allowed, was against the Philippine Government, not the United States.[5] The claim asserted in this proceeding, on the contrary, is against the United States and based on the alleged taking of property without just compensation in violation of the Fifth Amendment. Petitioner would have us hold that this just compensation case could not be filed until after an administrative denial of his claim filed with the Army Claims Service. But, even if the claims were laid on the same theory and each was directed against the United States, Congress has made no such requirement. It has not so restricted the jurisdiction of

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[5] On August 6, 1945, the functions of the Army Claims Service, which had been established in April 1945, were extended to include consideration of certain types of guerrilla claims, such as claims of civilians for compensation for supplies delivered to the guerrillas during the Japanese occupation, provided "there was a clear understanding at the time the supplies and equipment or services were purchased or contracted for that payment would eventually be made." See the order of General MacArthur to the Commanding General, U. S. Armed Forces, Western Pacific, dated August 6, 1945. Such claims were actually asserted against the Philippine Government and, if and when approved by the Claims Service, were paid by that Government. In 1946, Congress advanced $200,000,000 for the expenses of the Army of the Philippines, 60 Stat. 14, and at various other times during the war similar special appropriations were made. From such appropriations the Philippine Government paid whatever claims were found valid. For further discussion of the operation of the Army Claims Service in the Philippines, see *Victorio* v. *United States*, 91 F. Supp. 748 (1950).

the Court of Claims.[6] Under the circumstances, for us to say that the exhaustion of administrative remedies in such case is a prerequisite to the jurisdiction of the Court of Claims would but "engraft [another] disability upon the statute" and thus frustrate the purpose of Congress. Furthermore, it would be a limitless extension of the period of limitation that Congress expressly provided for the prosecution of claims against the Government in the Court of Claims. This we cannot do.

We now reach petitioner's second contention. The cause of action as alleged by petitioner was for just compensation for supplies, etc., taken from him by guerrillas during the Japanese occupation of the Philippines. He alleges in his complaint that the action, if any he has, accrued at the time of the taking and could only be maintained within six years thereafter but for the existence of the hostilities which he claims tolled the statute. He depends on *Hanger* v. *Abbott,* 6 Wall. 532 (1868), to support this position. Such reliance is misplaced. That case involved private citizens, not the Government. It has no applicability to claims against the sovereign. See *Haycraft* v. *United States,* 22 Wall. 81 (1875).

To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was

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[6] While the Court of Claims held in *Dino* v. *United States,* 119 Ct. Cl. 307 (1951), that a claim similar to the one here involved should first be asserted in the appropriate administrative agency, this rule has now been abandoned by that court. See, *e. g.,* the discussion in *Tan* v. *United States,* 122 Ct. Cl. 662, 102 F. Supp. 552 (1952), and the cases there cited.

not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war.[7] And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *United States* v. *Sherwood*, 312 U. S. 584, 590–591 (1941), and cases there cited. Furthermore, even if hostilities prevented petitioner from filing his claim and this condition could be regarded as creating a "disability," the claim would nonetheless be barred by the express terms of this statute because not filed within three years after the cessation of hostilities, to wit, before September 2, 1948. Likewise, if petitioner claimed such a disability under the Trading with the Enemy Act,[8] he would not better his position, for timely action was necessary by the

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[7] Congress specifically tolled the statute of limitations for some actions against the Government during the Second World War, *e. g.*, Soldiers' and Sailors' Civil Relief Act, 54 Stat. 1181, 50 U. S. C. App. § 525, providing for suspension of limitations in suits by or against servicemen; and § 34 of the Trading with the Enemy Act, 60 Stat. 925–926, 50 U. S. C. App. § 34 (a), suspending limitations in suits against the Alien Property Custodian respecting vested property. However, the statute of limitations has not been enlarged by Congress for claims such as petitioner's.

[8] 40 Stat. 411, 50 U. S. C. App. § 2:

"That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

same date. The same is true of any claim under the disability specifically provided for "persons beyond the seas," [9] even if this provision were applicable to petitioner. Such applicability has not been urged and we do not pass upon it.

We are not unmindful that the enforcement of this rule might result in hardship in some cases, and perhaps frustrate the expectations of some Philippine citizens who in good faith supplied recognized guerrilla units. Such considerations are not for us, as this Court can enforce relief against the sovereign only within the limits established by Congress. Petitioner here had six years within which to act. He filed no claim whatever until after the expiration of three years from the date he alleges the last taking occurred. This claim was filed with the Army Claims Service on the basis of an alleged contract. That claim was denied within less than three months after it was filed. This left petitioner over two and a half years additional time to pursue his just compensation remedy. Still he did nothing for almost three years, when he filed this suit in the Court of Claims. By that time his claim, on any theory, was barred by statute. The judgment is therefore

Affirmed.

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

If petitioner had sued in the Court of Claims without first presenting his claim to the Army Claims Service, I

[9] The present saving clause (see note 1, *supra*) was enacted in 1948. However, the pre-1948 statute, 36 Stat. 1139, 28 U. S. C. (1940 ed.) § 262, also had a saving clause which contained as a specific disability "persons beyond the seas at the time the claim accrued." The 1948 amendment merely substituted the general saving clause for the prior clause which specifically set forth various disabilities.

think the Court of Claims would have been warranted in dismissing it. The Army Claims Service was established April 7, 1945, by General Douglas MacArthur to process claims such as this one. The Army Claims Service questioned whether expenses incurred by guerrilla organizations could be paid out of the appropriated funds. On August 6, 1945, General MacArthur advised the Army Claims Service that it could authorize the payment of claims such as this one. That directive stated:

> ". . . The United States Army will assume the responsibility for paying certain claims arising out of activities of guerrilla forces in the Philippines. That responsibility will be limited to claims for the value of goods or services essential for carrying on operations against the enemy.
>
> ". . . No payments will be made on claims arising out of activities of other than recognized guerrilla forces.
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> . . . . .
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> ". . . Such claims will be paid from the appropriation, 'Expenses, Army of the Philippines'.
>
> ". . . Payment will be made only on claims where there was a clear understanding at the time the supplies and equipment or services were purchased or contracted for that payment would eventually be made. There must have been a clear intention on the part of the guerrilla commander and of the vendor or employee that an obligation was being created. It must be definitely shown that the provision of such supplies, equipment or services was not intended as a patriotic donation to the common cause against the enemy. It must also be definitely shown that the supplies, equipment or services were essential for the operation of the guerrilla forces."

That directive was issued in accordance with the Act of July 3, 1945, 59 Stat. 401–402, which appropriated money for "all expenses necessary for the mobilization, operation, and maintenance of the Army of the Philippines." The expenditure and accounting were to be in the manner prescribed by the President. *Id.*, at 402. And the moneys were to be available to the Philippine Government "as authorized by the Commanding General, United States Army Forces in the Far East." *Id.*, at 402. The Government's brief advises us that nearly $300,000,000 was appropriated by the Congress for that purpose through July 3, 1945. And on February 18, 1946, $200,000,000 more was added to that appropriation. 60 Stat. 14.

The statutory scheme for payment of the expenses of the guerrilla forces, therefore, demonstrates that this claim, if it can be sustained on the merits, runs against the United States. The fact that approved claims were paid by the Philippine Government is a mere administrative detail. For it acted in this respect only as a disbursing agency for the United States.

Hence petitioner properly first presented his claim to the Army Claims Service, which rejected it June 21, 1948. The six-year statute should be held to run from that date. For it is the general rule that, where a claim must first be processed by an administrative agency, it does not accrue until the agency refuses payment. See *United States* v. *Taylor,* 104 U. S. 216, 222. Cf. *United States* v. *Clark,* 96 U. S. 37, 43–44.

That was the view of the Court of Claims in an earlier case involving such a problem. See *Dino* v. *United States,* 119 Ct. Cl. 307. I think the Court of Claims position in the *Dino* case is the correct one.

JAFFKE *v.* DUNHAM, TRUSTEE IN BANKRUPTCY.

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

No. 60. Argued December 12, 1956.—Decided January 14, 1957.

The District Court entered judgment for petitioner, although it struck from the record an affidavit offered in evidence by petitioner in support of his claim. The Court of Appeals reversed on the ground that petitioner had failed to prove his claim. In doing so, it refused to consider the action of the District Court in striking the affidavit, because petitioner had not cross-appealed. *Held:*

1. If the District Court erred in striking the affidavit, a cross-appeal by petitioner was not prerequisite to the Court of Appeals' considering the affidavit in support of the District Court's judgment. P. 281.

2. On remand of this case, the Court of Appeals should consider the questions of the admissibility and weight of the affidavit and whether relevant admissible evidence established a constructive trust under Illinois law. P. 281.

229 F. 2d 232, reversed and remanded.

Herbert J. Miller, Jr. argued the cause for petitioner. With him on the brief were *Chauncey P. Carter, Jr.* and *William M. Giffin.*

G. W. Horsley argued the cause and filed a brief for respondent.

PER CURIAM.

We granted certiorari in this case to review a judgment of the Court of Appeals for the Seventh Circuit, 229 F. 2d 232, reversing an order of the District Court for the Southern District of Illinois, sitting in bankruptcy, which required respondent as trustee of a bankrupt's estate to pay $27,400 to petitioner. 351 U. S. 949. The District Court's order was based on a finding that, subsequent to

the date of the adjudication of bankruptcy, the bankrupt had obtained money by fraud from the petitioner and had turned over $27,400 of that money to respondent. At the hearing before the District Court, petitioner had sought to introduce into evidence an affidavit in which the bankrupt stated that he had paid $36,000 of the money he had received from petitioner to the respondent. At the conclusion of the hearing, the District Court sustained respondent's motion to strike the affidavit.

On appeal, the Court of Appeals held that petitioner had failed to prove that any specific portion of the money that he had given the bankrupt became a part of the funds in the hands of respondent. Because petitioner had not cross-appealed, the Court of Appeals held that it could not consider the action of the District Court in striking the bankrupt's affidavit from the record.

A successful party in the District Court may sustain its judgment on any ground that finds support in the record. If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435–436; *Langnes* v. *Green,* 282 U. S. 531, 538–539. Since the Court of Appeals did not consider the admissibility and weight of the affidavit, we remand to the Court of Appeals for its consideration of those issues.

The claim in this case is that relevant admissible evidence established a constructive trust. Whether it did so or not is a question of Illinois law. The Court of Appeals, in the view it took of the case before it, did not reach this local question. On remand, that question too must be considered by the Court of Appeals.

Reversed and remanded.

NATIONAL LABOR RELATIONS BOARD *v.* LION OIL CO. ET AL.

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

No. 4. Argued October 8, 1956.—Decided January 22, 1957.

Section 8 (d) (4) of the National Labor Relations Act, as amended, provides that a party who desires to modify or terminate a collective bargaining contract must continue "in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after . . . notice is given or until the expiration date of such contract, whichever occurs later." Under a collective bargaining contract between an employer and a labor union, the earliest date upon which the contract was subject to amendment was October 23, 1951, and the contract became terminable after that date upon further notice by either party. The union gave notice of proposed amendments 60 days in advance of October 23, and a strike occurred long after that date, though without further notice of termination of the contract. *Held:*

1. The notice and waiting requirements of § 8 (d) were fully satisfied; the strike did not violate § 8 (d) (4); and the strikers did not lose their status as employees entitled to the protection of the Act. Pp. 283–294.

(a) In expounding a statute, courts must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy. P. 288.

(b) A construction of a statute that would produce incongruous results is to be avoided. P. 288.

(c) The substitution of collective bargaining for economic warfare, and the protection of the right of employees to engage in concerted activities for their own benefit, were dual purposes of the Taft-Hartley Act; and a construction which serves neither of these aims is to be avoided. *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 284. P. 289.

(d) "Expiration date" in § 8 (d) (1) of the Act relates to the date when a contract is subject to modification as well as the date when it would come to an end; and the same phrase in § 8 (d) (4) must carry the same meaning. Pp. 289–290.

(e) This construction gives meaning to the congressional language which accords with the general purpose of the Act. Pp. 290–292.

(f) The fact that on October 23 the contract became terminable upon further notice by either party is immaterial. The statutory notice requirement operates wholly independently of whatever notice requirement the parties have fixed for themselves. P. 292.

2. The strike was not in breach of the contract and the strikers were not disentitled to relief in proceedings before the Labor Board. *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, distinguished. Pp. 293–294.

(a) Where there has been no express waiver of the right to strike, a waiver of the right during such a period is not to be inferred. P. 293.

(b) The two-phase provision for terminating the contract here involved does not mean that it was not within the contemplation of the parties that economic weapons might be used to support demands for modification before the notice to terminate was given. P. 293.

221 F. 2d 231, reversed and remanded.

Theophil C. Kammholz argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Marvin E. Frankel* and *Dominick L. Manoli.*

Jeff Davis argued the cause for respondents. With him on the brief were *B. L. Allen* and *Sam Pickard, Jr.*

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

In this case we are called upon again to interpret § 8 (d) of the National Labor Relations Act, as amended.[1]

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[1] "SEC. 8. . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an

See *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270. In particular we are concerned with § 8 (d)(4), which provides that a party who wishes to modify or terminate

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industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." 61 Stat. 140, 142–143, 29 U. S. C. § 158 (d).

a collective bargaining contract must continue "in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after . . . notice [of his wish to modify or terminate] is given or until the expiration date of such contract, whichever occurs later." Since § 8 (d) defines the duty to bargain collectively, a violation of § 8 (d)(4) constitutes a refusal to bargain, an unfair labor practice for employers, § 8 (a)(5), and unions, § 8 (b)(3). The last sentence of § 8 (d) contains an additional sanction: an employee who strikes within the specified 60-day period loses his status as an employee for the purposes of §§ 8, 9 and 10 of the Act. The sole question presented by the petition for certiorari is:

> Whether the requirement of this Section is satisfied where a contract provides for negotiation and adoption of modifications at an intermediate date during its term, and a strike in support of modification demands occurs after the date on which such modifications may become effective—and after the 60-day notice period has elapsed—but prior to the terminal date of the contract.

We are told by the Solicitor General that the question is of major importance in the negotiation and administration of hundreds of collective bargaining agreements throughout the country; that there is a decided trend among unions and employers to execute contracts of longer duration than formerly and to include provisions for reopening to negotiate changes during the contract term.[2] Because of the importance of the question, we granted certiorari, 350 U. S. 986, to review a decision of the Court of Appeals for the Eighth Circuit to the effect that § 8 (d)(4) bans strikes to obtain modifications of a

[2] BNA, Collective Bargaining Negotiations and Contract Service, 36:301.

contract until the contract by its terms or by the action of the parties has terminated.

On October 23, 1950, respondent Lion Oil Co. and the Oil Workers International Union, CIO, entered into a contract which provided:

> "This agreement shall remain in full force and effect for the period beginning October 23, 1950, and ending October 23, 1951, and thereafter until canceled in the manner hereinafter in this Article provided.
>
> "This agreement may be canceled and terminated by the Company or the Union as of a date subsequent to October 23, 1951, by compliance with the following procedure:
>
> "(a) If either party to this agreement desires to amend the terms of this agreement, it shall notify the other party in writing of its desire to that effect, by registered mail. No such notice shall be given prior to August 24, 1951. Within the period of 60 days, immediately following the date of the receipt of said notice by the party to which notice is so delivered, the Company and the Union shall attempt to agree as to the desired amendments to this agreement.
>
> "(b) If an agreement with respect to amendment of this agreement has not been reached within the 60-day period mentioned in the sub-section immediately preceding, either party may terminate this agreement thereafter upon not less than sixty days' written notice to the other. Any such notice of termination shall state the date upon which the termination of this agreement shall be effective."

On August 24, 1951, the union served written notice on the company of its desire to modify the contract.[3] Nego-

[3] Copies of the notice were sent to the Federal Mediation and Conciliation Service and to the Arkansas Labor Commissioner to comply with § 8 (d) (2).

tiations began on the contractual changes proposed by the union. The union members voted for a strike on February 14, 1952, but the strike, thrice postponed as negotiations continued, did not actually begin until April 30, 1952. The union never gave notice to terminate the contract as contemplated by the quoted contractual provision. Therefore, at all relevant times a collective bargaining agreement was in effect. On August 3, a new contract was executed, and the strikers began to return to work the following day. Certain actions of the company during the strike were the basis of unfair labor practice charges by the union upon which a complaint issued.

The Labor Board found that the company was guilty of unfair labor practices under § 8 (a)(1), (3) and (5) of the Act. The company defended on the ground that the strike, because it occurred while the contract was in effect, was in violation of § 8 (d)(4). A majority of the Board rejected this defense, holding that

> "The term 'expiration date' as used in Section 8 (d)(4) . . . has a twofold meaning; it connotes not only the terminal date of a bargaining contract, but also an agreed date in the course of its existence when the parties can effect changes in its provisions."

The Board held that since, under the contract in dispute, October 23, 1951, was such an "agreed date," the notice given August 24 followed by a wait of more than 60 days satisfied the statute. The company was ordered to cease and desist and, affirmatively, to make whole employees found to have been discriminated against. 109 N. L. R. B. 680, 683.

On the company's petition for review, the Court of Appeals set aside the Board's order. 221 F. 2d 231. The court held that the "expiration date" of the contract was the date on which all rights and obligations under it would

cease; that the second notice required to bring about this termination not having been given, the strike violated § 8 (d)(4) and the strikers therefore lost their status as employees entitled to the protection of the Act.[4]

In *Mastro Plastics Corp.* v. *Labor Board, supra,* we had before us another provision of § 8(d). What we said there in ruling out a narrowly literal construction of the words of the statute is equally apropos here. "If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' *United States* v. *Boisdoré's Heirs,* 8 How. 113, 122." 350 U. S., at 285. Moreover, in *Mastro Plastics* we cautioned against accepting a construction that "would produce incongruous results." *Id.,* at 286.

That § 8 (d)(4) is susceptible of various interpretations is apparent when § 8 (d) is read as a whole. Its ambiguity was recognized by the Joint Committee of Congress created by the very act of which § 8 (d) was a part to study the operation of the federal labor laws.[5] Members of the National Labor Relations Board, the agency specially charged by Congress with effectuating the purposes of the national labor legislation, have expressed divergent views on the proper construction of § 8 (d)(4); none of them has taken the position adopted

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[4] The only other case in the Courts of Appeals involving the question presented here is *Local No. 3, United Packinghouse Workers* v. *Labor Board,* 210 F. 2d 325, cert. denied, 348 U. S. 822, also decided by the Eighth Circuit. The court there construed § 8 (d)(4) as it did here, although on its facts the decision is reconcilable with the Board's construction of the section in this case.

[5] Joint Committee on Labor-Management Relations, Final Report, S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 62–63.

by the court below.[6] In the face of this ambiguity it will not do simply to say Congress could have made itself clearer and automatically equate the phrase "expiration date" only with the date when a contract comes to an end.

We find our guide to the general context of the statute in *Mastro Plastics*. In that case we recognized a "dual purpose" in the Taft-Hartley Act—to substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit. 350 U. S., at 284. A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it. The restriction on employees' concerted activities which would result from the construction placed upon § 8 (d)(4) by the Court of Appeals is obvious.[7] Too, we think it would discourage the development of long-term bargaining relationships. Unions would be wary of entering into long-term contracts with machinery for reopening them for modification from time to time, if they thought the right to strike would be denied them for the entire term of such a contract, though they imposed no such limitations on themselves.

We do not believe that the language used by Congress requires any such result. Section 8 (d)(1) provides that

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[6] The Board's original view in *Wilson & Co.*, 89 N. L. R. B. 310, was that § 8 (d) permitted strikes in support of contract changes any time after 60 days' notice. Member Peterson, concurring specially in the present case, adhered to that view. Member Murdock dissented on the same ground on which he had concurred specially in *Wilson & Co.*, namely, that § 8 (d) applies only during the period around the termination of a contract.

[7] Cf. § 13 of the Act: "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.

no party to an existing collective bargaining contract "shall terminate or modify such contract, unless the party desiring such termination or modification—(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . . ." The phrase "expiration date" is repeated in § 8 (d)(1) and again in the "whichever occurs later" clause of § 8 (d)(4) upon which this case turns. The use of the three words "termination," "modification" and "expiration" is significant. We conceive that a notice of desired modification would typically be served in advance of the date when the contract by its own terms was subject to modification. Notice of desired termination would ordinarily precede the date when the contract would come to an end by its terms or would be automatically renewed in the absence of notice to terminate. Therefore we conclude that Congress meant by "expiration date" in § 8 (d)(1) to encompass both situations, and the same phrase in § 8 (d)(4) must carry the same meaning. "Expiration" has no such fixed and settled meaning as to make this an unduly strained reading.

Our conclusion is buttressed by a provision of § 8 (d) which was added by the Conference Committee.[8]

> "[T]he duties . . . imposed [by subsections (2), (3) and (4)] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

The negative implication seems clear: Congress recognized a duty to bargain over modifications when the con-

[8] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35.

tract itself contemplates such bargaining. It would be anomalous for Congress to recognize such a duty and at the same time deprive the union of the strike threat which, together with "the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements." [9]

Although a 1948 committee report is no part of the legislative history of a statute enacted in 1947, we note that the Joint Committee on Labor-Management Relations, made up of members of the Congress which passed the Taft-Hartley Act, in its final report reached the same conclusion we do:

> "Reading section 8 (d) as a whole seems to lead to the conclusion that the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages. Use of the words 'or modify' and 'or modification' in the proviso, and use of 'or modification' in section 8 (d)(1), and the statement in the final paragraph of the section that the parties are not required to agree to any modification effective before the contract may be reopened under its terms, all seem to contemplate the right of either party to insist on changes in the contract if they have so provided. The right of the union would be an empty one without the right to strike after a 60-day notice." [10]

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[9] Subcommittee on Labor and Labor-Management Relations, Factors in Successful Collective Bargaining, S. Rep. under S. Res. 71, 82d Cong., 1st Sess. 7 (Committee Print).

[10] S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 62. In 1949 Senator Taft, who was a member of the Joint Committee, introduced a clarifying amendment to § 8 (d). See S. Rep. No. 99, Pt. 2, 81st Cong., 1st Sess. 42 (minority report). The amendment, along with a group of others, passed the Senate, 95 Cong. Rec. 8717, but did not become law.

The contemporary legislative history manifests no real recognition of the problem before us.[11] A reading of the committee reports and the floor debates alone could well lead to the conclusion that both the sponsors and the opponents of the bill saw in § 8 (d)(4) no more than a means for preventing "quickie" strikes by requiring a "cooling-off" period which would not in any circumstances exceed 60 days.[12] But the language used in the statute goes beyond this limited purpose. Significance must be given to the clause, "or until the expiration date of such contract, whichever occurs later." We believe our construction gives meaning to the congressional language which accords with the general purpose of the Act.

Applying that construction to the facts of this case, we hold that the notice and waiting requirements of § 8 (d) were fully satisfied. October 23, 1951, was the first date upon which the contract by its terms was subject to amendment. Notice of proposed amendments was served 60 days in advance. The strike did not occur until long afterward. The fact that on October 23 the contract became terminable upon further notice by either party is immaterial. One thing the most authoritative legislative gloss on § 8 (d), the report of the Senate Committee, makes clear is that the statutory notice

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[11] See S. Rep. No. 105, 80th Cong., 1st Sess. 24; *id.*, Pt. 2, pp. 21–22; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34–35. See also 93 Cong. Rec. 3835, 3839, 4036, 4904–4905, 5005, 5014, 6385, 6389, 6444, 6503–6504, 7530.

[12] The minority members of the Senate Committee which reported out the bill containing § 8 (d) did say that the effect of it was to incorporate no-strike clauses into labor contracts "by legislative fiat." The context, however, makes it tolerably clear that they were referring to a ban on strikes during the 60-day notice period. S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 22.

requirement operates wholly independently of whatever notice requirement the parties have fixed for themselves.[13] The situation here is not different, so far as the applicability of the statute is concerned, from that of a fixed-term contract with a clause providing for reopening at some specific time.

Nor can we accept respondents' alternative contention that, even apart from § 8 (d), the strike was in breach of contract and the strikers were for that reason not entitled to relief at the hand of the Board. Respondents rely upon *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332. In *Sands,* as in this case, the contract did not contain an express no-strike clause. Employees there refused in the course of the contract to continue work "in accordance with their contract." *Id.*, at 344. The refusal occurred midway in a fixed-term contract which did not provide for modifications during its term. This Court sustained the propriety of the employer's action in discharging the employees. Here the strike occurred at a time when the parties were bargaining over modifications after notice and in accordance with the terms of the contract. Where there has been no express waiver of the right to strike,[14] a waiver of the right during such a period is not to be inferred. We do not believe that the two-phase provision for terminating this contract means that it was not within the contemplation of the parties that

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[13] Section 8 (d) originated in the Senate. The Committee said, "It should be noted that this section [§ 8 (d)] does not render inoperative the obligation to conform to notice provisions for longer periods, if the collective agreement so provides. Failure to give such notice, however, does not become an unfair labor practice if the 60-day provision is complied with." S. Rep. No. 105, 80th Cong., 1st Sess. 24.

[14] A no-strike clause was one of the company's demands during the negotiations in this case.

economic weapons might be used to support demands for modification before the notice to terminate was given.

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

Reversed and remanded.

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

MR. JUSTICE FRANKFURTER, concurring in part and dissenting in part.

Agreeing as I do with the Court's construction of § 8 (d) of the National Labor Relations Act, as amended, I join its opinion on that phase. But I do not think that the Court should now pass upon respondent's alternative defense of breach of contract, which the Court of Appeals did not reach because of its view of the statute. Perhaps that question is not open for judicial consideration. Section 10 (e) of the Act provides that:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." [1]

The Board has not raised the point here, and it is not clear from the record that respondent urged this objection before the Board. In any event, it is not for this Court in the first instance to construe this particular contract. In remanding the case I would therefore leave it to the Court of Appeals to determine: (1) whether respondent has complied with § 10 (e); (2) whether in this contract an agreement not to strike is reasonably to be implied; and (3) whether respondent continued its

[1] Section 10 (f) specifies that this rule shall apply where judicial review of a Board order is obtained by an aggrieved person.

employment relationship with the strikers and should on that account be subject to the consequences of its alleged unfair labor practices even if the strike was in violation of contract. Finally, it is for the Court of Appeals to judge whether the record as a whole supports the Board's findings of unfair labor practices. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 491.

The inherent complications of the problem of statutory construction, as reflected in the conflicting views of the members of the Labor Board, make further discussion desirable, even though this may entail some repetition of what is said in the Court's opinion. Section 8 (d) defines the duty of the employer and the union to bargain collectively. A long proviso in the section treats specifically of this duty where a collective-bargaining agreement is in effect. The proviso must be considered in its entirety:

> "That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> "(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> "(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;
>
> "(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency estab-

lished to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The reasoned efforts of the five members of the Board and the three Circuit Judges whose task it has been to apply this proviso to the problem before us—where an economic strike occurs prior to the contract's termination but pursuant to its reopening provisions and after sixty

days' notice—have produced four distinct interpretations of the Act. The Court of Appeals, relying on its previous decision in *Wilson & Co.* v. *Labor Board,* 210 F. 2d 325, adopted respondent's contention that "expiration date" means termination date and that § 8 (d)(4) therefore bans all bargaining strikes throughout the life of a collective-bargaining contract. The Board majority held that "expiration date" also comprehends "an agreed date in the course of [the contract's] existence when the parties can effect changes in its provisions . . ." and that § 8 (d) prohibits all strikes during the life of the contract except those in support of bargaining pursuant to a reopening clause. Member Peterson adhered to the Board's former interpretation, see *Wilson & Co.,* 89 N. L. R. B. 310, that so long as the union gives notice of its desire to modify the contract sixty days before striking, § 8 (d) does not prohibit a strike at any time during the life of the contract. Finally, Member Murdock argued that § 8 (d) "applies only to the period around the expiration date of a contract," which he defined to mean its termination date, and that prior to that period a union may strike without any notice whatsoever.

Such diverse interpretations, particularly by the authorities charged with the administration of the Act, reflect not only the ambiguity of § 8 (d)'s language but also the obscurity of its legislative history. The fact is that the Taft-Hartley Congress did not reveal its "intention" regarding our present problem—the legality of economic strikes prior to the contract's ending. It has thus become a judicial responsibility to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.

The construction placed upon the proviso by the Court of Appeals—that it bans strikes throughout the life of

the contract, even at reopening—seems least tenable. Although expiration is a common synonym for termination, § 8 (d) does not use the terms interchangeably. It speaks repeatedly of "termination or modification," while "expiration" seems to embrace both events. Moreover, this section provides that it

> "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

This implies an affirmative duty to bargain during reopening. It is not to be assumed that Congress provided such a duty and at the same time foreclosed a potential strike, a conventional factor in the collective-bargaining process.

The meaning given to "expiration date" by the Court of Appeals would make § 8 (d) achieve other anomalous results. For example, where there is in effect a two-year contract providing for reopening after one year, the party proposing modification at reopening would not be required by § 8 (d)(1) to serve notice upon the other party until ten months after reopening had passed, and § 8 (d)(3) would not require notice to mediating agencies until eleven months after reopening. Similarly, the loss-of-status sentence, which applies to employees who strike "within the sixty-day period specified in this subsection . . . ," would punish only employees who strike ten months following reopening.

Nothing in § 8 (d)'s legislative history warrants such a strained construction. To be sure, at one point in the Senate debate Senator Taft did say that "If such [sixty days'] notice is given, the bill provides for no waiting period except during the life of the contract itself." But

Senator Taft's attention was directed solely to strikes at termination, and this statement was intended merely to emphasize the point made in the following sentence that if notice is given less than sixty days prior to termination the waiting period extends beyond the life of the contract.[2]

Section 8 (d)'s subsequent legislative history affords persuasive evidence that a reasonable interpretation of what the Taft-Hartley Congress legislated is that it allowed bargaining strikes at reopening if preceded by sixty days' notice. When, in 1948, the ambiguity in the statutory language was called to the attention of Congress, the Joint Committee on Labor-Management Relations, of which Senator Taft was a member, recommended a clarifying amendment in order to avoid the possibility that § 8 (d) might be interpreted as either banning strikes at reopening or as permitting strikes prior to reopening. The Committee Report stated:

> "In order that the parties may better know their rights in the matter, the committee recommends the adoption of the amendments which would permit a

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[2] Senator Taft's full statement was:

"We have provided in the revision of the collective-bargaining procedure, in connection with the mediation process, that before the end of any contract, whether it contains such a provision or not, either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining, and then for the intervention of the Mediation Service. If such notice is given, the bill provides for no waiting period except during the life of the contract itself. If, however, either party neglects to give such notice and waits, let us say, until 30 days before the end of the contract to give the notice, then there is a waiting period provided during which the strike is an unlawful labor practice for 60 days from that time, or to the end of the contract and 30 days beyond that time. In that case there is a so-called waiting period during which a strike is illegal, but it is only brought about by the failure of the union itself to give the notice which the bill requires shall be given. So it seems to me to be no real limitation of the rights of labor unions." 93 Cong. Rec. 3839.

> strike or a lock-out after a 60-day notice in support of demands they have anticipated in a reopening clause." S. Rep. No. 986, 80th Cong., 2d Sess. 63 (1948).

In 1949, Senator Taft himself proposed such an amendment, S. Rep. No. 99, 81st Cong., 1st Sess. 27, 42 (1949), which was passed by the Senate, 95 Cong. Rec. 8717, but never became law.

At the opposite end of the statutory spectrum is Board Member Murdock's view that § 8 (d) only bars strikes at termination, leaving unions free to strike without any notice whatsoever prior to the last sixty days of the contract. Ignoring the introductory paragraph of the proviso, which states: "Where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract, unless . . . ," Mr. Murdock urged that the rest of the proviso contemplates the situation "around" the contract's "expiration date," which he defined as termination date. From this he inferred that § 8 (d) only regulates conduct during this period.

If Mr. Murdock read "expiration" to include reopening, his claim to have resolved § 8 (d)'s logical inconsistencies would be more persuasive. The difficulty of his position is made manifest by the last part of the penultimate sentence of § 8 (d), which clearly implies that the subsection applies to modifications under a reopening clause. The statement of Senator Ball, a leading proponent of § 8 (d), that "ours is a very mild provision, which merely says to unions, 'You must have a 60-day reopening clause in your contract'," 93 Cong. Rec. 7530, and § 8 (d)'s subsequent legislative history, erase any doubt that it was intended to operate at least at reopening as well as at termination.

Even as thus revised the Murdock view is an artifact. It would permit a union, in an effort to force changes in

its contract, to stop work without warning at any time except during the last sixty days of the period fixed by contract and to remain out for the length of the period short of its last sixty days. Yet Mr. Murdock mentioned no factors that would have made Congress so concerned about strikes at expiration as to lay down elaborate procedures applicable thereto and so unconcerned about strikes prior to the expiration period as to ignore them. The legislative history, on the other hand, makes clear that the dominant purpose of Congress in passing § 8 (d) was one that is applicable to strikes at both times—to prevent the damaging effects of strikes without warning and to allow a cooling-off period during which differences might be discussed, mediated and resolved. See, *e. g.*, 93 Cong. Rec. 3839, 5005, 5014. If anything, § 8 (d)'s application would appear more necessary between expiration periods than during them, since the parties have by their contract warned each other of the possibility of work stoppage at the latter times.

It is significant also that the 1948 report of the Joint Committee on Labor-Management Relations, S. Rep. No. 986, 80th Cong., 2d Sess. 62 (1948), which stated that § 8 (d) was subject to three interpretations, did not mention Mr. Murdock's among them. Moreover, since the clarifying amendment proposed by the Committee was designed to preclude the possibility that § 8 (d) might be construed to permit strikes at any time prior to reopening upon sixty days' notice, the Committee must have rejected, *a fortiori,* the possibility that § 8 (d) permitted strikes at any time prior to reopening in the absence of such notice. The Murdock view was also rejected by the Board's General Counsel shortly after the Act's passage. He issued a complaint in the *Wilson* case, *supra,* even though the strike occurred more than nine months before the contract's reopening date. See 89 N. L. R. B. 310, 317, and S. Rep. No. 986, 80th Cong., 2d Sess. 62 (1948).

404165 O—57——26

Mr. Murdock pointed out that the Senate Report on the Taft-Hartley bill stated, with respect to § 301, that a no-strike clause was something to be bargained for, S. Rep. No. 105, 80th Cong., 1st Sess. 17–18, and he reasoned that it would not have said this "If it had been intended to remove no-strike provisions from the realm of collective bargaining . . . ." This argument would have force against an interpretation which actually does remove such provisions from bargaining. Section 8 (d), however, has no effect on whether unions may validly strike over non-bargaining matters. See *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270. Nor does it render obsolete union pledges not to resort to bargaining strikes at reopening, if the present Board's interpretation is correct, or at any time after sixty days' notice, if the view of the former Board prevails. In any event, this statement from the Committee report on another section of the bill provides a flimsy basis for frustrating the oft-expressed legislative purpose of preventing "quickie" strikes.

The question remains whether the old Board's interpretation is more persuasive than that of the present Board. The statutory language points toward the latter view—that § 8 (d) not only proscribes strikes on less than sixty days' notice but also forbids strikes prior to reopening or termination. Section 8 (d)(1) requires the party proposing a change in the contract to give sixty days' notice prior to "expiration," thereby implying that the proposed change will not take place until that time. Only in the event the contract contains no expiration date does this subsection provide for notice "sixty days prior to the time it is proposed to make such termination or modification; . . . ." Section 8 (d)(4) explicitly proscribes strikes "for a period of sixty days after such notice [that provided for in (1)] is given or until the expiration date of such contract, whichever occurs later." And the last part of § 8 (d)'s penultimate sentence provides further

evidence that Congress contemplated modification of the contract's terms only at reopening. The loss-of-status clause alone is more favorable to the former Board's view, since it speaks of "the sixty-day period specified in this subsection," and, to be effective under the present Board's construction, this clause has to be understood as reading "the period specified in paragraph (4)." Since the problem before us was not anticipated, it is not surprising that § 8 (d)'s legislative history offers little direct evidence that Congress did more than require a sixty-day waiting period prior to bargaining strikes. When the Joint Committee did note the problem in 1948, however, it adopted the present Board's view of the statute and not that of the old Board. The light which this subsequent history sheds on the ambiguity reinforces the present Board's construction as the more persuasive interpretation of § 8 (d).

As the Court's opinion holds, since the union struck more than sixty days after giving notice of its desire to amend and in the course of negotiations pursuant to the contract's reopening clause, the Court of Appeals erred in setting aside the Board's order on the ground that the strike violated the waiting requirements of § 8 (d).

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I join in so much of the Court's opinion as relates to the construction of § 8 (d), agreeing with THE CHIEF JUSTICE'S reasoning and MR. JUSTICE FRANKFURTER'S further amplification of that problem. But I dissent from that part of the Court's opinion which dismisses respondent's breach of contract defense. That question was never passed on by the Court of Appeals, and I think that our remand should leave it open for the Court of Appeals to decide in the first instance. Further, I find the Court's opinion unclear as to whether the Court of Appeals is like-

wise foreclosed from now dealing with the sufficiency of the evidence as to the unfair labor practice charge against respondent—a question which the Court of Appeals also did not reach because of its views on § 8 (d)—and I think that question, too, should be left open for the Court of Appeals on remand.

This is the fourth time this Term that the Court has passed on questions which the court below never reached. See *Mesarosh* v. *United States,* 352 U. S. 1; [1] *Thompson* v. *Coastal Oil Co.,* 352 U. S. 862; [2] *Gibson* v. *Phillips Petroleum Co.,* 352 U. S. 874.[3] I think this practice is an unfortunate one, depriving this Court, as it does, of the considered views of the lower courts. Its dangers are particularly apparent in the present case. As my brother FRANKFURTER points out, there is at least some question as to whether respondent ever raised its breach of contract defense before the National Labor Relations Board. And on the merits the question is an unusual one because of the atypical nature of this contract, and surely requires

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[1] This Court granted the defendants a new trial on the ground that their conviction was tainted by prosecution evidence suspected to be perjurious. Neither the trial court nor the Court of Appeals had passed on this question, and there had been no investigation as to the reliability of the testimony or its precise bearing on the case.

[2] The Court of Appeals reversed a judgment for the plaintiff in an unseaworthiness case on the ground that plaintiff had signed a valid release. This Court reversed, holding the release invalid, and reinstated the judgment of the District Court. The Court of Appeals therefore never had an opportunity to pass on the other points raised by the defendant on its appeal, mainly the question whether there was sufficient evidence for the finding that the vessel was unseaworthy.

[3] The Court of Appeals had held that as a matter of Texas law plaintiff was barred from recovery by his own contributory negligence. This Court reversed and reinstated the judgment of the District Court. Again, the Court of Appeals had no opportunity to pass on alleged errors of the trial court in instructing the jury, that court not having reached those questions on the initial appeal.

for its reliable adjudication much sharper consideration than it is possible for this Court to give it here as an original matter. Indeed, the nature of the question is such that the Court of Appeals might well conclude that the issue should be referred to the Board for its expert views in the first instance.

This kind of original adjudication by this Court is not what litigants have a right to expect. Moreover, to decide questions which, as here, have not been raised in the petition for certiorari offends our own rules.[4] There will no doubt be cases where remand is not justified because the questions left open by the lower court are manifestly insubstantial. It seems to me that in such instances this Court should state that it is not remanding for that reason, instead of proceeding as a matter of course to decide the questions itself, either expressly or *sub silentio*. The latter procedure can only have a tendency to lead this Court, as here, to decide questions which it should not pass upon in the first instance, and in my opinion represents unsound judicial administration.

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[4] Rule 23, 1 (c), Revised Rules.

UNITED STATES *v.* ALLEN-BRADLEY CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 78. Argued December 13, 1956.—Decided January 22, 1957.

Under § 124 (f) of the Internal Revenue Code of 1939, as amended, the War Production Board had authority to certify that only a part of the cost of essential wartime expansion of production facilities of a private manufacturer was "necessary in the interest of national defense," so as to be amortizable within five years or less under §§ 23 (t) and 124 for income-tax purposes. Pp. 306–311.
134 Ct. Cl. 800, reversed.

Hilbert P. Zarky argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Philip Elman* and *Joseph F. Goetten.*

Harvey W. Peters argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1940 this country embarked on the greatest program of defense preparedness in its history. Such an undertaking called for a vast expansion of the nation's industrial capacity. New and improved facilities were desperately needed, not only for the production of guns, planes and the other obvious weapons of war, but also for the innumerable items that are essential to the prosecution of large-scale conflict. This unprecedented program of expansion demanded the full and immediate cooperation of everyone who could lend assistance. While the Government attempted to secure the necessary facilities by building them itself or by extending emergency construction loans to private business, it soon appeared that these methods would not be adequate to meet the needs of defense. Private capital was called on for assistance in

the task. However business exhibited a reluctance to build new war plants because of widespread fears that such facilities would become wholly useless when the emergency had passed. In response to these fears, Congress acted to lessen the financial risks involved in the private construction of emergency facilities. Among other things it amended the 1939 Internal Revenue Code by adding §§ 23 (t) and 124,[1] which allowed business to write off the cost of new facilities as a deduction against taxable income within a period of five years or less, regardless of the actual economic life of the facilities, provided they had been certified by the proper executive agency as "necessary in the interest of national defense." This accelerated amortization privilege generally enabled those businesses receiving it to reduce their federal income taxes with the net result that a large part of the construction costs was, at least temporarily, borne by the Federal Government through a reduction in its tax receipts.

This case involves a question of the proper interpretation of § 124 (f), a vital part of these accelerated amortization provisions. The essential facts are not in dispute. During the Second World War the respondent Allen-Bradley Company produced radio parts and other materials needed by the Government to carry on the war. These products were in critically short supply and at the request of government procurement officers respondent repeatedly increased and improved its facilities in order to boost its output. In connection with such expansions it applied to the War Production Board, which was then the certifying authority, for certificates that the improvements were necessary to the national defense. The Board issued nine different certificates of necessity to respondent but the dispute here involves only three of these certificates. Each of these three stated that the facilities

[1] 54 Stat. 998–1003, as amended, 26 U. S. C. §§ 23 (t), 124.

covered by it were necessary in the interest of national defense but only up to a specified percentage of their total cost. This "partial certification" was made pursuant to a policy adopted by the Board in 1943 that it would certify essential facilities, which could reasonably be expected to have peacetime utility, only to the extent that their costs were attributable to the wartime increase in prices. Respondent accepted these partial certifications, proceeded with the expansion and in its tax returns for 1944 and 1945 deducted an amount based on the accelerated amortization of that part of the total cost which had been certified by the Board.

In 1953 respondent first raised the claim which is the basis of this suit that the Board had no authority to certify only part of the cost of a necessary emergency facility. Respondent concedes that the Board had discretion to refuse to issue any certificate at all, but contends that once it decided that a facility was necessary to the national defense its function was at an end and that any attempt by it to limit the certification to a part of the cost of such facility was a nullity. Therefore, respondent contends, it was entitled to accelerate the amortization of the full cost of those facilities covered by the three partial certificates and not just that part of the full cost which had been certified by the Board. On the basis of these contentions respondent filed the present action in the Court of Claims to recover an alleged overpayment of its 1944 and 1945 income taxes. The Court of Claims accepted respondent's arguments and rendered judgment for it. 134 Ct. Cl. 800. We granted certiorari, 351 U. S. 981, because of the conflict between this decision and that of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161.

The language of the crucial section 124 (f) is ambiguous. It specifies that in determining the amount of the

wartime construction costs which are to be available for the special amortization privilege:

> "(1) There shall be included only so much of the amount . . . as is properly attributable to such construction . . . after December 31, 1939, as [the War Production Board] has certified as necessary in the interest of national defense during the emergency period . . . ."

Respondent argues that the phrase "only so much of the amount" in this section refers simply to that part of the cost of facilities that is attributable to construction after 1939. On the other hand the Government contends that this qualifying phrase refers not only to those costs incurred after 1939, but also to that portion of those costs which the War Production Board has certified is necessary to the national defense. We believe that either interpretation is possible; that neither is compelled. But those who were responsible for the administration of the Act consistently interpreted § 124 (f) as authorizing them to certify that only a part of the costs of construction after 1939 was necessary to the national defense.[2]

The legislative history shows that Congress intended that the administrators of the certification program were to have broad discretion in exercising their power. These administrators were faced with extremely complicated problems in attempting to accomplish the desired objective of Congress in the face of constant and drastic changes in conditions. And as the nation's industrial capacity became more adequate they carefully balanced the need for the proposed expansion against the loss of

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[2] See War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Reg. 4233 (1942); War Production Board Regulations, Issuance of Necessity Certificates, 8 Fed. Reg. 16964 (1943). And compare Treas. Reg. 111, § 29.124–6.

revenue to the Government caused by accelerated amortization before issuing a certificate. The power to certify only a portion of the cost gave them a more flexible instrument to balance these conflicting objectives.

It appears that Congress kept close supervision over the certification program and the special amortization privilege. For example, § 124 was amended five times during the war;[3] two of these amendments altered § 124 (f) itself in a manner which did not affect the language decisive of the present controversy. But no attempt was made to restrain the administrators from issuing certificates covering only a part of the cost of necessary facilities, although it seems apparent that responsible committees of Congress were aware that § 124 (f) had been consistently interpreted and applied by the certifying authorities as permitting them to issue such certifications. In fact a special Senate "watch-dog" committee was established to continually study and investigate the program for construction of war plants and facilities including the ". . . benefits accruing to contractors with respect to amortization for the purposes of taxation or otherwise . . . ."[4]

Perhaps § 124 (f) could have been construed differently. But it was not. Construed as it was, it served its purpose. It contributed materially to the phenomenal expansion of our industrial plants which was so necessary for successful prosecution of the war. Certificates issued for only a portion of the cost of necessary facilities were accepted by business in general, and respondent in particular—apparently without substantial objection. The technique employed in § 124 (f) was a new one and those who drafted that section could not be certain how it would

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[3] 55 Stat. 4, 55 Stat. 757, 56 Stat. 50, 56 Stat. 850 and 59 Stat. 525.

[4] S. Res. 71, 77th Cong., 1st Sess. (87 Cong. Rec. 1615), and S. Res. 6, 78th Cong., 1st Sess. (89 Cong. Rec. 331).

work in practice. They could not foresee the many problems that would arise in the administration of this sweeping power which could be used to encourage expansion of any industry producing materials useful in the all-out war effort. Therefore it is not strange that the provision was loosely drawn and, in some respects, imprecise. However it would have been strange in these circumstances if Congress had embarked on this new course without leaving wide discretion for flexible administration in the light of the day-to-day grind of experience. The language of § 124 (f) lends itself to such flexibility.

We hold that the Board had authority under § 124 (f) to issue certificates, as in this case, certifying that only a part of the cost of essential wartime improvements was necessary to the national defense. Therefore, the judgment of the Court of Claims must be reversed.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

Both the terms of the statute, and the fact that two courts of such special expertise in tax matters as the Tax Court and Court of Claims have sustained the taxpayer's position,[1] leave me doubtful as to whether, under the statutory provisions in question,[2] the War Production Board had the right to issue partial certificates. The Court finds ambiguity in the statute, but, in resolving that ambiguity as it has, does little more than point out

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[1] *National Lead Co.* v. *Commissioner,* 23 T. C. 988; *Allen-Bradley Co.* v. *United States,* 134 Ct. Cl. 800.

[2] 26 U. S. C. § 124 (f) (1), from which the Court quotes, must be read in context with 26 U. S. C. §§ 124 (e) (1) and 124(f) (3). Together these sections provide:

§ 124 (e) (1). "As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and

that Congress did not interfere with the authority claimed by the Board.

However, in my view the scope of the Board's powers need not be reached in this case, because, for the reasons given by Judge Lumbard in his opinion for the unanimous Court of Appeals in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161, I think it clear that respondent cannot maintain the present action. On that basis I join in the Court's decision.

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with respect to which a certificate under subsection (f) has been made. . . ."

§ 124 (f). "In determining, for the purposes of subsection (a) . . . the adjusted basis of an emergency facility—

"(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

§ 124 (f)(3). ". . . In no event and notwithstanding any of the other provisions of this section, no amortization deduction shall be allowed in respect of any emergency facility for any taxable year—

"(C) unless a certificate in respect thereof under paragragh (1) shall have been made (i) prior to the filing of the taxpayer's return for such taxable year, or prior to the making of an election . . . to take the amortization deduction, or (ii) before December 1, 1941, whichever is later . . . ."

On December 17, 1943, the powers under these sections were transferred by the President to the War Production Board.

NATIONAL LEAD CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 124. Argued December 13, 1956.—Decided January 22, 1957.

Under § 124 (f) of the Internal Revenue Code of 1939, as amended, the War Production Board had authority to certify that only a part of the cost of essential wartime expansion of production facilities of a private manufacturer was "necessary in the interest of national defense," so as to be amortizable within five years or less under §§ 23 (t) and 124 for income-tax purposes. Pp. 313–314.
230 F. 2d 161, affirmed on other grounds.

Karl Riemer argued the cause for petitioner. With him on the brief was *Lawrence S. Lesser.*

Hilbert P. Zarky argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Philip Elman* and *Joseph F. Goetten.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a companion case to No. 78, *United States* v. *Allen-Bradley Co., ante,* p. 306, which was also decided today. During World War II petitioner manufactured engine bearings. In 1944 petitioner expanded its plant in an effort to increase the output of these essential war products. At the same time it applied to the War Production Board for certification that the various additions were necessary in the interest of national defense. However the Board, as in *Allen-Bradley,* granted certificates of necessity for only a part of the cost of petitioner's new facilities. In its income tax return for 1944 petitioner exercised the privilege such certification conferred by taking as a deduction a sum based on the accelerated

amortization of that part of the costs which had been certified by the Board.

In 1951 the Commissioner of Internal Revenue asserted a deficiency against petitioner on grounds unrelated to the present controversy. Petitioner subsequently filed a petition for redetermination with the Tax Court claiming that it was entitled to a refund for overpayment of income taxes in 1944. The amount of this overpayment was calculated on the basis that petitioner was entitled to accelerate the amortization of the full cost of those facilities covered by the Board's "partial certifications." Petitioner contends that the Board was not authorized to certify only a part of the cost of a facility when the Board had determined that the facility as a whole was necessary to the national defense. The Tax Court granted petitioner's claim, but on appeal the Second Circuit reversed, holding that petitioner had forfeited its right to challenge the Board's action by waiting too long after accepting the tax benefits of the "partial certificates" to attack their validity. 230 F. 2d 161. The Court of Appeals did not reach the question whether the Board was authorized to issue such "partial certificates." For reasons stated in our opinion in No. 78, *United States* v. *Allen-Bradley Co., supra,* we hold that the Board was empowered to issue certificates covering only a part of the cost of petitioner's improvements. Accordingly, we affirm the judgment of the Court of Appeals.

Affirmed.

Mr. Justice Harlan joins in the Court's decision for the reasons stated in his concurring opinion in *United States* v. *Allen-Bradley Co., ante,* p. 311.

RAYONIER INCORPORATED *v.* UNITED STATES.

NO. 45. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued December 4, 1956.—Decided January 28, 1957.

Under the Federal Tort Claims Act, the United States is not immune from liability for negligence of employees of the Forest Service in fighting a fire, if in similar circumstances a private person would be liable under the laws of the State in which the fire occurred. Pp. 315–321.

225 F. 2d 642, 650, judgments vacated and causes remanded.

Lucien F. Marion argued the cause for petitioner in No. 45. With him on the brief were *Lowell P. Mickelwait, Chester Rohrlich* and *Burroughs B. Anderson.*

William H. Ferguson argued the cause for petitioners in No. 47. With him on the brief were *Donald McL. Davidson* and *Charles S. Burdell.*

Assistant Attorney General Doub argued the causes for the United States. With him on the briefs were *Solicitor General Rankin, Paul A. Sweeney* and *Alan S. Rosenthal.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In both of these cases petitioners brought suit in the United States District Court in the State of Washington seeking to recover damages under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2671–2680, for losses which they allege were caused by the negligence of employees of the United States in allowing a forest fire to be started on Government land and in failing to act with due care to put this fire out. The complaints in the two

*Together with No. 47, *Arnhold et al.* v. *United States,* also on certiorari to the same Court.

cases are substantially the same and in summary make the following allegations. The United States owned certain land in the State of Washington. It permitted a railroad to run trains over a right of way passing through this land. On August 6, 1951, sparks from a railroad engine ignited six fires on the right of way and adjoining land. These fires started in areas where highly inflammable dry grasses, brush, and other materials had been negligently allowed to accumulate by the Government. Shortly after the fires started United States Forest Service personnel appeared and took exclusive direction and control of all fire suppression activities. The Forest Service had entered into an agreement with the State of Washington to protect against and to suppress any fires in an area which included the public lands where these fires started and the petitioners' lands. Petitioners were aware of this contract and relied on the Forest Service to control and put out the fires involved in this case. But as a result of the Forest Service's improper firefighting these fires spread until they became a single fire covering 1,600 acres. By August 11, however, this blaze was under control and was substantially out except for certain spots that continued to burn and smolder until September 20. During the period between August 11 and September 20 there were men, equipment and a plentiful supply of water available to the Forest Service and if these resources had been properly utilized the fire could have been completely extinguished. For several days immediately preceding September 20 there was decreasing humidity accompanied by strong winds. But the Forest Service kept only a few men guarding the fire despite the fact that it was smoldering close to a tinder-dry accumulation of debris, down logs and dead undergrowth. On September 20 the winds blew sparks from the smoldering embers into these inflammable materials and the fire exploded spreading as much as twenty miles in one direction. As it fanned

out it destroyed timber, buildings and other property some of which belonged to the petitioners.

The complaints allege that these consequences were caused by the Forest Service's negligence (1) in permitting inflammable materials to accumulate on Government land thereby allowing the fires to start and to spread; (2) in not preventing the railroad from starting the original spot fires; (3) in not properly suppressing the spot fires; and (4) in failing to quench and prevent the spread of the fire when it was under control in the 1,600 acre area. The district judge dismissed the complaints holding that they failed to state a claim upon which relief could be granted. He indicated that the facts alleged were sufficient to show actionable negligence on the part of a private person under the laws of Washington, but nevertheless felt compelled to dismiss the complaints because of the following statements by this Court in *Dalehite* v. *United States,* 346 U. S. 15, 43.

> "As to the alleged failure in fighting the fire, we think this too without the [Tort Claims] Act. The Act did not create new causes of action where none existed before. . . . 'Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' . . . It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

The Court of Appeals affirmed the trial judge's disposal of the complaints. 225 F. 2d 642 and 225 F. 2d 650. In agreeing that the United States could not be sued for any carelessness by the Forest Service in fighting the fire, it also relied exclusively on the *Dalehite* case. It rejected petitioners' other claims of negligence on the ground that Washington law would impose no liability for the misconduct alleged. We hold that the courts below erred in

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deciding that the United States was immune from liability for any negligence by the Forest Service in fighting the fire.

The Tort Claims Act makes the United States liable (with certain exceptions which are not relevant here) for the negligence of its employees

> ". . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U. S. C. § 2674.

It gives the District Courts jurisdiction of all claims against the Government for losses

> ". . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b).

These provisions, given their plain natural meaning, make the United States liable to petitioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaints, Washington law would impose liability on private persons or corporations under similar circumstances.

Nevertheless the Government, relying primarily on the *Dalehite* case, contends that Congress by the Tort Claims Act did not waive the United States' immunity from liability for the negligence of its employees when they act as public firemen. It argues that the Act only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees and that neither the common law nor the law of Washington imposes liability on municipal or other local governments for the

negligence of their agents acting in the "uniquely governmental" capacity of public firemen. But as we recently held in *Indian Towing Co.* v. *United States,* 350 U. S. 61, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity.[1] To the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing.*[2]

It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury. It points out the possibility that a fire may destroy hundreds of square miles of forests and even burn entire communities. But after long consideration, Congress, believing it to be in the

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[1] And see *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 548–550.

[2] See also *Eastern Air Lines* v. *Union Trust Co.,* 95 U. S. App. D. C. 189, 221 F. 2d 62, aff'd *per curiam sub nom. United States* v. *Union Trust Co.,* 350 U. S. 907; *Air Transport Associates* v. *United States,* 221 F. 2d 467. Cf. *United States* v. *Praylou,* 208 F. 2d 291, 294–295.

best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. And for obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bankrupt if it were subject to liability for the negligence of its firemen. There is no justification for this Court to read exemptions into the Act beyond those provided by Congress.[3] If the Act is to be altered that is a function for the same body that adopted it.

The record shows that the trial judge dismissed both complaints in their entirety solely on the basis of the *Dalehite* case. While the Court of Appeals relied on state law to uphold the dismissal of those allegations in the complaints which charged negligence for reasons other than the Forest Service's carelessness in controlling the fire, we cannot say that court's interpretation of Washington law was wholly free from its erroneous acceptance of the statements in *Dalehite* about public firemen. Furthermore it has been strongly contended here that the Court of Appeals improperly interpreted certain allegations in the complaints and as a result of such misinterpretation incorrectly applied Washington law in passing on the sufficiency of these allegations. In view

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[3] See *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383.

of the circumstances, we think it proper to vacate both judgments in their entirety so that the District Court may consider the complaints anew, in their present form or as they may be amended, wholly free to determine their sufficiency on the basis of whether the allegations and any supporting material offered to explain or clarify them would be sufficient to impose liability on a private person under the laws of the State of Washington.[4] The judgments of both courts are vacated and the cases are remanded to the District Court for consideration in accordance with this opinion.

It is so ordered.

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

The Court of Appeals in my view correctly applied the law as to public fire fighters. Congress assumed liability "as a private individual under like circumstances." The immunity of public bodies for injuries due to fighting fire was then well settled. *Dalehite* v. *United States,* 346 U. S. 15, 43. Private organizations, except as community volunteers, for fire fighting were hardly known. The situation was like private military forces. Cf. *Feres* v. *United States,* 340 U. S. 135, 142. *Indian Towing Co.* v. *United States,* 350 U. S. 61, presents a different situation.

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[4] Cf. *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555; *State Tax Commission* v. *Van Cott,* 306 U. S. 511, 514–515; and *Patterson* v. *Alabama,* 294 U. S. 600, 607.

PRINCE *v.* UNITED STATES.

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

No. 132. Argued December 11, 1956.—Decided February 25, 1957.

Petitioner was convicted under the Federal Bank Robbery Act, 18 U. S. C. § 2113, on a two-count indictment charging (1) robbery of a federally insured bank, and (2) entering the bank with intent to commit a felony. He was sentenced to 20 years' imprisonment for the robbery and 15 years for the entering, the two sentences to run consecutively. *Held:* The sentence was illegal, and he must be resentenced on the conviction on the robbery count only. Pp. 323–329.

(a) This interpretation of the language of the Act is uncontradicted by anything in the legislative history. Pp. 325–328.

(b) The obvious purpose of the 1937 amendment was to establish offenses less serious than robbery; there is no indication that Congress intended thereby to pyramid the authorized penalties. Pp. 327–328.

(c) The gravamen of the unlawful entry offense is the intent to commit a felony; and, when a robbery is consummated following an entry, this intent is merged into the robbery and there is only one crime. P. 328.

(d) When Congress made either robbery or an entry for that purpose a crime, it intended that the maximum prison term for robbery should remain at 20 years (or 25 years if aggravated by assault with a deadly weapon), but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned similarly for entering with the felonious intent. P. 329.

(e) This conclusion is consistent with the policy of not attributing to Congress an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history. P. 329.

230 F. 2d 568, reversed and remanded.

Joseph P. Jenkins argued the cause and filed a brief for petitioner.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Felicia Dubrovsky.*

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

The question presented by this case calls for interpretation of the Federal Bank Robbery Act. 18 U. S. C. § 2113.[1] That statute creates and defines several crimes incidental to and related to thefts from banks organized or insured under federal laws. Included are bank robbery and entering a bank with intent to commit a rob-

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[1] "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

. . . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

bery.[2] We must decide here whether unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation.

Petitioner entered the Malone State Bank, in Malone, Texas, through an open door and during regular banking hours. He asked for and received certain directions. Thereupon he displayed a revolver, intimidating a bank employee and putting his life in jeopardy, and thus consummated a robbery. A grand jury returned a two-count indictment against him. The first charged the robbery offense; the second, entering the bank with the intent to commit a felony. Petitioner was convicted on both counts, and the district judge sentenced him to 20 years for robbery and 15 years for entering. The sentences were directed to be served consecutively. Some years thereafter, petitioner filed a "Motion to Vacate or Correct Illegal Sentence." The District Court, treating it as a proceeding under Rule 35 of the Federal Rules of Criminal Procedure, denied relief without conducting a hearing. The Court of Appeals for the Fifth Circuit affirmed. 230 F. 2d 568.

Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the latter is consummated has puzzled the courts for several years. A conflict has arisen between the circuits.[3] We granted certiorari because of the recurrence

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[2] As used in this opinion, "robbery" and "larceny" refer not to the common-law crimes, but rather to the analogous offenses in the Bank Robbery Act.

[3] In accord with the decision of the Fifth Circuit is its own earlier ruling in *Durrett* v. *United States,* 107 F. 2d 438, and *Rawls* v. *United States,* 162 F. 2d 798, decided by the Tenth Circuit. Another decision of the Fifth Circuit affirmed consecutive sentences for robbery and entering with intent to commit robbery. *Wells* v. *United States,* 124 F. 2d 334. However, the prisoner, appearing *pro se,* had not raised a question of merger of these offenses in that proceeding. When he tried to do so later, the court held that he was barred

of the question and to resolve the conflict. 351 U. S. 962. In addition to the Court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purposes of punishment.[4] None of these is particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The original Bank Robbery Act was passed in 1934. It covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. In 1937 the Attorney General requested that the Act be amended. In his letter proposing the bill, the Attorney General declared that

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on the ground that he was making a second motion under 28 U. S. C. § 2255 for similar relief on behalf of the same prisoner. *Wells* v. *United States,* 210 F. 2d 112. Finally he sought remedy by writ of habeas corpus, but the Ninth Circuit concluded that the earlier § 2255 proceedings precluded jurisdiction. *Madigan* v. *Wells,* 224 F. 2d 577, reversing *Wells* v. *Swope,* 121 F. Supp. 718.

Contrary to the Fifth and Tenth Circuits are determinations of the Sixth Circuit in *Simunov* v. *United States,* 162 F. 2d 314, and a District Court in *Wells* v. *Swope, supra.* To the same effect are dicta in Ninth Circuit cases. *Madigan* v. *Wells, supra,* at 578; *Barkdoll* v. *United States,* 147 F. 2d 617.

[4] *United States* v. *Michener,* 331 U. S. 789; *United States* v. *Raynor,* 302 U. S. 540; *Blockburger* v. *United States,* 284 U. S. 299; *United States* v. *Adams,* 281 U. S. 202; *Albrecht* v. *United States,* 273 U. S. 1; *Morgan* v. *Devine,* 237 U. S. 632; *Gavieres* v. *United States,* 220 U. S. 338; *Burton* v. *United States,* 202 U. S. 344; *Carter* v. *McClaughry,* 183 U. S. 365. See also *Bell* v. *United States,* 349 U. S. 81; *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218; *Ebeling* v. *Morgan,* 237 U. S. 625; *United States* v. *Daugherty,* 269 U. S. 360.

"incongruous results" had developed under the existing law. He cited as a striking instance the case of

> ". . . a man [who] was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute."

The Act was amended accordingly to add other crimes less serious than robbery. Two larceny provisions were enacted: one for thefts of property exceeding $50, the other for lesser amounts. Congress further made it a crime to

> ". . . enter or attempt to enter any bank, . . . with intent to commit in such bank or building, or part thereof, so used, any felony or larceny . . . ."

Robbery, entering and larceny were all placed in one paragraph of the 1937 Act.[5]

Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and $5,000. The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1,000 fine, while the maximum for the more serious theft was set at 10 years and $5,000. No sepa-

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[5] This appeared in 12 U. S. C. (1946 ed.) § 588b (a). The statute in its present form was enacted by the June 1948 revision. 18 U. S. C. § 2113 (a). The legislative history indicates that no substantial change was made in this revision. It segregated the larceny provisions in § 2113 (b), leaving robbery and unlawful entry in § 2113 (a). See note 1, *supra*.

rate penalty clause was added for the crime of unlawfully entering. It was simply incorporated into the robbery provision.[6]

The Government asks us to interpret this statute as amended to make each a completely independent offense. It is unnecessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted to have the offender given 10 years for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank.[7] Nor is

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[6] The Bank Robbery Act has, since it was passed in 1934, contained a special provision for increased punishment for aggravated offenses. One who, in committing robbery, assaults any person or puts the life of any person in jeopardy by the use of a dangerous weapon can be sentenced to 25 years in jail or fined $10,000 or both. When the Act was amended in 1937 to add larceny and unlawful entry, these were incorporated in the same paragraph with robbery and thus made subject to the increased penalty under aggravating circumstances. This provision currently is found in 18 U. S. C. § 2113 (d). See note 1, *supra*.

[7] Under the government view, if carried to its logical extreme, one who enters a bank and commits a robbery could be sentenced to 20 years for robbery, 10 years for larceny and 20 years for unlawful entry. The Government conceded that this was error in *Heflin* v. *United States*, 223 F. 2d 371 (robbery and larceny). However, it now declares that its confession of error was made by mistake and that larceny and robbery are separate offenses, cumulatively punishable.

there anything in the reports of the House of Representatives or the Senate or the floor debates to warrant such a reading of the statute.[8]

It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours.[9] Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended, by the 1937 amendment, to make drastic changes in authorized punishments. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection.[10]

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[8] H. R. Rep. No. 732, 75th Cong., 1st Sess.; S. Rep. No. 1259, 75th Cong., 1st Sess.; 81 Cong. Rec. 2731, 4656, 5376–5377, 9331.

[9] This distinguishes the unlawful entry provision in the Bank Robbery Act from a very similar provision relating to post-office offenses. 18 U. S. C. § 2115:

"Whoever *forcibly* breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined . . . ." (Italics supplied.)

This section was held to create an offense separate from a completed post-office theft. *Morgan* v. *Devine*, 237 U. S. 632.

[10] Further evidence that Congress was concerned only with proscribing additional activities and not with alteration of the scheme of penalties is revealed by the form in which the bill was cast. Introduced in the House of Representatives, the proposal merely interjected into the robbery provision clauses making larceny and

We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years,[11] but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.

While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for the purpose of resentencing the petitioner in accordance with this opinion.

Reversed and remanded.

MR. JUSTICE BURTON dissents for the reasons stated in the opinion of the Court of Appeals, 230 F. 2d 568.

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

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entering criminal. H. R. 5900, 75th Cong., 1st Sess.; H. R. Rep. No. 732, 75th Cong., 1st Sess. 2. All three would have made violators subject to the existing penalty clause. During the debate on the floor, Rep. Wolcott pointed to the incongruity of establishing degrees of larceny without corresponding discrimination in punishment. 81 Cong. Rec. 4656. The Committee on the Judiciary then amended the bill to provide for punishments related to the larceny offenses. 81 Cong. Rec. 5376–5377. The Senate accepted the House version without debate. 81 Cong. Rec. 9331; see S. Rep. No. 1259, 75th Cong., 1st Sess.

[11] In this case, petitioner was convicted of robbery aggravated by assault with a deadly weapon and was subject to the maximum of 25 years provided in 18 U. S. C. § 2113 (d). See note 6, *supra*.

IN RE GROBAN ET AL.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

No. 14. Argued November 6, 1956.—Decided February 25, 1957.

After a fire occurred on premises of a corporation owned and operated by appellants in Ohio, the State Fire Marshal subpoenaed appellants to appear as witnesses in an investigation by him of the cause of the fire. Relying on Page's Ohio Rev. Code, 1954, § 3737.13, which provides that such an investigation "may be private" and that the Marshal may "exclude from the place" where the investigation is held "all persons other than those required to be present," he refused to permit appellants' counsel to be present at the proceeding. Appellants declined to be sworn and to testify in the absence of their counsel. This was treated as a violation of § 3737.12, which forbids any witness to refuse to be sworn or to refuse to testify; and, pursuant to § 3737.99 (A), the Marshal committed appellants to jail until such time as they should be willing to testify. Denial of their application for a writ of habeas corpus was affirmed by the State Supreme Court. *Held:*

1. Under 28 U. S. C. § 1257 (2), this Court has jurisdiction of this appeal. Pp. 331–332.

2. Appellants had no constitutional right to be assisted by counsel in giving testimony at the investigatory proceeding conducted by the Fire Marshal; and, insofar as it authorizes the exclusion of counsel while a witness testifies, § 3737.13 is not repugnant to the Due Process Clause of the Fourteenth Amendment. Pp. 332–335.

164 Ohio St. 26, 128 N. E. 2d 106, affirmed.

James F. Graham and *Ernest B. Graham* argued the cause and filed a brief for appellants.

Earl W. Allison and *J. Ralston Werum* argued the cause and filed a brief for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

The question presented by this appeal is whether appellants had a constitutional right under the Due Process Clause of the Fourteenth Amendment to the

assistance of their own counsel in giving testimony as witnesses at a proceeding conducted by the Ohio State Fire Marshal to investigate the causes of a fire.

After a fire occurred on the premises of a corporation owned and operated by appellants, the Fire Marshal started an investigation into the causes of the fire and subpoenaed appellants to appear as witnesses. The Fire Marshal refused to permit appellants' counsel to be present at the proceeding, relying on § 3737.13 of the Ohio Code, which provides that the "investigation may be private" and that he may "exclude from the place where [the] investigation is held all persons other than those required to be present . . . ." [1] Appellants declined to be sworn and to testify without the immediate presence of their counsel, who had accompanied them to the hearing. Their refusal was treated as a violation of § 3737.12, which provides that "No witness shall refuse to be sworn or refuse to testify . . . ." Section 3737.99 (A) provides that "Whoever violates section 3737.12 . . . may be summarily punished, by the officer concerned, by . . . commitment to the county jail until such person is willing to comply with the order of such officer." The Fire Marshal accordingly committed appellants to the county jail until such time as they should be willing to testify.[2] Appellants' application for a writ of habeas corpus was denied by the Ohio Court of Common Pleas, and this denial was affirmed on appeal by the Ohio Court of Appeals and by the Ohio Supreme Court.[3]

We postponed further consideration of the question of jurisdiction to the hearing on the merits. 351 U. S. 903. The Ohio Supreme Court construed § 3737.13 to

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[1] Page's Ohio Rev. Code, 1954, § 3737.13.

[2] Appellants were released on bond and have never in fact been incarcerated.

[3] *In re Groban,* 99 Ohio App. 512, 135 N. E. 2d 477; 164 Ohio St. 26, 128 N. E. 2d 106.

authorize the Fire Marshal to exclude appellants' counsel from the proceeding. Since appellants' attack is on the constitutionality of that section, we have jurisdiction on appeal. 28 U. S. C. § 1257 (2).

We note at the outset that appellants explicitly disavow making any direct attack on the Fire Marshal's power of summary punishment under § 3737.99 (A). They challenge not the validity of the procedure by which they were committed to jail, but the constitutional sufficiency of the grounds on which they were so committed. Their sole assertion is that the Fire Marshal's authority to exclude counsel under § 3737.13 was unconstitutional because they had a right, under the Due Process Clause, to the assistance of their counsel in giving their testimony.

It is clear that a defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel. *Chandler* v. *Fretag,* 348 U. S. 3. Prosecution of an individual differs widely from administrative investigation of incidents damaging to the economy or dangerous to the public. The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to "determine whether the fire was the result of carelessness or design," and to arrest any person against whom there was sufficient evidence on which to base a charge of arson.[4]

The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom in-

[4] Page's Ohio Rev. Code, 1954, §§ 3737.08, 3737.10.

formation was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel,[5] nor can a witness before other investigatory bodies.[6] There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination.[7] U. S. Const., Amend. V; Ohio Const., Art. I, § 10. See *Adamson* v. *California,* 332 U. S. 46, 52. This is a privilege available in investigations as well as in prosecutions. See *In re Groban,* 164 Ohio St. 26, 28, 128 N. E. 2d 106, 108, and 99 Ohio App. 512, 515, 135 N. E. 2d 477, 479–480; *McCarthy* v. *Arndstein,* 266 U. S. 34, 40; *Adams* v. *Maryland,* 347 U. S. 179. We have no doubt that the privilege is available in Ohio against prosecutions as well as convictions reasonably feared. Cf. *Ullmann* v. *United States,* 350 U. S. 422, 431. The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts to support such a belief, does not bar the taking of testimony in a private investigatory proceeding.

It may be that the number of people present in a grand jury proceeding gives greater assurance that improper

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[5] *In re Black,* 47 F. 2d 542; accord, *United States* v. *Blanton,* 77 F. Supp. 812; see *United States* v. *Scully,* 225 F. 2d 113, 116.

[6] *Bowles* v. *Baer,* 142 F. 2d 787; *United States* v. *Levine,* 127 F. Supp. 651. Note, Rights of Witnesses in Administrative Investigations, 54 Harv. L. Rev. 1214, 1216–1217.

[7] Cf. *Ullmann* v. *United States,* 350 U. S. 422; *Hoffman* v. *United States,* 341 U. S. 479, 486; *Smith* v. *United States,* 337 U. S. 137, 150; *Hale* v. *Henkel,* 201 U. S. 43, 66–67.

404165 O—57——28

use will not be made of the witness' presence. We think, however, that the presumption of fair and orderly conduct by the state officials without coercion or distortion exists until challenged by facts to the contrary. Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention. As in similar situations, abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained.

Ohio, like many other States, maintains a division of the state government directed by the Fire Marshal for the prevention of fires and reduction of fire losses.[8] Section 3737.13, which has been in effect since 1900,[9] represents a determination by the Ohio Legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with so weighty a public interest as fire prevention to protect, we cannot hold that the balance has been set in such a way as to be contrary to "fundamental principles of liberty and justice." *Hebert* v. *Louisiana,* 272 U. S. 312, 316. That is the test to measure the validity of a state statute under the Due Process Clause.

Appellants urge, however, that the Fire Marshal's power to exclude counsel under § 3737.13 must be considered in the light of his power of summary punishment

[8] See National Fire Protection Association Handbook of Fire Protection (10th ed. 1948) 41–45; Annual Report of the Division of [Ohio] State Fire Marshal for 1955.

[9] Ohio Laws 1900, Senate Bill No. 51.

under § 3737.99 (A), and they would have us hold that, so considered, his power to exclude counsel was unconstitutional. We held in *In re Oliver,* 333 U. S. 257, that a witness before a one-man grand jury, a judge, could not constitutionally be punished summarily for contempt of the grand jury without being allowed to be represented by his counsel. We see no relation between the premise that appellants could not be punished without representation by counsel and the conclusion that they could not be questioned without such representation. Section 3737.13 may contain a constitutional flaw if it should be construed to authorize the exclusion of counsel while the Fire Marshal determines that a witness has violated § 3737.12 and orders the witness committed. The sole assertion of a constitutional violation that appellants relied upon before the Ohio Supreme Court and the only one open on the record here—the authorization in § 3737.13 of the exclusion of counsel while a witness testifies—is not well founded. We hold that appellants had no constitutional right to be assisted by their counsel in giving testimony at the investigatory proceeding conducted by the Fire Marshal, and that § 3737.13, insofar as it authorizes the exclusion of counsel while a witness testifies, is not repugnant to the Due Process Clause of the Fourteenth Amendment.

Affirmed.

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

To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt, such a doctrine of fear can hardly serve as a test, under the Due Process Clause of the Fourteenth Amendment, of a particular exercise of a State's legislative power. And so, the constitutionality of a particular statute, expressive of a State's view of desirable policy for dealing with one of

the rudimentary concerns of society—the prevention of fires and the ascertainment of their causes—and directed towards a particular situation, cannot be determined by deriving a troupe of hobgoblins from the assumption that such a particularized exercise of power would justify an unlimited, abusive exercise of power.

If the Ohio legislation were directed explicitly or by obvious design toward secret inquisition of those suspected of arson, we would have a wholly different situation from the one before us. This is not a statute directed to the examination of suspects. It is a statute authorizing inquiry by the chief guardian of a community against the hazards of fire into the causes of fires. To be sure, it does not preclude the possibility that a suspect might turn up among those to be questioned by the Fire Marshal. But the aim of the statute is the expeditious and expert ascertainment of the causes of fire. The Fire Marshal is not a prosecutor, though he may, like others, serve as a witness for the prosecution. In various proceedings, as for instance under some workmen's compensation laws, the presence of lawyers is deemed not conducive to the economical and thorough ascertainment of the facts. The utmost devotion to one's profession and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitutional principle that no administrative inquiry can be had *in camera* unless a lawyer be allowed to attend.

The assumption that as a normal matter such an inquiry carries with it deprivation of some rights of a citizen assumes inevitable misuse of authority. For good reasons, and certainly for constitutional purposes, the contrary assumption must be entertained. The potential danger most feared is that it will invade the privilege against self-incrimination in States where it is constitutionally recognized. But that privilege is amply safeguarded by the decision of the Supreme Court of Ohio in this case.

We are not justified in invalidating this Ohio statute on the assumption that people called before the Fire Marshal would not be aware of their privilege not to respond to questions the answers to which may tend to incriminate. At a time when this privilege has attained the familiarity of the comic strips, the assumption of ignorance about the privilege by witnesses called before the Fire Marshal is too far-fetched an assumption on which to invalidate legislation.

What has been said disposes of the suggestion that, because this statute relating to a general administrative, non-prosecutorial inquiry into the causes of fire is sustained, it would follow that secret inquisitorial powers given to a District Attorney would also have to be sustained. The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process. We are admonished from time to time not to adjudicate on the basis of fear of foreign totalitarianism. Equally so should we not be guided in the exercise of our reviewing power over legislation by fear of totalitarianism in our own country.

For these reasons I join the opinion of the Court.

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

I believe that it violates the protections guaranteed every person by the Due Process Clause of the Fourteenth Amendment for a state to compel a person to appear alone before any law-enforcement officer and give testimony in secret against his will. Under the reasoning of the majority every state and federal law-enforcement officer in this country could constitutionally be given power to conduct such secret compulsory examinations.

This would be a complete departure from our traditional methods of law enforcement and would go a long way toward placing "the liberty of every man in the hands of every petty officer." [1] By sanctioning the Ohio statutes involved here the majority disregards "this nation's historic distrust of secret proceedings" [2] and decides contrary to the general principle laid down by this Court in one of its landmark decisions that an accused ". . . requires the guiding hand of counsel at every step in the proceedings against him." [3]

The Ohio statutes give the state Fire Marshal and his deputies broad power to investigate the cause of fires. These officers can summon any person to appear before one or more of them to testify under oath.[4] They can punish him summarily for contempt if he refuses to answer their questions or if he disobeys any of their orders.[5] They can exclude any person they wish from the examination, including the witness' counsel.[6] After the questioning the Marshal or his deputy can arrest the witness if he believes that there is evidence sufficient to charge him with arson or a similar crime.[7] Any statements taken from the suspect during these secret sessions must be turned over to the Prosecuting Attorney for use in any subsequent prosecution.[8] An "Arson Bureau" is established in the Fire Marshal's office and it is provided with

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[1] James Otis used this phrase in denouncing the Writs of Assistance and General Warrants in his famous argument in *Paxton's Case*. 2 The Works of John Adams (Boston 1850), App. 524.

[2] *In re Oliver*, 333 U. S. 257, 273.

[3] *Powell* v. *Alabama*, 287 U. S. 45, 69.

[4] Page's Ohio Rev. Code, 1953, §§ 3737.11, 3737.12.

[5] *Id.*, §§ 3737.12, 3737.99 (A).

[6] *Id.*, § 3737.13.

[7] *Id.*, § 3737.10.

[8] *Id.*, § 3737.10.

a staff charged with the duty of investigating fires to determine if a crime has been committed. The Fire Marshal and his deputy in charge of the "Arson Bureau" are expressly made ". . . responsible . . . for the prosecution of persons believed to be guilty of arson or a similar crime." [9] The statutory provisions show that the Fire Marshal and his deputies are given the ordinary duties of policemen with respect to "arson and similar crimes."

After appellants' place of business at Dresden, Ohio, burned down, a deputy fire marshal summoned appellants to appear before him with their business records to answer questions about the fire. According to their unchallenged affidavit, the Fire Marshal believed that they had started the fire. Appellants appeared before the deputy with their lawyer, stating that they were willing to testify fully but only if they could have their counsel present during the interrogation. The deputy informed them that the interrogation would be held in private and refused to admit their lawyer. Under these conditions they refused to testify. The deputy proceeded to hold them in contempt and ordered them imprisoned until they were willing to testify before him in secret. Appellants' counsel was not present at the time they refused to testify nor when they were adjudged in contempt and ordered imprisoned.

Appellants instituted this action for a writ of habeas corpus in a state court of Ohio contending that their imprisonment would be contrary to the Fourteenth Amendment. The Ohio Supreme Court rejected this contention and affirmed the judgments of lower state courts refusing to issue the writ. This Court upholds the decision below, but even on the narrow grounds upon which it chooses to decide the case I think that its holding

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[9] *Id.*, § 3737.02.

is erroneous and constitutes a very dangerous precedent.[10] I believe that the judgments below should be reversed because it is contrary to due process of law to imprison appellants for refusing to testify before the Deputy Fire Marshal in secret.

A secret examination such as the deputy proposed to conduct is fraught with dangers of the highest degree to a witness who may be prosecuted on charges related to or resulting from his interrogation. Under the law of Ohio it seems clear that any statement allegedly secured from the witness may be used as evidence against him at a preliminary examination to justify his detention, before a grand jury to secure his indictment, and at the formal trial to obtain his conviction.[11] The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of

[10] I would also reverse the decision below because appellants were found guilty of contempt and sentenced to jail in a proceeding where they were denied the benefit of counsel. This Court has expressly held that a person charged with contempt has a constitutional right to be heard through counsel of his own choosing at a trial on the contempt charge. *In re Oliver,* 333 U. S. 257. While the majority refuses to act on the denial here by claiming that appellants failed to challenge it in the Ohio Supreme Court or in their appeal to this Court, the record convinces me that the matter has been properly raised for our consideration. When a person is to be imprisoned as the result of a proceeding in which he was denied his constitutional rights, we should not be anxious to conclude that he has failed to raise the constitutional questions in the correct procedural form. Cf. *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393; *Hodges* v. *Easton,* 106 U. S. 408, 412.

[11] See generally 15 Ohio Jur. 2d, Criminal Law § 388.

his assistants and they all vouch for his story.[12] But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.[13]

The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as

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[12] In this respect it is important to note that under the Ohio statutes the Fire Marshal or his deputies may permit such persons as they wish to attend the interrogation.

[13] This has been recognized from ancient times. As said in Matthew 18:15–16:

"Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established."

Blackstone many centuries later noted that:

"[The] open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk . . . . There an artful or careless scribe may make a witness speak what he never meant . . . ." 3 Blackstone Commentaries 373.

And Bentham subsequently pointed out:

"In case of registration and recordation of the evidence, publicity serves as a security for the correctness in every respect (completeness included) of the work of the registrator.

"In case of material incorrectness, whether by design or inadvertence,—so many auditors present . . . any or each of whom may eventually be capable of indicating, in the character of a witness, the existence of the error, and the tenor (or at least the purport) of the alteration requisite for the correction of it." 1 Bentham, Rationale of Judicial Evidence (1827), 523.

a practical matter, he is subject to their uncontrolled will. Here it should be pointed out that the Ohio law places no restrictions on where the interrogations can be held or their duration. Exemplifying the abuses which may occur in secret proceedings, this Court has repeatedly had before it cases where confessions have been obtained from suspects by coercive interrogation in secret.[14] While the circumstances in each of these cases have varied, in all of them, as well as in many others, the common element has been the suspect's interrogation by officers while he was held incommunicado without the presence of his counsel, his friends or relatives, or the public. As was said in a concurring opinion in *Haley* v. *Ohio*, 332 U. S. 596, at 605: "An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations natually engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry." [15] Noth-

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[14] See, *e. g.*, *Fikes* v. *Alabama*, 352 U. S. 191; *Leyra* v. *Denno*, 347 U. S. 556; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ward* v. *Texas*, 316 U. S. 547; *White* v. *Texas*, 310 U. S. 530; *Chambers* v. *Florida*, 309 U. S. 227. For a discussion of the dangers and abuses arising from the secret interrogation of suspects by police see the report of the American Bar Association's Committee on Lawless Enforcement of the Law, Aug. 19, 1930. 1 Am. J. Police Science 575.

[15] In *United States* v. *Minker*, 350 U. S. 179, the Court, at p. 188, pointed out with regard to proposed examinations by immigration officers that:

"It does not bespeak deprecation of official zeal, nor does it bring into question disinterestedness, to conclude that compulsory *ex parte* administrative examinations, untrammelled by the safeguards of a

ing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders.[16]

A witness charged with committing contempt during the secret interrogation faces the gravest handicaps in defending against this charge. The interrogating officers may assert that he engaged in certain contumacious behavior before them and seek to imprison him. Even when the charges are tried by someone other than his interrogators,[17] the accused's efforts to show that the actual events were not as pictured by the interrogating officers would normally be futile if he could call on no one to corroborate his testimony. And when a witness is deprived of the advice of counsel he may be completely

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public adversary judicial proceeding, afford too ready opportunities for unhappy consequences to prospective defendants in denaturalization suits."

[16] It seems wholly improper to "wait and see" in each case whether a witness has been coerced or tricked into giving involuntary statements at the secret interrogation and then to set aside convictions which may be based on such statements. This "abuse-by-abuse" approach fails to give the person interrogated sufficient protection. Usually he has no substantial chance of showing that the one or more interrogators used improper means to elicit involuntary statements from him. Only in the most extreme cases will this Court, or any other, be able to find that statements were made involuntarily in the face of the interrogating officers' testimony that they were spontaneous and freely given. Apparently in Ohio, as in most jurisdictions, the suspect faces the additional obstacle that his alleged statements are presumed to be voluntary and he has the burden of proving that they were not. See 15 Ohio Jur. 2d, Criminal Law § 387. In the few cases where a person interrogated could prove that his statements were made involuntarily he will still be subjected to considerable expense, inconvenience and unfavorable publicity. More important, he will already have suffered mistreatment at the hands of his interrogators.

[17] Here, of course, the interrogators were authorized to try the charges of contempt which they preferred.

unaware that his conduct has crossed the obscure boundary and become contemptuous. Moreover, executive officers will be somewhat more chary in exercising the dangerous contempt power if their actions are subject to external scrutiny.

I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him.[18] The broader implications of these decisions seem to me to support appellants' right to use their counsel when questioned by the Deputy Fire Marshal. It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. It is quite possible that the conviction of a person charged with arson or a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination.[19]

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[18] See, *e. g., Powell* v. *Alabama,* 287 U. S. 45; *Chandler* v. *Fretag,* 348 U. S. 3.

[19] This was recognized in *Ex parte Sullivan,* 107 F. Supp. 514. There two persons suspected of crime had been examined by law-enforcement officers in secret without the presence of counsel and had been tricked into making statements which were instrumental in their conviction. At pp. 517–518, the district judge observed:

"In view of [*Powell* v. *Alabama,* 287 U. S. 45], to mention but one

Looking at the substance of things, the Fire Marshal's secret interrogation contains many of the dangers to an accused that would be present if he were partially tried in secret without the assistance of counsel for "arson or a similar crime." Suppose that at the commencement of a criminal trial, the judge, acting under statutory authorization, expelled everyone from the courtroom but the prosecuting attorney and his assistants and allowed them to question the accused "privately." After such interrogation the doors were thrown open, the jury recalled, and the jurors given a résumé or transcript of the accused's purported testimony. And then the defendant's lawyer, who had been excluded from the secret examination, was allowed to make such defense as he could. Surely no one would contend that such a proceeding was due process of law. Yet the techniques as well as the end effects of the Fire Marshal's secret interrogation are substantially the same.

It is said that a witness can protect himself against some of the many abuses possible in a secret interrogation by asserting the privilege against self-incrimination. But this proposition collapses under anything more than the most superficial consideration. The average witness has little if any idea when or how to raise any of his constitutional privileges. There is no requirement in the Ohio statutes that the fire-prevention officers must inform the

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of many cases, unquestionably Petitioners were entitled to have effective counsel *at the trial*. The question here is how they ever could have had effective counsel at the trial, no matter how skilled, in view of what went on before trial. They were denied effective counsel at the trial itself because of what went on before trial while the defendants were without counsel, and absolutely under the control of the prosecution. . . . One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' " (Emphasis not supplied.)

Also see Jackson, J., concurring in *Watts* v. *Indiana*, 338 U. S. 49, 57.

witness that he is privileged not to incriminate himself. And in view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it.[20] If the witness is coerced or misled by his interrogators he may not dare to raise the privilege. Undoubtedly he will be made aware that hanging over his head at all times is the officer's power to punish him for contempt—a power whose limitations the witness will not understand. Furthermore, the Fire Marshal or his deputies would seldom be competent to decide if the privilege has been properly claimed or, even if they wish, to instruct the witness how to make correct use of it.

To support its decision that Ohio can punish a witness for refusing to submit to the Fire Marshal's secret interrogation, the majority places heavy reliance on the practice of examining witnesses before a grand jury in secret without the presence of the witness' counsel. But any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed.[21]

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[20] See, *e. g., Rogers* v. *United States,* 340 U. S. 367.

[21] All of the cases cited by the majority as authority for the practice before grand juries apparently involved a traditional grand jury. It has been suggested that a state can constitutionally provide for grand juries composed of less than 12 persons. See *In re Murchison,* 349 U. S. 133, 139, 140 (dissenting opinion); *In re Oliver,* 333 U. S. 257, 283, 283–284 (dissenting opinion). Even if this suggestion is correct it certainly does not follow that a state can designate one or more of its law-enforcement officers as a grand jury and constitutionally give them power to compel witnesses to appear and give testimony in secret without the presence of counsel. This point was expressly not considered in *In re Oliver, supra,* at 265. Such power in the hands of law-enforcement officers is equally obnoxious to due process whether they are styled as a grand jury, as fire-prevention officers or simply as policemen.

They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them.

The majority also relies on a supposed proposition that there is no right to use counsel in an administrative investigation.[22] Here it is relevant and significant to point out that in 1946 Congress specifically required in the Administrative Procedure Act that:

> "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." [23]

In reporting the bill which was substantially enacted as the Administrative Procedure Act the Senate Judiciary Committee unanimously declared:

> "By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all

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[22] The only authorities offered by the majority as support for this proposition are three lower federal court decisions.

[23] 5 U. S. C. § 1005 (a).

> private interests in the country a policy respecting the minimum requirements of fair administrative procedure." [24]

And the House Judiciary Committee in reporting the House version of the Administrative Procedure Act stated:

> "The bill is an outline of minimum essential rights and procedures." [25]

Heretofore this Court has never held and I would never agree that an administrative agency conducting an investigation could validly compel a witness to appear before it and testify in secret without the assistance of his counsel.

In any event, the investigations authorized by the Ohio statutes are far more than mere administrative inquiries for securing information useful generally in the prevention of fires. Rather, these statutes command action with a view toward the apprehension and prosecution of persons believed guilty of certain crimes. The Marshal or his deputies may compel a person suspected of arson or a similar offense—as appellants apparently were—to appear and give testimony under oath. And as previously indicated any statement elicited from such person may be used as evidence against him. Once testimony has been taken from a suspect the duties of the Marshal and his deputies are not at an end. They must arrest the witness if they believe that the evidence is sufficient to charge him with certain crimes. All testimony taken from him and all other evidence must be turned over to the prosecuting attorney. The Fire Marshal and his deputy in charge of the "Arson Bureau" are specifically made ". . . responsible . . . for the prosecution of persons believed to be guilty of arson or a similar crime."

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[24] S. Rep. No. 752, 79th Cong., 1st Sess. 31.

[25] H. R. Rep. No. 1980, 79th Cong., 2d Sess. 16.

The foregoing clearly demonstrates that the Fire Marshal's interrogation is, and apparently was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime.[26] The rights of a person who is examined in connection with such crimes should not be destroyed merely because the inquiry is given the euphonious label "administrative." [27]

Finally it is argued that the Fire Marshal and his deputies should have the right to exclude counsel and such other persons as they choose so that their "investigatory proceedings" will not be "unduly encumbered." From all that appears the primary manner in which the presence of counsel or the public would "encumber" the interrogation would be by protecting the legitimate rights of the witness.[28] It is undeniable that law-enforcement officers could rack up more convictions if they were not "hampered" by the defendant's counsel or the presence of others who might report to the public the manner in which people were being convicted.[29] But the procedural safe-

[26] It seems highly unrealistic to equate this interrogation with a proceeding involving a claim for workmen's compensation.

[27] Nor should they be defeated because the Fire Marshal and his deputies are given other duties besides investigating fires to determine if any criminality is involved. For obvious reasons these other responsibilities do not make the interrogation proposed here any less objectionable.

[28] Perhaps, if a real need could be shown, counsel could be restricted to advising his client and prohibited from making statements or asking questions. And there are other alternatives, much less drastic and prejudicial to the witness than the complete exclusion of his counsel, which might provide satisfactory protection for the witness without unduly impairing the efficiency of the examination.

[29] As Bentham said of criminal proceedings:
"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 Bentham, Rationale of Judicial Evidence (1827), 524.

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guards deemed essential for due process have been imposed deliberately with full knowledge that they will occasionally impede the conviction of persons suspected of crime.

The majority states that "with so weighty a public interest as fire prevention to protect," they cannot hold that it violates the Due Process Clause to compel a witness to testify at a secret proceeding. But is the public's interest in fire prevention so weighty that it requires denying the person interrogated the basic procedural safeguards essential to justice? Suppose that Ohio authorized the Chief of State Police and his deputies to inquire into the causes and circumstances of crime generally and gave them power to compel witnesses or persons suspected of crime to appear and give testimony in secret. Since the public's interest in crime prevention is at least as great as its interest in fire prevention, the reasoning used in the majority's opinion would lead to the approval of such means of "law enforcement." In fact, the opinion could readily be applied to sanction a grant of similar power to every state trooper, policeman, sheriff, marshal, constable, FBI agent, prosecuting attorney, immigration official,[30] narcotics agent, health officer, sanitation inspector, building inspector, tax collector, customs officer and to all the other countless state and federal officials who have authority to investigate violations of the law.[31] I believe that the

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[30] See *United States* v. *Minker*, 350 U. S. 179.

[31] The Court's opinion does not deny that secret inquisitorial powers could be given such law-enforcement officers. A concurring opinion suggests that the grant of such broad power might be unconstitutional so far as a district attorney is concerned. However if policemen in general could constitutionally subject persons to secret compulsory interrogation, how can it be said that a district attorney could not? For constitutional purposes I can see no means of distinguishing this Ohio fire policeman from any other policeman or law-enforcement officer. Any attempted constitutional distinction between these various law-enforcement officers would be purely

majority opinion offers a completely novel and extremely dangerous precedent—one that could be used to destroy a society of liberty under law and to establish in its place authoritarian government.

No one disputes that Ohio has a great interest in the enforcement of its fire laws. But there is nothing which suggests that it is essential to adequate enforcement of these laws to give the Fire Marshal and his deputies the extreme powers of interrogation which they proposed to exercise here. This method of law enforcement has heretofore been deemed inconsistent with our system of justice. As MR. JUSTICE FRANKFURTER said in announcing the Court's judgment in *Watts* v. *Indiana,* 338 U. S. 49, at 54:

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." [32]

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artificial. The constitutionality of the Ohio law authorizing secret interrogation by fire marshals acting as policemen in arson cases should not be rested on a conjecture that such an artificial distinction will be drawn by this Court at some future day.

[32] A survey of British law reveals nothing which is equivalent to the type of examination that the Ohio Fire Marshal is allowed to conduct. Official inquiries into the cause of fires are generally made by the police. "[W]hen the police are inquiring into a case, they have no power to compel anyone to give them information; a witness may be compelled to attend a *court* and there give evidence, but before proceedings are actually brought he can refuse

Secret inquisitions are dangerous things justly feared by free men everywhere.[33] They are the breeding place for arbitrary misuse of official power. They are often

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to say a word." Jackson, The Machinery of Justice in England (2d ed. 1953), 137. And in 1929 the Report of the Royal Commission on Police Powers and Procedure at p. 118 recommended that "A rigid instruction should be issued to the Police that no questioning of a prisoner, or a 'person in custody,' about any crime or offence with which he is, or may be, charged, should be permitted." It is doubtful if any statements obtained by the police by secret interrogation of a suspect would be admitted in evidence in a subsequent trial. See *Rex* v. *Grayson*, 16 Crim. App. R. 7 (1921); 43 Harv. L. Rev. 618; 43 Ky. L. Rev. 403.

In France official inquiries into fires are carried out as part of the general system of investigating crimes. The preliminary investigation is under the control of the public prosecutor and is conducted by the police. They have no authority to examine unwilling witnesses. The interrogation of such witnesses and of suspects is the function of the *Juge d'Instruction*, who is a judge with legal training. Prior to 1897 he had broad power to examine a witness under oath in secret without counsel. See Ploscowe, Development of Inquisitorial and Accusatorial Elements in French Procedure, 23 J. Crim. L. & Criminology 372. In 1882 Stephen commented on these secret proceedings as follows:

> "To a person accustomed to the English system and to English ways of thinking and feeling . . . the French system would be utterly intolerable in England. The substitution of a secret [interrogation] for our open investigation before the committing magistrate would appear to us to poison justice at its source." 1 Stephen, History of the Criminal Law of England (1883), 565.

In response to widespread demands French law was changed in 1897 to grant a witness appearing before the *Juge d'Instruction* the right to counsel. M. Constans, one of the sponsors of the law in the French Senate, said: "The *juge d'instruction* is like other functionaries. He must be controlled . . . The presence of the lawyer will of itself . . . prevent him from doing anything but his duty." Quoted in Ploscowe, *supra*, at 381. See also Esmein, History of Continental Criminal Procedure (1913); Keedy, The Preliminary Investigation of Crime in France, 88 U. Pa. L. Rev. 692.

[33] A leading Italian jurist recently said:

"The right to counsel, without which the right to defend oneself

the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea wherever and whenever carried out remains unchanging—extraction of "statements" by one means or another from an individual by officers of the state while he is held incommunicado. I reiterate my belief that it violates the Due Process Clause to compel a person to answer questions at a secret interrogation where he is denied legal assistance and where he is subject to the uncontrolled and invisible exercise of power by government officials. Such procedures are a grave threat to the liberties of a free people.

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is of no practical meaning, does not exist during the first phase of the criminal process in those systems in which the pre-trial phase is carried out in secret without the presence of defense counsel. This is the phase in which the accused, alone and undefended before the examining magistrate, may be unable to find in his own innocence sufficient strength to resist the effects of prolonged questioning, and in order to put an end to his ordeal may be reduced to signing a confession to a crime he has not committed. Unfortunately, Italian criminal procedure retains this sad inheritance from an era of tyranny, which is unreconcilable with respect for the human personality . . . .

. . . . . .

"In criminal procedure as we see it applied, the accused is still an inert object at the mercy of the inquisitor's violence. . . . Held incommunicado during the period of questioning, the accused is alone with his examiners, without aid of counsel; torture, although formally abolished, has returned under new guises more scientific but nonetheless cruel: the third degree, endless hours of incessant questioning, truth serum." Calamandrei, Procedure and Democracy (Adams transl. 1956), 93–94, 102–103.

POLLARD *v.* UNITED STATES.

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

No. 38. Argued December 3, 1956.—Decided February 25, 1957.

After petitioner had pleaded guilty to a federal offense and had left the courtroom, the District Court entered judgment suspending sentence and placed petitioner on probation for three years. Nearly two years later, in 1954, upon petitioner's arrest for violation of probation, the District Court entered a formal judgment and commitment sentencing petitioner to 2 years' imprisonment and setting aside the earlier judgment and order. Petitioner's motion under 28 U. S. C. § 2255 to vacate this sentence was denied by the District Court; the Court of Appeals denied leave to appeal; and this Court granted certiorari. *Held:*

1. Although petitioner was released from federal prison after this Court granted his petition for certiorari, the possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify decision of this case on the merits. P. 358.

2. The Court deems it proper to consider questions as to the legality of the 1954 sentence, raised by petitioner in his brief, although, had petitioner been represented by counsel in the courts below and upon his petition for certiorari, those questions might well have been deemed neither preserved below nor raised in the petition. P. 359.

3. The 1954 sentence did not violate the Double Jeopardy Clause of the Fifth Amendment. Pp. 359–361.

4. The 1954 sentence did not violate petitioner's right under the Sixth Amendment to a speedy trial, nor the provision of Rule 32 (a) of the Federal Rules of Criminal Procedure requiring imposition of sentence "without unreasonable delay." Pp. 361–362.

5. Petitioner's other contentions, that in sentencing him in 1954 the trial judge disregarded the standards prescribed for such a proceeding, are not properly before the Court and are unsupported by the record. Pp. 362–363.

6. Since the decision of this case on the merits is against the petitioner, the question whether the Court of Appeals properly denied leave to appeal need not be determined. P. 363.

Affirmed.

Bennett Boskey, acting under appointment by the Court, 350 U. S. 980, argued the cause and filed a brief for petitioner.

Philip Elman argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Ralph S. Spritzer, Beatrice Rosenberg* and *Robert G. Maysack.*

MR. JUSTICE REED delivered the opinion of the Court.

This case concerns the validity of a sentence imposed on petitioner in September 1954. On September 8, 1952, petitioner pleaded guilty in the United States District Court for the District of Minnesota to an information charging him with the unlawful taking and embezzlement of a United States Treasury check in violation of 18 U. S. C. § 1702. The district judge deferred imposition of sentence pending presentence investigation. On October 3, 1952, petitioner appeared before the trial judge at 10 a. m. for sentencing. He was then serving a sentence in a Minnesota state prison, from which he was eligible for parole the following month. The judge stated that the probation report showed that petitioner had taken an active interest in the Alcoholics Anonymous organization in prison, and petitioner told him that he contemplated continuing that interest when he was released from the state prison. The judge added that he was impressed by the fact that petitioner, who had stolen the check after a two-week drinking spree, had revealed what he had done to an officer of Alcoholics Anonymous and to the FBI without any effort to minimize the offense. He advised petitioner to join Alcoholics Anonymous immediately on his release from the state prison. He then said:

> ". . . if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.

"So, good luck to you and I hope the parole board will give you an opportunity.

"That is all."

The judge then turned to other business.

It is clear that no explicit reference to petitioner's sentence had been made during this colloquy. But before the court adjourned at 10:30 a. m., when petitioner apparently had left the courtroom, an assistant United States District Attorney handling the matter said:

"Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary period after his release from Stillwater, or any type of sentencing?

"The Court: It is to commence at the expiration of sentencing at Stillwater.

"Mr. Hachey: Probation to commence after expiration of his sentencing at Stillwater—for how long?

"The Court: Three years."

A judgment and order of probation was then entered suspending imposition of sentence and placing petitioner on probation for that term. The Government concedes that the judgment and order was invalid because of petitioner's absence from the courtroom when probation was imposed. Fed. Rules Crim. Proc., 43.

Petitioner did not receive a copy of this order, despite a direction of the court, but learned of the probation from state prison officials the following month when he was paroled. On his release he began reporting to the federal probation officer. Nearly two years later, on September 1, 1954, the trial judge issued a bench warrant for petitioner's arrest on the basis of the probation officer's report that petitioner had violated the terms of his probation. Petitioner was arrested and brought before the

court on September 21, 1954. After waiver of counsel by petitioner, the following occurred at the hearing:

> "The Court: What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.
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> "Mr. Evarts [Asst. U. S. Attorney]: Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an Order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.
>
> "The Court: All right."

A formal judgment and commitment was then entered, sentencing petitioner to two years' imprisonment and setting aside the judgment and order of probation entered on October 3, 1952.

Petitioner's motion to vacate this sentence under 28 U. S. C. § 2255 was based upon a misapprehension of the basis for the sentence of 1954. He contended that, since his 1952 probation sentence was invalid, his 1954 prison sentence was also invalid because it was for probation violation. Actually, of course, it was punishment for the embezzlement. The District Court denied the motion on the ground that "[Petitioner] was initially sentenced upon September 21, 1954, and the files and records in the case conclusively show that said judgment was within the jurisdiction of the court and the sentence imposed was valid and in accordance with law." Petitioner filed a notice of appeal and a motion for leave to proceed *in forma pauperis*. The District Court denied this motion "in all respects." Petitioner then filed a motion for leave

to appeal *in forma pauperis* in the Court of Appeals for the Eighth Circuit. After examination of the record in the District Court, the Court of Appeals denied this motion without opinion. This Court granted leave to proceed *in forma pauperis,* and, deeming the issues as to the validity of the 1954 sentence of importance in the proper administration of the criminal law, granted certiorari. 350 U. S. 965. We also appointed counsel for petitioner. 350 U. S. 980.

Petitioner was released from federal prison in March 1956, after his petition for certiorari had been granted. He relies on *United States* v. *Morgan,* 346 U. S. 502, 512–513, and *Fiswick* v. *United States,* 329 U. S. 211, 220–223, as meeting the question of mootness that this fact suggests. Those cases are not entirely on all fours with this one, since petitioner is challenging the legality not of any determination of guilt, but instead of the sentence imposed. But those cases recognize that convictions may entail collateral legal disadvantages in the future. Appeals from convictions are allowed only after sentences. Fed. Rules Crim. Proc., 37. The determination of guilt and the sentence are essential for imprisonment. We think that petitioner's reference to the above cases sufficiently satisfies the requirement that review in this Court will be allowed only where its judgment will have some material effect. Cf. *St. Pierre* v. *United States,* 319 U. S. 41. The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.[1]

The petition for certiorari, *pro se,* sought reversal of the order of the Court of Appeals denying petitioner's motion for appeal *in forma pauperis* and also release from his then incarceration.[2] Petitioner contended that the 1954

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[1] Cf. *Pino* v. *Landon,* 349 U. S. 901, reversing 215 F. 2d 237.

[2] Such an order is reviewable on certiorari. *Wells* v. *United States,* 318 U. S. 257.

sentence was unconstitutional because it was imposed for violation of the invalid probation order.

Petitioner now, in his brief, claims that the trial judge determined on October 3, 1952, that no imprisonment and no probation should be imposed, and that consequently the imposition of sentence in September 1954 violated the Double Jeopardy Clause of the Fifth Amendment. He claims alternatively that the imposition of sentence in September 1954 in the circumstances under which it took place constituted a serious departure from proper standards of criminal law administration and violated his rights to a speedy trial under the Sixth Amendment and to due process of law under the Fifth Amendment.[3] The record now before us adequately states the facts for a final determination of the basic issues. Since the Court of Appeals' denial of petitioner's appeal involved an adjudication of the merits, *i. e.,* that there was no adequate basis for allowance of appeal *in forma pauperis,* we think the validity of the 1954 sentence for embezzlement should now be decided. And we conclude that it is proper that we deal with the questions as to legality of the 1954 sentence that petitioner now raises, although, had petitioner been represented by counsel in the courts below and upon his petition for certiorari, we might well have considered those questions neither preserved below nor raised in the petition. Cf. *Price* v. *Johnston,* 334 U. S. 266, 292.

I. The contention that the Double Jeopardy Clause of the Fifth Amendment forbids the 1954 sentence may be shortly answered. It depends upon the assertion that the trial court determined in 1952 that petitioner "should not be subject to imprisonment or probation" on his plea of guilty to embezzlement. Without such a determination, there could not be double jeopardy. The transcript

[3] No question is raised as to the length of the 1954 sentence. Cf. *Roberts* v. *United States,* 320 U. S. 264.

of evidence, all pertinent parts of which are quoted in the first part of this opinion, shows no such determination. The petitioner cites no words upon which he relies. The only sentence that was entered at the 1952 hearing was the one of probation, admittedly invalid because of petitioner's absence.[4]

It is clear to us, too, that the District Court did not by implication intend to acquit or dismiss the defendant. Within the morning session of court, when his failure to make explicit the sentence was called to his attention, the judge directed entry of the order suspending sentence and instituting probation. There is no occasion here for distinguishing between an oral pronouncement of sentence and its entry on the records of the court. Cf. *Spriggs* v. *United States,* 225 F. 2d 865, 868. Nor does the situation call for a determination of the correctness of petitioner's assertion that a federal judge has power, under a statute without minimum penalties,[5] to release or discharge an accused absolutely after conviction or plea of guilty without sentence, suspension of sentence or grant of probation.[6] It is unfortunate for inadvertencies to lead to confusion in criminal trials, but such misunderstanding as petitioner may have drawn from the occurrences at the 1952 sentence is not a basis for vacating the later sentence. The mishap of the prisoner's absence when the first sentence was pronounced cannot be a basis for vacating the 1954 sentence here

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[4] "In a criminal case final judgment means sentence; and a void order purporting permanently to suspend sentence is neither a final nor a valid judgment." *Miller* v. *Aderhold,* 288 U. S. 206, 210–211. Cf. *Korematsu* v. *United States,* 319 U. S. 432, 434; *Hill* v. *Wampler,* 298 U. S. 460, 464; *Berman* v. *United States,* 302 U. S. 211, 212.

[5] The statute upon which the information was based reads: ". . . [an embezzler] shall be fined not more than $2,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1702.

[6] See 18 U. S. C. § 3651; Fed. Rules Crim. Proc., 32 (a), (b), (e).

involved. If the probation sentence had been valid, petitioner on its violation would have been subject to the sentence actually imposed in 1954. 18 U. S. C. § 3653; *Roberts* v. *United States,* 320 U. S. 264, 268.

II. Petitioner's other contentions relate to violations of constitutional rights of speedy trial and due process, and significant departure from proper standards of criminal law administration. It is not disputed that a court has power to enter sentence at a succeeding term where a void sentence had been previously imposed. *Miller* v. *Aderhold,* 288 U. S. 206; cf. *Bozza* v. *United States,* 330 U. S. 160, 166. To hold otherwise would allow the guilty to escape punishment through a legal accident.

Petitioner argues that the 1954 sentence violated his right under the Sixth Amendment of the Constitution to a "speedy" trial.[7] He takes this position on the assumption that the case remained, as we have held above, uncompleted after the 1952 trial. We will assume *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment. The time for sentence is of course not at the will of the judge. Rule 32 (a) of the Federal Rules of Criminal Procedure requires the imposition of sentence "without unreasonable delay."

Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances. See, *e. g., Beavers* v. *Haubert,* 198 U. S. 77, 87; *Frankel* v. *Woodrough,* 7 F. 2d 796, 798. The delay must not be purposeful or oppressive. It was not here. It was accidental and was promptly remedied when discovered.

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[7] Fed. Rules Crim. Proc., 48 (b), provides for enforcement of this right: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Nothing in the record indicates any delay in sentencing after discovery of the 1952 error. From the issuance of the warrant in September 1954 for the violation of probation, the normal inference would be that the error was still unknown to the court, although petitioner states he had known of it since November 1952.[8] We do not have in this case circumstances akin to those in *United States* v. *Provoo,* 17 F. R. D. 183, 201, aff'd mem. 350 U. S. 857, where Judge Thomsen found the delay "caused by the deliberate act of the government" which the accused attempted to correct. The same situation existed in *United States* v. *McWilliams,* 82 U. S. App. D. C. 259, 163 F. 2d 695, where the Government's failure to be ready for trial persisted for nearly two years despite defendant's motions for trial. In these circumstances, we do not view the lapse of time before correction of the error as a violation of the Sixth Amendment or of Rule 32 (a). Error in the course of a prosecution resulting in conviction calls for the correction of the error, not the release of the accused. *Dowd* v. *Cook,* 340 U. S. 206, 210.

Petitioner contends also that, in sentencing him for the embezzlement in 1954, the judge disregarded the standards prescribed for such a proceeding. He points out that the transcript of evidence shows that the prosecuting attorney in open court, instead of the judge, inquired of petitioner as to waiver of his right to counsel. He suggests that this violates Rule 44 of the Federal Rules of Criminal Procedure.[9] On the same transcript authority,

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[8] We note that petitioner made no motion to secure a prompt proper sentence, often considered important in questions involving the Speedy Trial Clause. See cases cited in *Petition of Provoo,* 17 F. R. D. 183.

[9] "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

he makes the suggestion that Rules 32 (a) and 37 (a)(2) were disregarded concerning opportunity "to make a statement in his own behalf and to present any information in mitigation of punishment" and advice to a defendant "not represented by counsel . . . of his right to appeal." Petitioner argues that these irregularities constitute a denial of due process. While we do not impose on persons unlearned in the law the same high standards of the legal art that we might place on the members of the legal profession, we think that these issues are too far afield from the questions that petitioner raised in the courts below and in his petition for certiorari for them properly to be before us. In any case, the formal commitment papers signed by the judge show that these steps, except that of advising petitioner of his right to appeal, were actually taken. We are not willing to conclude from the transcript of evidence covering only such notes as were "taken at the above time and place" that the above purely routine statutory requirements were not followed.

This leaves unresolved the question whether the Court of Appeals' denial of leave to appeal was proper. Since we conclude that petitioner must lose on the merits, nothing could be gained by a remand to the Court of Appeals even if we should be of the opinion that the Court of Appeals erred in denying leave to appeal.

Affirmed.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, dissenting.

Our duty to supervise the administration of justice in the federal courts calls for a reversal here because of disregard shown for the procedural rights of petitioner—rights with which the law surrounds every person charged with crime.

Our law, based upon centuries of tragic human experience, requires that before a man can be sent to a penitentiary, he is entitled to a speedy trial, to be present in court at every step of the proceedings, at all times to be represented by counsel, or to speak in his own behalf, and to be informed in open court of every action taken against him until he is lawfully sentenced. These are not mere ceremonials to be neglected at will in the interests of a crowded calendar or other expediencies. They are basic rights. They bulk large in the totality of procedural rights guaranteed to a person accused of crime. Here, in the case of an impecunious defendant, who was summarily rushed through the court mill without benefit of counsel, all of them, in some degree, were denied him.

The petitioner was not a dangerous criminal. His trouble, as the court recognized, was intemperance. During the course of a long drinking spree, he became involved with both the state and federal authorities. As soon as he became sober enough to realize the consequences of his actions, he made a full disclosure to one of the officers of Alcoholics Anonymous and to the Federal Bureau of Investigation.

He was sentenced to a state penitentiary. He was also charged by the Federal Government with unlawfully opening a letter and extracting a check which he cashed. The case was not pressed until petitioner was about to be discharged from the state penitentiary.[1] Without counsel, he pleaded guilty. He was then

[1] The alleged offense occurred on or about May 21, 1951. A complaint was signed the following July. Nothing further ensued in the case until September 8, 1952. On that date the United States Attorney filed an information and petitioner entered his plea of guilty.

brought into court to receive sentence. The colloquy between him and the court concluded as follows:

> "The Court: You ought to know the misery and the grief and the sorrow and the horror of what continued drinking on your part will bring to you.
>
> "If I might suggest to you, and I am giving you gratuitous advice but it is the result of observation and experience—it is my view that when you get out you should immediately join the Alcoholics Anonymous organization—not wait a week or two weeks or three weeks—but have that your first mission after you contact your family, and do what they tell you to do and do it immediately and do it diligently and faithfully, carry out every obligation that they impose upon you. With your background and with your ability I think that you can win this fight.
>
> "If you don't do those things, and if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.
>
> "So, good luck to you and I hope the parole board will give you an opportunity.
>
> "That is all.
>
> "The Defendant: Thank you very much, sir."

Petitioner's wife, a close personal friend and the two state custodial officers who were present at the hearing concluded, as would anyone, that the kindly and understanding language of the judge ended the matter and that additional punishment was not to be imposed. Petitioner was returned to the state penitentiary. Later in the day, after an inquiry by the prosecuting attorney as to the disposition of the case, the judge casually said,

404165 O—57——30

"Three years [probation]." [2] Petitioner was absent when this occurred.[3] Notice of this action was not even communicated to him. A month or so later, as he was being released from the state prison, the officials advised him that he must report to the federal probation officer. Naturally, he complied. But he immediately tried to discover, through the probation officer, how and why he was subject to probation. The officer succeeded in convincing him that the "sentence" was legal. Again, a year later, petitioner requested his probation officer to investigate. The officer discovered the truth of petitioner's assertions. Though he recognized the irregularity of the proceedings, he suggested to petitioner that it would not be wise to pursue the matter—that further complications might develop.

In September 1954, nearly two years after his first appearance before the court for sentencing, petitioner lapsed in the fight against excessive drinking. Reported as a probation violator, he was again brought into federal court. His case was disposed of in the most summary style. The Assistant United States Attorney first obtained the defendant's statement waiving right to counsel. He was not advised by the court, as required by law,

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[2] "The Court: Is there anything else, Mr. Hachey [Prosecuting Attorney]?

"Mr. Hachey: Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary period after his release from Stillwater, or any type of sentencing?

"The Court: It is to commence at the expiration of sentencing at Stillwater.

"Mr. Hachey: Probation to commence after expiration of his sentencing at Stillwater—for how long?

"The Court: Three years."

[3] The Government concedes that the probation sentence was completely invalid because it was imposed in petitioner's absence. Fed. Rules Crim. Proc., 43.

of his right to counsel and to the appointment of counsel if desired. Fed. Rules Crim. Proc., 44. The judge, but not petitioner, had apparently been apprised beforehand of the illegality of the October 3, 1952, sentence.

> "The Court: What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.
>
> "Mr. Evarts [Prosecuting Attorney]: Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an Order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.
>
> "The Court: All right."

In this Court the Government concedes the total invalidity of the "sentence" of October 3, 1952, and contends that these events of September 21, 1954, are to be treated as the first and only sentence imposed on the defendant for the crime of which he had pleaded guilty in 1952. But it too has infirmities. It cannot be said that this long delayed sentencing hearing comports with the requirements of the Federal Rules of Criminal Procedure. As already stated, petitioner was not represented by counsel. There was no attempt to comply with Rule 37 (a)(2), which provides that: "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal . . . ." Furthermore, Rule 32 (a) contains a mandatory requirement: "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." No opportunity was afforded the defendant to say a word in mitigation or extenuation of his offense.[4]

Petitioner also questions the power of the trial court to sentence him so long after arraignment. The Sixth Amendment guarantees to persons accused of crimes in a federal court that they shall receive a "speedy and public trial." It has never been held that the sentence is not part of the "trial." But it is not necessary to decide this issue on constitutional grounds. The principle has been implemented by the Federal Rules of Criminal Procedure.

Rule 32 (a) declares unequivocally that: "Sentence shall be imposed without unreasonable delay." The majority holds that this two-year delay is not unreasonable because it was "accidental" and was "promptly remedied when discovered." There is nothing in the record to warrant either of these conclusions. Both the court and the prosecuting attorney were put on notice of the fatal defect of the abortive sentence on the day it was imposed. No steps were taken to remedy the defect. Petitioner declared that he twice initiated investigation of the legality of his sentence. The probation officer obviously checked with someone long before petitioner was brought to court for what is now called his "first" sentence. We cannot simply assume that the facts did not come to the attention of any responsible person.

This proceeding was initiated as a motion to vacate sentence under 28 U. S. C. § 2255. The district judge refused to accord petitioner a hearing and, considering only the motion and the files and records in the court,

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[4] The stereotyped recitals in the commitment papers, referred to by the majority, are wholly inconsistent with the verbatim transcript of the proceedings, which is clearly a complete record of all that actually occurred while petitioner was before the court.

denied relief. Then, in spite of the infirmities in the case revealed by these documents, leave to appeal *in forma pauperis* was denied. The Court of Appeals for the Eighth Circuit affirmed this action, but we granted certiorari and appointed counsel to represent petitioner.

The conclusion that the condonation of this succession of procedural shortcomings represents a restriction of petitioner's rights is inescapable. This Court has often said that such departures from accepted standards should not be permitted—that to do so encourages looseness in many ways. Petitioner has served the two years of imprisonment while pursuing his remedy to this Court. We cannot "unring" the bell that so casually sent him to prison, but we can and should make the record show that he was not committed to a federal prison in accordance with the accepted standard of criminal procedure.

SENKO *v.* LaCROSSE DREDGING CORP.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT.

No. 62. Argued December 12, 1956.—Decided February 25, 1957.

Petitioner was employed by respondent in dredging operations. The dredge was anchored to the shore at all times during petitioner's employment and was seldom in transit. Petitioner was injured in the course of his employment while ashore, and brought an action in a state court to recover damages under the Jones Act. Petitioner's evidence tended to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was in transit. The jury returned a verdict for petitioner and judgment was entered in his favor. *Held:* There was sufficient evidence in the record to support the jury's finding that petitioner was a "member of a crew" entitled to maintain the action under the Jones Act. Pp. 370–374.

(a) The fact that the dredge in this case was connected to the shore is not controlling; nor is the fact that the injury occurred on land. P. 373.

(b) In an action under the Jones Act, the finding of a jury that the claimant was a "member of a crew" is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate. Pp. 373–374.

7 Ill. App. 2d 307, 129 N. E. 2d 454, reversed and remanded.

George J. Moran argued the cause for petitioner. With him on the brief was *Stanley M. Rosenblum.*

Stuart B. Bradley argued the cause for respondent. With him on the brief were *Henry Driemeyer* and *Robert Broderick.*

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner was employed by respondent to assist with dredging operations being conducted by respondent in a slough dug to by-pass a rocky section of the Mississippi

River. His work was that of a handyman; it included the carrying and storing of supplies, and the general maintenance of a dredge. He was injured by the explosion of a coal stove while placing signal lanterns from the dredge in a shed on the neighboring bank. He filed this suit under the Jones Act in the City Court of Granite City, Illinois, to recover damages for his injuries. The Act provides a cause of action for "any seaman who shall suffer personal injury in the course of his employment." 41 Stat. 1007, 46 U. S. C. § 688. This Court, however, has held that the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, restricts the benefits of the Jones Act to "members of a crew of a vessel." *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1. To recover, therefore, petitioner had to be a member of a crew, as that term is used in the Longshoremen's Act, at the time of his injury.

The jury returned a verdict for petitioner and judgment was entered in his favor. On appeal, the Fourth District Appellate Court of the State of Illinois held that there was insufficient evidence to support the finding that petitioner was a member of a crew.[1] Accordingly, it reversed the trial court and entered judgment for respondent. *Senko* v. *LaCrosse Dredging Corp.*, 7 Ill. App. 2d 307, 129 N. E. 2d 454. The Illinois Supreme Court denied a petition for an appeal. We granted certiorari. 351 U. S. 949.

In *South Chicago Co.* v. *Bassett*, 309 U. S. 251, we said that whether or not an employee is " 'a member of a crew' turns on questions of fact" and that, if a finding on this question has evidence to support it, the finding is con-

[1] Although two other grounds were advanced on appeal, only this one was considered. See n. 4, *infra*. No question has been raised at any time as to whether the dredge involved here had the status of a "vessel" at the time of petitioner's injury.

clusive. *Id.*, at 257–258.[2] The sole question presented here, therefore, is whether there is an evidentiary basis for the jury's finding that petitioner was a member of a crew at the time of his injury. This finding was made under specific instructions not objected to here.

The appellate court characterized petitioner as

> "an employee whose principal duty is to load supplies on a vessel at anchor, and to perform incidental tasks of a common labor character . . . ." 7 Ill. App. 2d, at 313, 129 N. E. 2d, at 457.

They also noted that petitioner lived ashore and was not aboard except when the vessel was anchored. The court concluded that petitioner was not "naturally and primarily on board to aid in navigation" and could not "maintain an action under the Jones Act." 7 Ill. App. 2d, at 313–314, 129 N. E. 2d, at 457.

It is true that the dredge was anchored to the shore at the time of petitioner's injury and during all the time petitioner worked for respondent. It is also true that this dredge, like most dredges, was not frequently in transit. We believe, however, that there is sufficient evidence in the record for the jury to decide that petitioner was permanently attached to and employed by the dredge as a member of its crew.

Petitioner's witnesses testified that he was known as a "deckhand" among rivermen. They said that he was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge "in shape." This testimony indicated that substantially all of petitioner's duties were performed on or for the dredge. A normal inference is that petitioner was responsible for

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[2] The finder of fact in the *Bassett* case was a commissioner, but that holding applies with equal force to this case in which the finder was a jury.

its seaworthiness. If the dredge leaked, for example, the jury could suppose that his job would be to repair the leak. Furthermore, a witness testified that a usual duty of one holding petitioner's job was to take soundings and clean navigation lights when the dredge was in transit. 7 Ill. App. 2d, at 310, 129 N. E. 2d, at 455–456. Here again, the jury could reasonably have believed that petitioner would have these responsibilities in the event that this dredge were moved. Whether petitioner would be a member of the dredge's crew while taking soundings during a trip is certainly a jury question. If he were a member during travel, he would not necessarily lack that status during anchorage. Even a transoceanic liner may be confined to berth for lengthy periods, and while there the ship is kept in repair by its "crew." There can be no doubt that a member of its crew would be covered by the Jones Act during this period, even though the ship was never in transit during his employment. In short, the duties of a man during a vessel's travel are relevant in determining whether he is a "member of a crew" while the vessel is anchored. Thus, the fact that this dredge was connected to the shore cannot be controlling.

The fact that petitioner's injury occurred on land is not material. Admiralty jurisdiction and the coverage of the Jones Act depends only on a finding that the injured was "an employee of the vessel, engaged in the course of his employment" at the time of his injury. *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 4, citing *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36.[3]

As we have said before, this Court does not normally sit to re-examine a finding of the type that was made below.

[3] "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 62 Stat. 496, 46 U. S. C. § 740.

We believe, however, that our decision in *South Chicago Co.* v. *Bassett, supra,* has not been fully understood. Our holding there that the determination of whether an injured person was a "member of a crew" is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.

Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew. Cf. *Gianfala* v. *Texas Co.,* 350 U. S. 879, reversing 222 F. 2d 382. Accordingly, we reverse the decision below.

Respondent, on its appeal from the trial court's judgment, raised two questions which the appellate court did not reach because of its disposition of the case.[4] So that these issues may be reviewed, we remand the case to that court.

It is so ordered.

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

In my opinion the court below properly dismissed the complaint because the evidence shows affirmatively that

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[4] "2, the dredge was not operating in navigable waters; and 3, there was no evidence of negligence on its part and no basis to apply the doctrine of res ipsa loquitur." 7 Ill. App. 2d, at 309, 129 N. E. 2d, at 455.

petitioner was not a member of a "crew of a vessel," [1] as that term has heretofore been used by the courts, or indeed according to any commonly understood meaning of the expression. Since the passage of the Longshoremen's Act in 1927,[2] such membership has been a prerequisite to the right to sue under the Jones Act.[3] *Swanson* v. *Marra Bros.*, 328 U. S. 1.

According to past decisions, to be a "member of a crew" an individual must have some connection, more or less permanent, with a ship and a ship's company.[4] More particularly, this Court has said that he must be "naturally and primarily on board to aid in . . . navigation," as distinguished from those "serving on vessels, to be sure, but [whose] service was that of laborers, of the sort performed by longshoremen and harbor workers." Congress intended to remove from the coverage of the Jones Act "all those various sorts of longshoremen and harbor workers who were performing labor on a vessel." *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260, 257.

Petitioner's relationship to this dredge met none of these requirements. He was simply an ordinary laborer,

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[1] It is assumed that this dredge may properly be regarded as a "vessel." And, with the Court, I do not reach the question of whether the swampy land in which the dredge was operating could be deemed "navigable water," an additional factor conditioning the applicability of the Jones Act.

[2] 33 U. S. C. § 901 *et seq.*

[3] 46 U. S. C. § 688.

[4] See *Warner* v. *Goltra*, 293 U. S. 155; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Norton* v. *Warner Co.*, 321 U. S. 565; *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187; *The Bound Brook*, 146 F. 160, 164; *The Buena Ventura*, 243 F. 797; *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779; *De Wald* v. *Baltimore & Ohio R. Co.*, 71 F. 2d 810; *Diomede* v. *Lowe*, 87 F. 2d 296; *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. 2d 245; *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F. 2d 383, 388.

a member of the Common Laborers' Union. Temporarily unemployed, he applied to his union, which sent him to respondent as a laborer. Respondent was a contractor on the canal-digging project, and employed a construction gang on shore under the supervision of a foreman. This foreman assigned Senko to take the job of "deckhand" or "laborer" on respondent's dredge, the *James Wilkinson,* a craft which, though afloat, served as a stationary earth-removing machine. His duties there were miscellaneous, consisting of serving as assistant and handy-man to the team of men operating the earth-removing pumps. He carried supplies from shore to dredge and back, cleaned up the dredge, filled the water cooler, and did errands on shore. He worked an eight-hour shift, was paid by the hour, and received premium pay for overtime. He lived at home, drove to work every day, and brought his own meals. He did not belong to the National Maritime Union or any other seamen's organization. He was subject to the discipline and supervision not of officers of a vessel but of the labor foreman in charge of the construction project, who worked on shore. At any time Senko could have been shifted to a job on shore by the foreman and replaced with one of the shore laborers; in other words, his *connection* was not with the vessel but with the construction gang. He had no duties connected with navigation; in fact he had never been on the dredge when it was pushed from one location to another, and never even saw it moved.

There is nothing in the record to indicate that petitioner was responsible for the seaworthiness of the dredge, or that he ever performed or was qualified to perform any duties of that type. True, he cleaned lights, but these were not "navigation" lights, as the dredge did not carry the latter except when under tow. In effect he cleaned lanterns and placed them when the construction work continued at night. Again, he took "soundings," but in

spite of the maritime flavor of the phrase, the facts permit no salty inference, since the soundings were taken not in aid of navigation (the dredge being completely stationary at such times), but only to measure the amount of silt pumped from the canal. All this means is that Senko occasionally measured the work-progress on an earth-removal project, a task about as nautical as measuring the depth of a natural swimming pool under construction in marshy ground.

I do not think that these facts permit a finding that petitioner was a "member of a crew," more or less permanently connected with a ship's company and on board "naturally and primarily" in aid of navigation. His nexus was not with a ship's company but with a construction crew on shore. He signed no papers to join the vessel and his employment was governed by no "articles"; he was merely assigned by the Laborers' Union "pusher" to this particular task on an earth-removing project. His boss was not a ship's officer but a construction superintendent whose office was on land. In fact the record is bare of any of the things which common sense demands of a "ship's company." There was no captain, no master, no mate, no ship's papers or ship's discipline, no log, no galley, no watches to stand. And to say that Senko's job was naturally and primarily in aid of navigation can be done, it seems to me, only at the cost of removing from those words all semblance of content. Not only did Senko have nothing to do with navigation, but he did not "aid" navigation in the sense of helping to maintain the vessel or its crew in a condition to navigate.[5] He was

[5] I do not, of course, contend that men such as ship's cooks cannot be members of a crew merely because their actual jobs have nothing to do with making the vessel move. The vital distinction is that such men do contribute to the functioning of the vessel *as a vessel*—as a means of transport on water. Not so Senko, whose duties had absolutely nothing to do with the dredge in its aspects *as a vessel*.

simply a handy-man and assistant for a crew of men operating an earth-removing machine which happened to be afloat and which, occasionally and always in Senko's absence, was pushed from place to place.

The fact that it was a jury that found Senko to be "a member of a crew" does not relieve us of the responsibility for seeing to it that what is in effect a jurisdictional requirement of the Jones Act is obeyed. This Court has more than once reviewed similar determinations of other fact-finding bodies, and set them aside when satisfied that they did not meet the requirements of the Jones Act or Longshoremen's Act. *Cantey* v. *McLain Line, Inc.*, 312 U. S. 667; *Norton* v. *Warner Co.*, 321 U. S. 565; *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187. The reason is, of course, as the Court said in the *Norton* case, *supra*, that "where Congress has provided that those basic rights [conferred by the Jones Act] shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption [arising from the Longshoremen's Act] to be narrowed whether by administrative construction or otherwise." 321 U. S., at 571.[6] I cannot see why this same sound reasoning should not apply in reverse, that is, where Congress has provided that a right *shall* be withheld from a certain class, and where that class has been narrowed by the "construction" of some fact-finding body. Nor, I submit, should it make any difference that such a body is a jury.[7] A jury's verdict

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[6] It is worth noting that in *Norton*, where the Court reversed a determination by a Commissioner that a bargeman in general charge of a barge was not a member of a crew, all of the factors on which the Court relied are conspicuously absent here.

[7] Certainly *South Chicago Coal & Dock Co.* v. *Bassett*, *supra*, upon which the Court relies, does not suggest that a jury's verdict on this issue is to be accorded some special sanctity. That case simply held that a District Court could not grant a trial *de novo* on an issue

casts no such spell as should lead the Court to permit it to rob this restriction of the Jones Act of meaningful significance. This, in my opinion, is what today's decision permits.[8]

I would affirm the decision of the court below. This would not leave petitioner without a remedy. He has already applied for and secured workmen's compensation under the Illinois Workmen's Compensation Act. This is the relief which Congress intended him to have, and I would not add to it another remedy denied by Congress.

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within the primary jurisdiction of the Administrator, under the Longshoremen's Act. There is no comparable fact-finding procedure under the Jones Act. Moreover, despite the fact that the Longshoremen's Act gave the Administrator "full power and authority to hear and determine all questions in respect of" claims under the Act, this Court did in fact examine the Administrator's determination that the plaintiff there was not a member of a crew, and sustained it only after concluding that it was supported by the evidence. Further, the Court's citation of *Bassett* in *Cantey* v. *McLain Line, Inc., supra,* would seem in context to imply that the Court regarded the result in *Bassett* as reflecting its own independent determination as to the status of the petitioner there, rather than as a decision passing merely on the scope of judicial review to be accorded to the determination of the Administrator. And, if that be so, *Bassett* should surely control the result here, since if the *Bassett* petitioner was as a matter of law not a "member of a crew," *a fortiori,* Senko was not.

[8] *Gianfala* v. *Texas Co.,* 350 U. S. 879, should not be regarded as an obstacle to reaching what, in my view, is plainly the right result here. The petitioner in *Gianfala* at least played a part in the operation of moving the barge, and thus arguably was performing a function "in aid of" navigation. Moreover, the *per curiam* order in *Gianfala,* entered solely on the basis of the petition for certiorari, without the benefit of an opposing brief or oral argument, can scarcely be regarded as a precedent of much significance.

BUTLER *v.* MICHIGAN.

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF DETROIT, MICHIGAN.

No. 16. Argued October 16, 1956.—Decided February 25, 1957.

Section 343 of the Michigan Penal Code, in effect, makes it a misdemeanor to sell or make available to the general reading public any book containing obscene language "tending to the corruption of the morals of youth." For selling to an adult police officer a book which the trial judge found to have such a potential effect on youth, appellant was convicted of a violation of this section. *Held:* The statute violates the Due Process Clause of the Fourteenth Amendment, and the conviction is reversed. Pp. 380–384.

Reversed.

Manuel Lee Robbins argued the cause for appellant. With him on the brief was *William G. Comb.*

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for appellee. With him on the brief were *Thomas M. Kavanagh,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General.

Briefs of *amici curiae* supporting appellant were filed by *Horace S. Manges* for the American Book Publishers Council, Inc., *Osmond K. Fraenkel* for the Authors League of America, Inc., and *Erwin B. Ellmann* for the Metropolitan Detroit Branch, American Civil Liberties Union.

John Ben Shepperd, Attorney General, and *Philip Sanders,* Assistant Attorney General, filed a brief for the State of Texas, as *amicus curiae,* urging that the appeal be dismissed.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This appeal from a judgment of conviction entered by the Recorder's Court of the City of Detroit, Michigan,

challenges the constitutionality of the following provision, § 343, of the Michigan Penal Code:

> "Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor."

Appellant was charged with its violation for selling to a police officer what the trial judge characterized as "a book containing obscene, immoral, lewd, lascivious language, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." Appellant moved to dismiss the proceeding on the claim that application of § 343 unduly restricted freedom of speech as protected by the Due Process Clause of the Fourteenth Amendment in that the statute (1) prohibited distribution of a book to the general public on the basis of the undesirable influence it may have upon youth; (2) damned a book and

404165 O—57——31

proscribed its sale merely because of some isolated passages that appeared objectionable when divorced from the book as a whole; and (3) failed to provide a sufficiently definite standard of guilt. After hearing the evidence, the trial judge denied the motion, and, in an oral opinion, held that ". . . the defendant is guilty because he sold a book in the City of Detroit containing this language [the passages deemed offensive], and also because the Court feels that even viewing the book as a whole, it [the objectionable language] was not necessary to the proper development of the theme of the book nor of the conflict expressed therein." Appellant was fined $100.

Pressing his federal claims, appellant applied for leave to appeal to the Supreme Court of Michigan. Although the State consented to the granting of the application "because the issues involved in this case are of great public interest, and because it appears that further clarification of the language of . . . [the statute] is necessary," leave to appeal was denied. In view of this denial, the appeal is here from the Recorder's Court of Detroit. We noted probable jurisdiction. 350 U. S. 963.

Appellant's argument here took a wide sweep. We need not follow him. Thus, it is unnecessary to dissect the remarks of the trial judge in order to determine whether he construed § 343 to ban the distribution of books merely because certain of their passages, when viewed in isolation, were deemed objectionable. Likewise, we are free to put aside the claim that the Michigan law falls within the doctrine whereby a New York obscenity statute was found invalid in *Winters* v. *New York*, 333 U. S. 507.

It is clear on the record that appellant was convicted because Michigan, by § 343, made it an offense for him to make available for the general reading public (and he in fact sold to a police officer) a book that the trial judge

found to have a potentially deleterious influence upon youth. The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. Indeed, the Solicitor General of Michigan has, with characteristic candor, advised the Court that Michigan has a statute specifically designed to protect its children against obscene matter "tending to the corruption of the morals of youth." * But the appellant was not convicted for violating this statute.

We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby

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*Section 142 of Michigan's Penal Code provides:

"Any person who shall sell, give away or in any way furnish to any minor child any book, pamphlet, or other printed paper or other thing, containing obscene language, or obscene prints, pictures, figures or descriptions tending to the corruption of the morals of youth, or any newspapers, pamphlets or other printed paper devoted to the publication of criminal news, police reports, or criminal deeds, and any person who shall in any manner hire, use or employ such child to sell, give away, or in any manner distribute such books, pamphlets or printed papers, and any person having the care, custody or control of any such child, who shall permit him or her to engage in any such employment, shall be guilty of a misdemeanor."

Section 143 provides:

"Any person who shall exhibit upon any public street or highway, or in any other place within the view of children passing on any public street or highway, any book, pamphlet or other printed paper or thing containing obscene language or obscene prints, figures, or descriptions, tending to the corruption of the morals of youth, or any newspapers, pamphlets, or other printed paper or thing devoted to the publication of criminal news, police reports or criminal deeds, shall on conviction thereof be guilty of a misdemeanor."

arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction.

Reversed.

MR. JUSTICE BLACK concurs in the result.

Syllabus.

NILVA *v.* UNITED STATES.

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

No. 37. Argued November 8, 13, 1956.—Decided February 25, 1957.

In connection with a trial for conspiracy to violate the Federal Slot Machine Act, the court issued subpoenas *duces tecum* directing a corporation owned by one of the defendants to produce certain records of purchases and sales of slot machines. Petitioner, who was a vice-president of the corporation and an attorney of record for its owner, appeared on behalf of the corporation, produced certain records and stated that they were all of the subpoenaed records that he could find. Under court order, all records of the corporation were impounded by a Federal Marshal and among them were found records of purchases and sales of slot machines which petitioner had not produced. On the day after conviction of the defendants, the court ordered petitioner to appear four days later and show cause why he should not be held in criminal contempt for obstructing the administration of justice on three specifications. After a hearing, petitioner was found guilty of criminal contempt on all three specifications and was given a general sentence of imprisonment. On appeal, the Government abandoned two of the specifications but contended that the sentence should be sustained on the third. *Held:*

1. The conviction of criminal contempt on the third specification is sustained. Pp. 392–396.

(a) A criminal contempt is committed by one who, in response to a subpoena calling for corporate records, refuses to surrender them when they are in existence and within his control. P. 392.

(b) The evidence reasonably supports the conclusion that the records covered by the third specification were in existence and were within petitioner's control. Pp. 392–394.

(c) Although petitioner testified at his trial that he attempted in good faith to comply with the subpoenas, this testimony was subject to appraisal by the trial court, and the record contained sufficient basis to justify the court in concluding that petitioner's failure to comply with the subpoena was intentional and without "adequate excuse" within the meaning of Rule 17 (g) of the Federal Rules of Criminal Procedure. P. 395.

(d) In the circumstances of this case and in view of the wide discretion on such matters vested in the trial court, petitioner's

claim that he was not allowed adequate time to prepare his defense is unfounded. P. 395.

(e) Trial of petitioner before the trial judge who initiated the contempt proceeding was not improper, because Rule 42 (b) of the Federal Rules of Criminal Procedure requires disqualification of the trial judge only when "the contempt charged involves disrespect to or criticism of a judge," the contempt here charged was not of that kind, and there is no showing in this case of an abuse of discretion in failing to assign another judge. Pp. 395–396.

2. Since petitioner's general sentence followed his conviction on three original specifications and the Government has abandoned two of them, the trial court should be given an opportunity to reconsider the sentence; and the sentence is vacated and the case is remanded to the trial court for that purpose. P. 396.

227 F. 2d 74, 228 F. 2d 134, judgment vacated and case remanded to the District Court.

Eugene Gressman argued the cause for petitioner. With him on the brief was *John W. Graff*.

Richard J. Blanchard argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg*.

Mr. Justice Burton delivered the opinion of the Court.

In this case, a Federal District Court convicted an attorney of criminal contempt on three specifications for disobeying subpoenas *duces tecum*, and imposed a general sentence of imprisonment for a year and a day. Since the Government has abandoned two of the specifications, the principal questions are whether there is sufficient evidence to sustain the conviction on the third specification standing alone, and, if so, whether the case should be remanded for resentencing. For the reasons hereafter stated, we answer each in the affirmative.

In 1953, in the District Court of the United States for the District of North Dakota, petitioner, Allen I. Nilva,

was tried, with Elmo T. Christianson and Herman Paster, for conspiracy to violate the Federal Slot Machine Act, 64 Stat. 1134–1136, 15 U. S. C. §§ 1171–1177. Christianson was the Attorney General of North Dakota. Paster was the owner of several distributing companies located in St. Paul, Minnesota. Petitioner was an attorney in St. Paul, a brother-in-law of Paster, and an officer in several of Paster's distributing companies. The indictment charged that these three conspired, with others, to accumulate slot machines late in 1950 and transport them into North Dakota, where they were to be distributed and operated under the protection of Christianson, who was to take office as Attorney General of that State on January 2, 1951.

On the first trial, in 1953, a jury was unable to agree on the guilt of Christianson and Paster but acquitted petitioner. In 1954, in preparation for a retrial of Christianson and Paster, the same court issued subpoenas *duces tecum* No. 78, returnable on March 22, and No. 160, returnable on March 29. Each was addressed to the Mayflower Distributing Company, a St. Paul slot machine distributing corporation wholly owned by Paster. Each called for the production of records, for certain periods in 1950 and 1951, relating to transactions in slot machines and other coin-operated devices.[1] Each was served on Walter D. Johnson, secretary-treasurer of the company.

On the date set for trial, Paster, instead of producing the subpoenaed records, moved to quash the subpoenas

[1] Subpoena No. 160 commanded the corporation to—

"Come and bring with you all invoices, bills, checks, slips, papers, records, letters, ledger sheets, bookkeeping records, journals and copies thereof between, by or concerning Mayflower Distributing Company, made, entered, sent or received from July 1, 1950, through April 30, 1951, both dates inclusive, reflecting any and all purchases, sales, trades, exchanges or transfers, both domestic and foreign of any and all slot machines, flat-top or console, coin operated device, whether new or used with any persons, firm or concern."

on the ground that the company was wholly owned by him and that the subpoenas required him to furnish evidence against himself. The motion was denied and, in response to the Government's request, the court ordered the subpoenaed records to be produced "forthwith." [2] Three days later, on April 1, petitioner, who was an attorney of record for Paster, appeared in court and stated that he was the company's vice-president appearing for it in answer to the subpoenas. He said that "in response to this subpoena I personally, with the aid of people in the office force, searched all of our records in an attempt to comply with your subpoena and have brought all of the evidence I could to comply therewith." However, when the Government asked for the records of purchases and sales of slot machines called for by the subpoenas, he stated that he had been unable to locate them and suggested that some of the company's records had been transferred to St. Louis in connection with a conspiracy case pending there on appeal.[3]

The trial court, being convinced, as it later stated, that petitioner was giving false and evasive testimony, issued

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[2] This was pursuant to Rule 17 (c), Federal Rules of Criminal Procedure:

"Rule 17. Subpoena.

. . . . . .

"(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

[3] See *Nilva* v. *United States*, 212 F. 2d 115, decided April 19, 1954. This related to Samuel George Nilva, not the petitioner herein.

an order reciting the failure of the officers of the company to produce the subpoenaed records and ordering all records of the company impounded by the United States Marshal. Many of the company's records in St. Paul were at once impounded and accountants from the Federal Bureau of Investigation promptly examined them. Among them were records of the company's purchases and sales of slot machines in 1950 and 1951. At the conspiracy trial on April 12, an F. B. I. agent named Peterson testified about those records from summaries he had compiled.

On April 15, the trial court found it apparent that petitioner's testimony "was evasive or false, or both," and ordered him not to leave its jurisdiction without permission. No further action was taken at that time "because it was the Court's desire that the jury [in the conspiracy case] should not learn of the affair during the trial, so that the defendants therein would not be prejudiced by it in any way."

On April 22, the jury found Christianson and Paster guilty of the conspiracy charged.[4] On the following day, the court directed petitioner to appear on April 27 and show cause why he should not be held in criminal contempt for having obstructed the administration of justice.[5] In three specifications, the court charged petitioner with—

> "1. Giving false and evasive testimony under oath on April 1, 1954, upon answering, as vice-president of the Mayflower Distributing Company, subpoenaes duces tecum directed to [it] . . .

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[4] See *Christianson* v. *United States*, 226 F. 2d 646.

[5] "Rule 42. Criminal Contempt.

. . . . . .

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the

"2. Disobedience to subpoena duces tecum No. 78, directed to the Mayflower Distributing Company . . . in that the following articles were not produced, as required thereby:

"(a) Original ledger sheet reflecting the account of Stanley Baeder, November 1, 1950 through August 30, 1951;

. . . . . .

"3. Disobedience to subpoena duces tecum No. 160 directed to the Mayflower Distributing Company, and disobedience to the order of the Court, made on March 29, 1954, directing the Mayflower Distributing Company to produce records forthwith, in the case of *United States of America v. Elmo T. Christianson and Herman Paster,* Criminal No. 8158, in that the following articles were not produced, as required thereby:

"(a) General ledger 1950;
"(b) General ledger 1951;
"(c) Journal 1950–1951;
"(d) Check Register 1950–1951; . . . ."

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defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment." Fed. Rules Crim. Proc.

Authority to prosecute for criminal contempt is found in Rule 17 (g), Federal Rules of Criminal Procedure, and 18 U. S. C. § 401 (3).

At 10 a. m., on April 27, petitioner appeared as directed. The court gave his counsel access to the impounded records and postponed the hearing until 3 p. m. At that time, the impounded books and records were present on the trial table and petitioner took the stand in his own defense. He identified items (a), (b), (c) and (d) of the 22 listed in the third specification and introduced those records as his exhibits. Item (a) was the company's general ledger for 1950. It contained a record of sales of new slot machines during October 1950—January 1951; sales of used slot machines during July 1950—January 1951; and purchases of used slot machines during August 1950—January 1951. Petitioner admitted having previously examined the company's 1950 and 1951 general ledgers but said that he had not found evidence of slot machine purchases and sales. He also admitted that he had not examined 19 of the 22 items listed in specification No. 3. At the close of the hearing, over petitioner's objection, a transcript of the testimony of F. B. I. Agent Peterson, given at the conspiracy trial, was admitted in evidence in the contempt proceeding without opportunity for petitioner to confront him or cross-examine him in that proceeding.

After finding petitioner guilty of criminal contempt on each of the three specifications, the court gave him a general sentence of imprisonment for a year and a day. On June 3, it released him on bail but denied his motion to suspend his sentence and grant him probation.

The Court of Appeals affirmed the judgment, 227 F. 2d 74, and denied rehearing, 228 F. 2d 134. We granted certiorari. 350 U. S. 1005.

Although the District Court found petitioner guilty of contempt on each of the three specifications, the Government now concedes that the convictions on the first two are of doubtful validity and does not undertake

to sustain them. Consequently, we do not consider them here.[6]

This reduces the case to the charge that petitioner wilfully disobeyed the court's order to produce certain corporate records required by subpoena No. 160. On that issue, it is settled that a criminal contempt is committed by one who, in response to a subpoena calling for corporation or association records, refuses to surrender them when they are in existence and within his control. *United States* v. *Fleischman,* 339 U. S. 349; *United States* v. *White,* 322 U. S. 694; *Wilson* v. *United States,* 221 U. S. 361; and see *United States* v. *Patterson,* 219 F. 2d 659.

The Government rests its case on petitioner's failure to produce the records listed in the first four items set forth in specification No. 3, *i. e.,* the general ledger for 1950, the general ledger for 1951, the journal for 1950–1951, and the check register for 1950–1951. These are impounded records which petitioner introduced in evidence as his exhibits.[7] The first is the general ledger for 1950, shown by the list of petitioner's exhibits to include records of purchases and sales made during part of the

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[6] The Government concedes also that the transcript of Agent Peterson's testimony at the conspiracy trial should not have been admitted in evidence in the contempt proceeding and does not rely on it here. This concession does not materially affect the Government's case under specification No. 3, because the books and records named in that specification were properly introduced by petitioner as exhibits in the contempt proceeding and speak for themselves.

[7] The parties stipulated that these exhibits would be a part of the record on appeal. Their contents are summarized in a list of exhibits which is included in a supplemental record, first introduced before the Court of Appeals. Although petitioner moved to strike out most of that supplemental record, he omitted from his motion all references to the pages containing this list and he has not objected to its presence in the record before us.

period called for by subpoena No. 160.[8] Petitioner admits having previously examined the first two items.

Petitioner was a "nominal" vice-president of the corporation; he rendered it legal and administrative services of many kinds; he was a brother-in-law of its sole owner and president; he appeared in court as its official representative in answer to the subpoenas and represented that he had brought with him all of the subpoenaed records that he and the office force could find.

The subpoenas had been served on the secretary-treasurer of the corporation, who, in turn, had entrusted to petitioner the duty of satisfying them. When peti-

[8] Among the records called for by subpoena No. 160 are "ledger sheets" reflecting purchases and sales of slot machines between July 1, 1950, and April 30, 1951. See note 1, *supra*. The list of exhibits shows that exhibit No. 1 includes Mayflower's general ledger for 1950 in which the—

> Records indicate that "Sales—Bells New" (Slot Machines) [were] made as follows:
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> . . . . .
>
> | | |
> |---|---|
> | October 1950 | $650.00 |
> | December 1950 | 3,631.00 |
> | January 1951 | 9,000.00 |
> | total | $13,501.00 |
>
> Sales—Bells used (slot machines)
>
> . . . . .
>
> | | |
> |---|---|
> | July 1950 | $1,249.00 |
> | August 1950 | 3,160.00 |
> | September 1950 | 2,125.00 |
> | October 1950 | (1,140.00) |
> | November 1950 | 625.00 |
> | December 1950 | 14,104.00 |
> | January 1951 | 50,005.00 |
> | total | $72,499.50 |

(*Footnote 8 continued on p. 394*)

tioner appeared in court in response to the subpoenas, he did not claim either want of actual possession of the required records or lack of opportunity or authority to produce them. See *United States* v. *Bryan,* 339 U. S. 323, 333; *Wilson* v. *United States, supra,* at 376. Yet he failed to produce the vital corporate records which the Government promptly impounded. In our opinion, the evidence reasonably supports the conclusion that those records were in existence and were within petitioner's control.

The records further indicate that the following purchases were made:

"Purchases—Bells New" (slot machines)

. . . . .

"Purchases—Bells used" (slot machines)

. . . . .

August 1950	$320.00	
" 1950	400.00	
" 1950	980.00	
September 1950	990.00	
" 1950	315.00	
" 1950	(80.00)	
November 1950	100.00	
December 1950	10,620.00	
January 1951	965.00)	
" 1951	3,815.00)	$11,960.00
" 1951	7,180.00)	
total	$25,784.00	

. . . . .

Exhibit No. 2 is described as a ledger containing, among other records, the Mayflower—St. Paul general journal March 31, 1951, to January 31, 1952, and general ledger February 1, 1951, to January 31, 1952.

Exhibit No. 3 is described as the Mayflower—St. Paul journal February 1, 1946, to January 31, 1953.

Exhibit No. 4 is described as the check register for Mayflower—St. Paul July 1, 1946, to January 31, 1955. Its contents are described as relating to purchases of used slot machines.

Petitioner contends that his testimony that he attempted, in good faith, to comply with the subpoenas disproves the existence of any wilful default, and presents an "adequate excuse" for his failure to comply under Rule 17 (g), Federal Rules of Criminal Procedure. However, his protestations of good faith were subject to appraisal by the court that heard them. It was the judge of his credibility and of the weight to be given to his testimony. *Lopiparo* v. *United States,* 216 F. 2d 87, 91. In our view, the trial court had a sufficient basis for concluding that petitioner intentionally, and without "adequate excuse," defied the court.[9] We, therefore, agree that the record sustains petitioner's conviction for criminal contempt under specification No. 3.

Petitioner claims that he was not allowed adequate time to prepare his defense. Under the circumstances of this case and in view of the wide discretion on such matters properly vested in the trial court, we think this claim is unfounded.[10]

Petitioner also contends that, as a matter of law, this contempt proceeding should have been heard by a judge other than the one who initiated the proceeding. Rule 42 (b), Federal Rules of Criminal Procedure, does not require disqualification of the trial judge except where

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[9] Whether proof of a lesser species of intent will satisfy the requirements for a conviction of criminal contempt need not be decided here. See, generally, Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 Col. L. Rev. 780, 793–796 (1943); Note, The Intent Element in Contempt of Injunctions, Decrees and Court Orders, 48 Mich. L. Rev. 860, 864–869 (1950).

[10] Petitioner was an attorney familiar with the case. He appeared in answer to the subpoenas on April 1; after the impounded records were produced, he was, on April 15, warned not to leave the jurisdiction of the court; the order for him to show cause why he should not be held in criminal contempt was issued on April 23, returnable on April 27; and on April 27 his hearing was postponed five hours to give his counsel extra time to examine the impounded records.

"the contempt charged involves disrespect to or criticism of a judge . . . ." [11] Concededly, the contempt here charged was not of that kind. And while there may be other cases, brought under Rule 42 (b), in which it is the better practice to assign a judge who did not preside over the case in which the alleged contumacy occurred to hear the contempt proceeding, such an assignment is discretionary. In the absence of a showing of an abuse of that discretion, petitioner's conviction on specification No. 3 should be sustained.

There remains a question as to petitioner's general sentence. It was imposed following his conviction on each of the three original specifications. Although the Government now undertakes to sustain but one of the convictions, it contends that petitioner's sentence should be left as it is because it was within the trial court's allowable discretion. We believe, however, that the court should be given an opportunity to reconsider petitioner's sentence in view of the fact that his conviction now rests solely on the third specification.[12]

Accordingly, petitioner's conviction for criminal contempt on specification No. 3 is affirmed but his sentence is vacated and the case is remanded to the District Court for reconsideration of his sentence.

It is so ordered.

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

This conviction for criminal contempt should be reversed and the case should be remanded to the District Court with directions that it be tried before some district judge other than the one who preferred the charges against

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[11] See note 5, *supra*.

[12] Cf. *Yasui* v. *United States*, 320 U. S. 115, 117; *Husty* v. *United States*, 282 U. S. 694, 703.

the petitioner and then convicted him. There have probably been few cases in the annals of this Court where the proceedings below were afflicted with so many flagrant errors. The Government has confessed most of these errors, but contends that enough can be salvaged from the record to sustain the conviction.

Petitioner, who is a lawyer, was a vice president of the Mayflower Distributing Company. Apparently he served largely as a nominal officer and performed only minor functions for this company. He was indicted with the president of the company and another man on a charge that they had conspired unlawfully to transport gambling devices in interstate commerce. A jury acquitted petitioner but failed to reach a verdict on the charge against the other two defendants. Subsequently a new trial was ordered for these two defendants. Prior to this new trial, the Government procured the issuance of two very broad subpoenas that directed the Mayflower Distributing Company to produce a large number of its corporate records, which the Government anticipated might show illegal transactions in interstate commerce. These subpoenas were served on the company's secretary but since he was occupied elsewhere he asked the petitioner to produce the material demanded by the subpoenas. On rather short notice petitioner produced a substantial number of records in compliance with these orders.

However, the Government, believing that all of the company's records called for by the subpoenas had not been produced, examined petitioner under oath before the trial judge in an effort to determine the extent of his compliance. Petitioner testified that he had produced as many of the records demanded as he could locate by a diligent search; nevertheless the trial judge ordered that all of the company's records be impounded. Government agents took charge of these impounded records and examined them. The Government claims that this

404165 O—57——32

material included books and documents called for by the subpoenas but not produced by the petitioner.

The trial judge issued an order under Rule 42 (b) of the Federal Rules of Criminal Procedure for petitioner to show cause why he should not be held in criminal contempt of the court. This charge of contempt was based on three specifications: (1) that petitioner had testified falsely and evasively when asked under oath whether he had produced all the materials called for by the subpoenas; (2) that he had failed to comply with the first subpoena by not producing five items; and (3) that he had disobeyed the second subpoena by failing to produce twenty-two items. Four days after this order was issued, a hearing on the contempt charge was held before the same trial judge who sat in the retrial of the two other defendants and who preferred the charge against the petitioner. The judge found petitioner guilty on all three specifications of contempt and sentenced him to one year and one day imprisonment. The Court of Appeals affirmed the judgment.[1]

The Government confesses that the conviction on the first two specifications of contempt cannot be sustained. As it concedes, there was not only insufficient evidence to support the charges made in these specifications but the trial court admitted and relied on evidence which was clearly incompetent. In addition, petitioner was denied his constitutional right to confront and cross-examine witnesses whose testimony was used against him. And in regard to the first specification alleging false and evasive testimony under oath, petitioner's conduct, at most, only involved perjury, a crime that cannot be punished by use of the contempt power.[2] Nevertheless, the Government would have us uphold the conviction and

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[1] 227 F. 2d 74.

[2] *In re Michael*, 326 U. S. 224.

sentence below on the basis of the finding of guilt on the third specification alone, the alleged failure to comply with the second subpoena.

A fundamental premise of our criminal law is that the prosecution has the burden of proving beyond a reasonable doubt that the accused committed the offense charged. And this Court has repeatedly emphasized that a prosecution for criminal contempt should be treated the same as any other criminal prosecution in this respect.[3] Before petitioner could be found guilty of criminal contempt for failing to comply with a subpoena, the prosecution had the burden of showing beyond a reasonable doubt that he intentionally refused to obey the court's order by not producing the materials demanded even though they were available to him. In this case the record does not contain enough competent evidence for the trier of fact to find that petitioner intentionally refused to comply with the second subpoena or even that the books and documents demanded by that subpoena were available to him.

Only four of the twenty-two documents referred to in the third specification were introduced in evidence and, as

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[3] *E. g., Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66 ("In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt . . . ."); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444 ("Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt . . . .").

See also *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.*, 163 F. 2d 168, 172. ("[W]e have examined the authorities with a view of ascertaining the essential elements necessary to be alleged and proven in order to justify a conviction for criminal contempt. It is plain that a defendant is entitled to all the protection afforded a defendant in an ordinary criminal case and that the burden is upon the government to establish his guilt beyond a reasonable doubt.")

the Government recognizes, the conviction must rest on petitioner's intentional refusal to produce these four documents. The only competent evidence in the record which even tends to support an inference that petitioner knew the location of any of these four documents or that they were accessible to him was his comment that he had "previously" examined two of them.[4] But by itself this solitary ambiguous fragment is clearly insufficient to justify finding beyond a reasonable doubt that the records were available to petitioner at the time when he was supposed to comply with the second subpoena. Since the prosecution offered no admissible evidence at the trial, this obscure remark constitutes the sole case on this point against petitioner. It is the only shred of admissible evidence that the majority has been able to glean from the record. On the other hand, petitioner testified that as far as he knew most of the company's records were stored in the basement of its office and that he had made a diligent search through these records in an effort to produce the material demanded by the subpoena. And he was not the custodian of the company's records, but only a nominal officer.

Similarly there was almost nothing before the trial court which even suggested that petitioner intentionally refused to produce the records demanded. He stated under oath that he was not trained in accounting and was not familiar with the company's accounting records.

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[4] The transcript of the record gives the following colloquy:

"Q. [By petitioner's counsel] Have you examined Respondent's Exhibit 3? [Exhibit 3 was one of the four documents introduced in evidence.]

"A. [By petitioner] Yes, sir, I have examined this record, as well as the others, and from my examination—no, let me say, I examined those other two records previously and was unable to find any evidence of slot machines—"

Petitioner's answer is ambiguous. It does not indicate where or when the prior examination took place or under what conditions.

He repeatedly testified that he had attempted in good faith to comply with the subpoena. The Government contends that a prima facie case of intentional refusal can be made out circumstantially from such evidence as is contained in the record. But since the competent evidence does not even support an inference that petitioner knew the location of the four crucial documents or that they were accessible to him, it is hard to see how an intentional refusal to obey can be implied at all, let alone beyond a reasonable doubt.

The trial judge compounded his error in convicting petitioner on such a striking insufficiency of competent evidence by relying on inadmissible hearsay statements which were not subject to cross-examination. The Government introduced in evidence, over objection, a transcript of an FBI agent's testimony at a prior trial in which petitioner was not a party. The agent had testified that he found certain records and documents in the company's offices. Apparently some of these were papers that the second subpoena had ordered the Mayflower Company to produce. The FBI agent's testimony together with certain statements by petitioner did furnish some evidence that these papers were available to petitioner, but, as the Government confesses, this testimony was plainly inadmissible.[5] Nevertheless the record indicates that the trial judge relied on it in finding petitioner guilty. As a matter of fact he went so far as to say ". . . that in this proceeding there ought to be included any pertinent part of the record or the files in the preceding case because this contempt proceeding arose out of the [petitioner's] actions [in refusing to comply with a subpoena issued in the prior case]."

The judge's position was manifestly wrong. A trial for criminal contempt is a proceeding wholly separate from

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[5] See *In re Oliver*, 333 U. S. 257, 273.

any prior trial out of which the alleged contempt arose.[6] A conviction for contempt in a Rule 42 (b) proceeding must stand on the evidence properly introduced in that proceeding. Where a trial judge bases his decision in part on evidence which although material is inadmissible the conviction cannot stand even though an appellate court might conclude after expunging the bad evidence that enough good remained to support the conviction. The defendant is entitled to a decision by the trial judge based on that judge's evaluation of the proper evidence. It is no answer to say that the trial judge could have found the defendant guilty solely on the good evidence. He did not and the defendant is entitled to a retrial. The danger of prejudice from inadmissible hearsay was particularly grave in this case since the admissible evidence before the trial court was so grossly inadequate.[7]

The erroneous admission of portions of the record from the earlier trial accentuated another impropriety in the proceedings below. I believe that it is wrong in a Rule 42 (b) proceeding for the same judge who issued the orders allegedly disobeyed and who preferred the charges of contempt on his own initiative and based on his own knowledge to sit in judgment on the accused. In essence, this allows a man who already believes that another person has disobeyed his command to act as both prosecutor and judge in a proceeding to "decide" formally whether that person disobeyed him and should be pun-

[6] *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444–446, 451; *Hayes* v. *Fischer*, 102 U. S. 121; *New Orleans* v. *The Steamship Co.*, 20 Wall. 387; *Ex parte Kearney*, 7 Wheat. 38.

[7] In its footnote 6 the majority states that the four documents introduced in evidence speak for themselves. It is not clear what the majority means by this statement. The mere fact that they were before the trial court does not tend to show that their location was known to petitioner or that they were available to him. At most it only shows that they were in existence at the trial and permits an inference that they existed somewhere previously.

ished. It is contrary to elemental principles of justice to place such power in the hands of any man.[8] At the very least another judge should be called upon to try the contempt charges. Here, besides issuing the orders allegedly disobeyed and then citing petitioner for contempt, the trial judge was intimately involved in earlier proceedings from which the contempt charge developed and in which evidence relevant to that charge was presented. Under such circumstances he would have been superhuman not to have held preconceived views as to petitioner's guilt.

The record discloses several incidents which specifically indicate that petitioner was not accorded a fair trial. At the outset, the judge informed the petitioner that the burden was on him to proceed. This is completely inconsistent with the presumption of innocence which exists in favor of a person charged with criminal contempt. Rather, the prosecutor carries the burden of establishing beyond a reasonable doubt that the alleged contemnor committed the offense charged.[9] The almost total absence of any attempt by the Government to introduce evidence at petitioner's trial in support of

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[8] In *In re Murchison*, 349 U. S. 133, this Court held that it violated due process for a judge to try contempt charges which he had preferred while acting as a so-called one-man grand jury. The Court, at pp. 136–137, declared:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

In the present case we are not compelled to reach the question of due process since this Court possesses general supervisory power over the criminal procedures in lower federal courts.

[9] See footnote 3, *supra*.

the accusations of contempt indicates that it relied on the trial judge's personal knowledge of the case. And as the majority points out several times the trial judge repeatedly indicated prior to the trial that he believed that petitioner was guilty of false and evasive testimony—the offense charged in the first specification of contempt. There is nothing which suggests that he did not have similar preconceived views on the other two specifications.[10] Surely every defendant is entitled to an impartial trial by one who has not prejudged his case but instead decides only on the evidence introduced at the trial. Application of this simple principle is just as necessary in contempt cases as in others.

Under Rule 42 (b) of the Federal Rules of Criminal Procedure when the alleged contempt involves "disrespect to or criticism of a judge" that judge shall be disqualified. Rule 42 (b) contains no provision with respect to disqualification in other circumstances. The majority relies on this silence to reject petitioner's contention that the trial judge here should have stepped aside. But at most Rule 42 (b) only permits a negative inference that a judge who prefers contempt charges for violations of his orders and who is intimately involved in related proceedings bearing on these charges can sit in judgment on the alleged contempt. In any event, Rule 42 (b) is a rule promulgated by this Court and where it is not explicit we should not interpret it in a manner to deny a fair trial before an impartial arbiter. Even if the majority were correct in saying that an "abuse of discretion" must be shown before

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[10] A further indication of the trial judge's attitude toward petitioner is found in the "supplemental record" prepared by the Government for the Court of Appeals. The judge is reported as stating at the conclusion of the contempt trial that had petitioner "been a defendant in the [trial of his two alleged coconspirators] as it was tried [the second time], I don't think he would have been so fortunate." The judge then imposed a harsh sentence on petitioner.

this Court will compel a judge to disqualify himself, the record in this case clearly shows that it was an "abuse of discretion" for the trial judge not to step aside.

If the preceding errors and improprieties are not flagrant enough, the Court of Appeals contributed additional error by relying on a so-called "supplemental record" to affirm the conviction. This "supplemental record" included material which was not introduced at the trial and which was not even made a part of the record on appeal by the trial judge. The Government now concedes that it was improper for the appellate court to rely on this material. But as its first opinion shows, the Court of Appeals referred to the "supplemental record" to support its conclusion that there was sufficient evidence for the trial judge to find that the papers called for were available to petitioner, that he failed to produce them and that this failure was in bad faith. And on rehearing the Court of Appeals added still further error. After conceding that there were grave doubts about the admissibility of the FBI agent's uncross-examined hearsay statements, it nevertheless stated that the conviction was not reversible because the contempt could have been prosecuted under the summary procedures of Rule 42 (a). But as the Government points out, petitioner could not conceivably have been convicted under that rule.

And there are even more matters tainting the proceedings below. For example, petitioner was rushed to trial with an unduly short period to prepare his defense to the contempt charge. He was informed of the specifications of contempt on a Friday and told to appear the next Tuesday for trial. Since the subpoenas were extremely broad and vague and the specifications involved a large number of documents petitioner faced a formidable task in preparing a defense. He had four days, over a weekend, to secure a lawyer and familiarize him with the case, to examine a great volume of records, to talk with those

having relevant knowledge about these records and to secure witnesses. And when at the trial his lawyer requested a reasonable continuance, the judge gave only a few hours respite.

This Court should not sanction a conviction where the whole proceedings below were riddled with so many basic errors of serious magnitude. Sending the case back for a new sentence, even if it turns out to be a smaller one, seems to me to fall far short of according this petitioner the kind of justice every defendant has a right to expect from our courts. While somehow there is an idea that procedural safeguards required in other criminal trials are not available in trials for criminal contempt, due process certainly requires that one charged with such contempt be given a fair trial before an impartial judge. Here petitioner is to be deprived of his liberty and perhaps his professional career without having received that essential prerequisite to justice.

Syllabus.

UNITED STATES *v.* TURLEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 289. Argued January 24, 1957.—Decided February 25, 1957.

In the National Motor Vehicle Theft Act, 18 U. S. C. § 2312, which makes it a federal crime to transport in interstate or foreign commerce a motor vehicle "knowing the same to have been stolen," the word "stolen" is not limited to takings which amount to common-law larceny, but it includes all takings of motor vehicles with a criminal intent to deprive the owner of the rights and benefits of ownership. Pp. 408–417.

(a) In the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law. P. 411.

(b) Where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning; but "stolen" has no accepted common-law meaning. Pp. 411–412.

(c) In these circumstances, the word "stolen" should be given a meaning consistent with the context in which it appears and the purpose of the legislation. Pp. 412–413.

(d) In the light of the purpose of the Act and its legislative history, the word "stolen" should not be interpreted so as to limit it to situations which at common law would be considered larceny, but should be interpreted to include all takings with a criminal intent to deprive the owner of the rights and benefits of ownership. Pp. 413–417.

(e) A different result is not required by the fact that after 1948 the Department of Justice proposed various clarifying amendments to the Act and several of these amendments have passed one House of Congress without coming to a vote in the other. P. 415, n. 14.

141 F. Supp. 527, reversed and remanded.

Roger D. Fisher argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

Fenton L. Martin argued the cause and filed a brief for appellee.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case concerns the meaning of the word "stolen" in the following provision of the National Motor Vehicle Theft Act, commonly known as the Dyer Act:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." [1]

The issue before us is whether the meaning of the word "stolen," as used in this provision, is limited to a taking which amounts to common-law larceny, or whether it includes an embezzlement or other felonious taking with intent to deprive the owner of the rights and benefits of ownership. For the reasons hereafter stated, we accept the broader interpretation.

In 1956, an information based on this section was filed against James Vernon Turley in the United States District Court for the District of Maryland. It charged that Turley, in South Carolina, lawfully obtained possession of an automobile from its owner for the purpose of driving certain of their friends to the homes of the latter in South Carolina, but that, without permission of the owner and with intent to steal the automobile, Turley

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[1] 18 U. S. C. § 2312. The original Act, sponsored by Representative L. C. Dyer of Missouri, became law in 1919. 41 Stat. 324. It was amended, in 1945, to include aircraft, 59 Stat. 536, and was re-enacted, in 1948, as part of the Criminal Code, 62 Stat. 806.

converted it to his own use and unlawfully transported it in interstate commerce to Baltimore, Maryland, where he sold it without permission of the owner.[2] The information thus charged Turley with transporting the automobile in interstate commerce knowing it to have been obtained by embezzlement rather than by common-law larceny.

Counsel appointed for Turley moved to dismiss the information on the ground that it did not state facts sufficient to constitute an offense against the United States. He contended that the word "stolen" as used in the Act referred only to takings which constitute common-law larceny and that the acts charged did not. The District Court agreed and dismissed the information. 141 F. Supp. 527. The United States concedes that the facts alleged in the information do not constitute common-law larceny, but disputes the holding that a motor vehicle obtained by embezzlement is not "stolen" within the meaning of the Act. The Government appealed directly

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[2] As amended, the information charged that—

"On or about January 20, 1956, at Columbia, South Carolina,

JAMES VERNON TURLEY

did lawfully obtain a certain 1955 Ford automobile from its owner, Charles T. Shaver, with permission of said owner to use the automobile briefly on that day to transport certain of their friends to the homes of the latter in Columbia, South Carolina, and to return with them, but after so obtaining the automobile and transporting said persons to their homes, and before returning with them or delivering back the automobile to its owner, James Vernon Turley, without permission of the owner, and with intent in South Carolina to steal the 1955 Ford automobile, did convert the same to his own use and did unlawfully transport it in interstate commerce from Columbia, South Carolina, to Baltimore in the State and District of Maryland, knowing it to have been stolen, where he did on January 21, 1956, sell said 1955 Ford automobile without permission of the owner."

to this Court under 18 U. S. C. § 3731 because the dismissal was based upon a construction of the statute upon which the information was founded. We noted probable jurisdiction. 352 U. S. 816.

Decisions involving the meaning of "stolen" as used in the National Motor Vehicle Theft Act did not arise frequently until comparatively recently. Two of the earlier cases interpreted "stolen" as meaning statutory larceny as defined by the State in which the taking occurred.[3] The later decisions rejected that interpretation but divided on whether to give "stolen" a uniformly narrow meaning restricted to common-law larceny, or a uniformly broader meaning inclusive of embezzlement and other felonious takings with intent to deprive the owner of the rights and benefits of ownership.[4] The Fifth, Eighth and Tenth Circuits favored the narrow definition,[5] while the Fourth, Sixth and Ninth Circuits favored

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[3] *Carpenter* v. *United States,* 113 F. 2d 692 (C. A. 8th Cir. 1940); *Abraham* v. *United States,* 15 F. 2d 911 (C. A. 8th Cir. 1926). The *Abraham* case arose in Oklahoma, where larceny was defined by statute in the narrow common-law sense, and the conviction was reversed because the taking did not meet that test. The *Carpenter* case arose in Minnesota, where the statutory definition of larceny included embezzlement and other types of fraudulent taking, and the conviction was affirmed.

[4] In this opinion felonious is used in the sense of having criminal intent rather than with reference to any distinction between felonies and misdemeanors.

[5] *Murphy* v. *United States,* 206 F. 2d 571 (C. A. 5th Cir. 1953) (false pretenses); *Ackerson* v. *United States,* 185 F. 2d 485 (C. A. 8th Cir. 1950) (false pretenses); *Hite* v. *United States,* 168 F. 2d 973 (C. A. 10th Cir. 1948) (false pretenses). Cf. *Hand* v. *United States,* 227 F. 2d 794 (C. A. 10th Cir. 1955) (larceny by bailee); and *Stewart* v. *United States,* 151 F. 2d 386 (C. A. 8th Cir. 1945) (larceny by bailee). See also, *United States* v. *Kratz,* 97 F. Supp. 999 (D. C. Neb. 1951) (embezzlement); *United States* v. *O'Carter,* 91 F. Supp. 544 (D. C. S. D. Iowa 1949) (false pretenses); *Ex parte Atkinson,* 84 F. Supp. 300 (D. C. E. D. S. C. 1949) (false pretenses).

the broader one.[6] We agree that in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law. See *Jerome* v. *United States,* 318 U. S. 101, 104 (1943); *United States* v. *Handler,* 142 F. 2d 351, 354 (C. A. 2d Cir. 1944).

We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.[7] But "stolen" (or "stealing") has no accepted common-law meaning. On this point the Court of Appeals for the Fourth Circuit recently said:

> "But while 'stolen' is constantly identified with larceny, the term was never at common law equated or

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[6] *Boone* v. *United States,* 235 F. 2d 939 (C. A. 4th Cir. 1956) (false pretenses); *Smith* v. *United States,* 233 F. 2d 744 (C. A. 9th Cir. 1956) (embezzlement); *Breece* v. *United States,* 218 F. 2d 819 (C. A. 6th Cir. 1954) (embezzlement); *Wilson* v. *United States,* 214 F. 2d 313 (C. A. 6th Cir. 1954) (embezzlement); *Collier* v. *United States,* 190 F. 2d 473 (C. A. 6th Cir. 1951) (embezzlement); *Davilman* v. *United States,* 180 F. 2d 284 (C. A. 6th Cir. 1950) (embezzlement). And see *United States* v. *Sicurella,* 187 F. 2d 533, 534 (C. A. 2d Cir. 1951) where the court said that "a narrow common law definition [of "stolen"] is not required under the Dyer Act."

Most of these cases adopted the definition of "stolen" given by Judge Shackelford Miller, Jr., in *United States* v. *Adcock,* 49 F. Supp. 351, 353 (D. C. W. D. Ky. 1943) (embezzlement):

". . . the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law, and that such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it."

[7] *United States* v. *Carll,* 105 U. S. 611 (1882); *United States* v. *Smith,* 5 Wheat. 153 (1820); *United States* v. *Brandenburg,* 144 F. 2d 656 (C. A. 3d Cir. 1944).

> exclusively dedicated to larceny. 'Steal' (originally 'stale') at first denoted in general usage a taking through secrecy, as implied in 'stealth,' or through stratagem, according to the Oxford English Dictionary. Expanded through the years, it became the generic designation for dishonest acquisition, but it never lost its initial connotation. Nor in law is 'steal' or 'stolen' a word of art. Blackstone does not mention 'steal' in defining larceny—'the felonious taking and carrying away of the personal goods of another'—or in expounding its several elements. IV Commentaries 229 et seq." *Boone* v. *United States,* 235 F. 2d 939, 940 (C. A. 4th Cir. 1956).

Webster's New International Dictionary (2d ed., 1953) likewise defines "stolen" as "Obtained or accomplished by theft, stealth, or craft . . . ." Black's Law Dictionary (4th ed., 1951) states that "steal" "may denote the criminal taking of personal property either by larceny, embezzlement, or false pretenses." [8] Furthermore, "stolen" and "steal" have been used in federal criminal statutes, and the courts interpreting those words have declared that they do not have a necessary common-law meaning coterminous with larceny and exclusive of other theft crimes.[9] Freed from a common-law meaning, we should

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[8] In defining "theft" Webster's New International Dictionary (2d ed. 1953) says: "*Stealing* and *theft*, esp. in popular use, are broader terms than *larceny*, and may include *swindling* as well as *embezzlement*."

"The term 'theft,' sometimes used as a synonym of larceny, is in reality a broader term, applying to all cases of depriving another of his property whether by removing or withholding it, and includes larceny, robbery, cheating, embezzlement, breach of trust, etc." 13 Encyclopaedia Britannica, Larceny (1953), 720. And see 2 Bouvier's Law Dictionary (3d rev. ed. 1914) 3267.

[9] See, *e. g., United States* v. *O'Connell,* 165 F. 2d 697, 698 (C. A. 2d Cir. 1948) ("steal" or "unlawfully take by any fraudulent device, scheme, or game" from dining car moving in interstate commerce);

give "stolen" the meaning consistent with the context in which it appears.

> "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U. S. 503, 509–510 (1955); see also, *United States* v. *Sullivan,* 332 U. S. 689, 693–694 (1948).

It is, therefore, appropriate to consider the purpose of the Act and to gain what light we can from its legislative history.

By 1919, the law of most States against local theft had developed so as to include not only common-law larceny but embezzlement, false pretenses, larceny by trick, and other types of wrongful taking. The advent of the automobile, however, created a new problem with which the States found it difficult to deal. The automobile was uniquely suited to felonious taking whether by larceny, embezzlement or false pretenses. It was a valuable, salable article which itself supplied the means for speedy escape. "The automobile [became] the perfect chattel for modern large-scale theft." [10] This challenge could be best

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United States v. *De Normand,* 149 F. 2d 622, 624 (C. A. 2d Cir. 1945) (interstate transportation of goods "stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin"); *United States* v. *Handler,* 142 F. 2d 351, 353 (C. A. 2d Cir. 1944) (same); *Crabb* v. *Zerbst,* 99 F. 2d 562, 565 (C. A. 5th Cir. 1938) ("embezzle, steal, or purloin" property of the United States); *United States* v. *Trosper,* 127 F. 476, 477 (D. C. S. D. Cal. 1904) ("steal" from the mails); *United States* v. *Jolly,* 37 F. 108 (D. C. W. D. Tenn. 1888) ("steal" from the mails); *United States* v. *Stone,* 8 F. 232 (C. C. W. D. Tenn. 1881) ("plunders, steals, or destroys" goods belonging to a vessel in distress).

[10] Hall, Theft, Law and Society (2d ed. 1952), 235, and see 233–240; 58 Cong. Rec. 5470–5478.

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met through use of the Federal Government's jurisdiction over interstate commerce. The need for federal action increased with the number, distribution and speed of the motor vehicles until, by 1919, it became a necessity.[11] The result was the National Motor Vehicle Theft Act.

This background was reflected in the Committee Report on the bill presented by its author and sponsor, Representative Dyer. H. R. Rep. No. 312, 66th Cong., 1st Sess. This report, entitled "Theft of Automobiles," pointed to the increasing number of automobile thefts, the resulting financial losses, and the increasing cost of automobile theft insurance. It asserted that state laws were inadequate to cope with the problem because the offenders evaded state officers by transporting the automobiles across state lines where associates received and sold them. Throughout the legislative history Congress used the word "stolen" as synonymous with "theft," a term generally considered to be broader than "common-law larceny." [12] To be sure, the discussion referred to "larceny" but nothing was said about excluding other forms of "theft." The report stated the object of the Act in broad terms, primarily emphasizing the need for the exercise of federal powers.[13] No mention is made of a purpose to

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[11] In 1895, there were four automobiles in the United States and, in 1910, about 500,000. Hall, *op. cit.* 234 *et seq.* In 1919, there were nearly 6,500,000. H. R. Rep. No. 312, 66th Cong., 1st Sess. 2–3. Today, there are over 65,000,000 motor vehicle registrations. World Almanac (1957) 699.

[12] See n. 8, *supra.*

[13] The report began and ended as follows:

"The Congress of the United States can scarcely enact any law at this session that is more needed than the bill herein recommended, and that has for its purpose the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. . . . State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from

distinguish between different forms of theft, as would be expected if the distinction had been intended.[14]

"Larceny" is also mentioned in *Brooks* v. *United States*, 267 U. S. 432 (1925).[15] This reference, however, carries

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one State to another and ofttimes have associates in this crime who receive and sell the stolen machines. . . .

. . . . . .

"The purpose of the proposed law is to suppress crime in interstate commerce. Automobiles admittedly are tangible property, capable of being transmitted in interstate commerce. The larceny of automobiles is made a crime under the laws of all the States in the Union. No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it, with the penalties attached." *Id.*, at 1, 4. See also, 58 Cong. Rec. 5470–5478, 6433–6435.

[14] In 1948, following the decision in *Hite* v. *United States*, 168 F. 2d 973 (C. A. 10th Cir.), holding that the word "stolen" was restricted to common-law larceny, the Department of Justice proposed various clarifying amendments to 18 U. S. C. § 2312. These amendments sought to clarify the application of the Act by adding the words "embezzled, feloniously converted, or taken feloniously by fraud," or similar language. Such an amendment was adopted by one House of Congress in each of the 81st, 83d and 84th Congresses, but in each case it failed to come to a vote in the other House. Appellee seeks support for his interpretation of "stolen" in the failure of Congress to enact these proposals, but we think this failure is entitled to no significance. The proposed amendments are shown by their respective Committee Reports to be clarifying amendments. They included other proposed changes and were never voted down. See S. 1483, 81st Cong., 1st Sess. (S. Rep. No. 358); S. 675, 83d Cong., 2d Sess. (S. Rep. No. 2364); and H. R. 3702, 84th Cong., 1st Sess. (H. R. Rep. No. 919).

[15] In that case Chief Justice Taft, after referring to the purpose of Congress in passing the Act "to devise some method for defeating the success of these widely spread schemes of larceny," did not further discuss larceny but said:

"The quick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another

no necessary implication excluding the taking of automobiles by embezzlement or false pretenses. Public and private rights are violated to a comparable degree whatever label is attached to the felonious taking. A typical example of common-law larceny is the taking of an unattended automobile. But an automobile is no less "stolen" because it is rented, transported interstate, and sold without the permission of the owner (embezzlement).[16] The same is true where an automobile is purchased with a worthless check, transported interstate, and sold (false pretenses).[17] Professional thieves resort to innumerable forms of theft and Congress presumably

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police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." *Id.*, at 438–439.

[16] See *Smith* v. *United States,* 233 F. 2d 744 (C. A. 9th Cir. 1956); *Hand* v. *United States,* 227 F. 2d 794 (C. A. 10th Cir. 1955); *Stewart* v. *United States,* 151 F. 2d 386 (C. A. 8th Cir. 1945); Clark and Marshall, Crimes (5th ed. 1952), 428–451, 482–503; Annotation, Distinction between larceny and embezzlement, 146 A. L. R. 532.

A car rental situation was involved in *Davilman* v. *United States,* 180 F. 2d 284 (C. A. 6th Cir. 1950). Kindred situations were involved in *Breece* v. *United States,* 218 F. 2d 819 (C. A. 6th Cir. 1954); *Wilson* v. *United States,* 214 F. 2d 313 (C. A. 6th Cir. 1954); and *Collier* v. *United States,* 190 F. 2d 473 (C. A. 6th Cir. 1951). Another embezzlement situation, the use of an employee to obtain automobiles feloniously, was involved in *United States* v. *Bucur,* 194 F. 2d 297 (C. A. 7th Cir. 1952).

[17] See *Boone* v. *United States,* 235 F. 2d 939 (C. A. 4th Cir. 1956); *Murphy* v. *United States,* 206 F. 2d 571 (C. A. 5th Cir. 1953); *Ackerson* v. *United States,* 185 F. 2d 485 (C. A. 8th Cir. 1950); *Hite* v. *United States,* 168 F. 2d 973 (C. A. 10th Cir. 1948). In each of these cases the defendant obtained possession of a car by passing a bad check, falsely representing that it would be paid.

sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion.[18]

We conclude that the Act requires an interpretation of "stolen" which does not limit it to situations which at common law would be considered larceny. The refinements of that crime are not related to the primary congressional purpose of eliminating the interstate traffic in unlawfully obtained motor vehicles. The Government's interpretation is neither unclear nor vague. "Stolen" as used in 18 U. S. C. § 2312 includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.

Reversed and remanded.

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

If Congress desires to make cheating, in all its myriad varieties, a federal offense when employed to obtain an automobile that is then taken across a state line, it should express itself with less ambiguity than by language that leads three Courts of Appeals to decide that it has not said so and three that it has. If "stealing" (describing a thing as "stolen") be not a term of art, it must be deemed a colloquial, everyday term. As such, it would hardly be used, even loosely, by the man in the street to cover "cheating." Legislative drafting is dependent on treacherous words to convey, as often as not, complicated ideas, and courts should not be pedantically exacting in con-

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[18] For examples of other automobile theft devices, see Hall, Theft, Law and Society (2d ed. 1952), 252–253. For a history of common-law larceny and the development of other theft crimes, see *id.*, at 1–109, and Hall and Glueck, Criminal Law and Enforcement (1951), 165–171.

struing legislation. But to sweep into the jurisdiction of the federal courts the transportation of cars obtained not only by theft but also by trickery does not present a problem so complicated that the Court should search for hints to find a command. When Congress has wanted to deal with many different ways of despoiling another of his property and not merely with larceny, it has found it easy enough to do so, as a number of federal enactments attest. See, *e. g.*, 18 U. S. C. §§ 641, 655, 659, 1707. No doubt, penal legislation should not be artificially restricted so as to allow escape for those for whom it was with fair intendment designed. But the principle of lenity which should guide construction of criminal statutes, *Bell* v. *United States,* 349 U. S. 81, 83–84, precludes extending the term "stolen" to include every form of dishonest acquisition. This conclusion is encouraged not only by the general consideration governing the construction of penal laws; it also has regard for not bringing to the federal courts a mass of minor offenses that are local in origin until Congress expresses, if not an explicit, at least an unequivocal, desire to do so.

I would affirm the judgment.

Syllabus.

FEDERAL TRADE COMMISSION *v.* NATIONAL LEAD CO. ET AL.

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

No. 63. Argued December 12, 1956.—Decided February 25, 1957.

In a proceeding under § 5 of the Federal Trade Commission Act, the Federal Trade Commission found that respondents had unlawfully conspired to adopt and use a zone delivered pricing system in their sale of lead pigments. In its general cease and desist order prohibiting concert of action among respondents in the further use of such system, the Commission inserted a provision directing each respondent individually to cease and desist from adopting the same or a similar system of pricing for the purpose or with the effect of "matching" the prices of competitors. *Held:* The inclusion of this provision, as here interpreted, was within the statutory authority of the Commission. Pp. 420–431.

1. The findings of the Commission are supported by substantial evidence and are binding on respondents. Pp. 421–423.

2. The contested portion of the order must be viewed as limited in these respects: (1) it is temporary; (2) the order is directed solely at the use of a zone delivered pricing system; and (3) zone delivered pricing *per se* is not banned. Pp. 425–426.

3. Delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered prices. P. 426.

4. Section 2 (b) of the Clayton Act, relating to the right of a seller in good faith to meet the lower price of a competitor, must be read into every Commission order, and respondents therefore are afforded all the benefits of that section. P. 426.

5. The record shows that the respondents were afforded all the safeguards of a fair hearing. Pp. 426–428.

6. The remedy adopted by the Commission has a reasonable relation to the unlawful practices which were found to exist. Pp. 428–429.

7. Under the circumstances here, the Commission was justified in its determination that it was necessary to include some restraint in its order against the individual corporations, in order to prevent a continuance of the unfair competitive practices found to exist. Pp. 429–430.

8. The order does not prohibit or interfere with independent delivered zone pricing *per se;* nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition. Pp. 430–431.

9. Hypothetical situations do not warrant striking down the contested provision of the order. P. 431.

227 F. 2d 825, reversed.

Earl W. Kintner argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston* and *Robert B. Dawkins.*

Eugene Z. Du Bose argued the cause for respondents. On the brief were *Mr. Du Bose* for the National Lead Co., *Thomas J. McDowell* for the Sherwin-Williams Co., and *Nathan S. Blumberg* for the Eagle-Picher Co. et al., respondents. Also on the brief were *John B. Henrich, Jr., Richard Serviss, Robert A. Sturges* and *John T. Van Keuls* of counsel.

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole question involved in this proceeding under § 5 of the Federal Trade Commission Act [1] concerns the power of the Commission in framing an order pursuant to its finding that respondents had conspired to adopt and use a zone delivered pricing system in their sale of lead pigments.[2] In its general cease and desist order prohibiting concert of action among respondents in the further use

[1] 38 Stat. 719, as amended, 15 U. S. C. § 45.

[2] The three principal lead pigments are dry white lead, white lead in oil, and the lead oxides, red lead and litharge. Dry white lead is a fine white powder used as a pigment in paints. White lead in oil is white lead with linseed oil added and is sold for use as the basic ingredient in exterior house paint. Lead oxides and litharge are sold to electric storage battery manufacturers as the basic raw material for battery plates. Red lead is also the basic ingredient in red lead paint commonly used as a protective coating for iron and steel structures.

of such system, the Commission inserted a provision directing each respondent individually to cease and desist from adopting the same or a similar system of pricing for the purpose or with the effect of "matching" the prices of competitors. The respondents assert that this is beyond the power of the Commission, and the Court of Appeals agreed, 227 F. 2d 825, striking that provision from the Commission's order. We granted certiorari, 351 U. S. 961, because of the importance of the question in the administration of the Act. We restore the stricken provision of the Commission order, permitting it to stand with the interpretations placed upon it in this opinion.

I.

The original proceeding under § 5 of the Act was commenced in 1944. The order was entered on a second amended complaint filed in 1946. After protracted hearings, the Commission entered its findings which the Court of Appeals has held to be supported by substantial evidence. The findings material here are as follows:

The pricing practice of the industry as to the sale of white lead in oil prior to 1933 is not shown in the record. However, National Lead had as early as 1910 sold this pigment on the basis of territorial differentials involving free freight to specified towns. The differentials added to the base price were generally uniform for some 589 cities listed in National Lead's pricing system in 1933. The charge to purchasers outside the listed cities was the base price plus actual freight to the nearest listed city. In the sales of dry white lead and lead oxides it appears that by the sales practice prior to 1933 there was a uniform delivered price in the case of the white lead, while the purchasers of lead oxides paid the freight charge in addition to the base price.

Beginning in July 1933, the industry held a series of meetings in Chicago for the ostensible purpose of draft-

ing a code of fair competition to govern it under the National Industrial Recovery Act. These meetings resulted in an understanding and agreement among those attending, including respondents, to sell lead pigments "on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones . . . ." 49 F. T. C. 840. Four zoning systems were established covering the various lead pigments. As an example, the system for white lead in oil and "keg" products consisted of 12 geographical zones, one known as a par zone. The remaining zones in this system were known as premium zones, the price in each being determined by adding a set premium to the par zone price. These premiums varied from $.125 per cwt. in two of the zones to a high of $1 per cwt. in the premium zone covering the State of New Mexico.[3] The zones were highly artificial and zone boundaries led to bizarre results at times, with purchasers located near the plants of respondents being charged higher prices than those located at a distance from the plants. The industry, including respondents, not only agreed to sell at the same zone delivered prices in identical geographical zones but also adopted uniform discounts, terms of sale, and differentials with respect to certain of their products. A further agreement was to sell white lead in oil on the basis of consignment contracts.

The Commission stated that "nowhere in the code, nor in any preliminary draft of a code produced at the meetings of any of the committees, is there any reference to

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[3] The par zone includes a number of northeastern and midwestern States. However, some cities located within these States are excluded from the par zone. On the other hand, the San Francisco area is a par zone, as is the City of St. Louis, though both are located in States not included in par zone areas. For a detailed discussion and maps of the operation of the zone pricing system, see the findings, 49 F. T. C. 840–870.

the use of zones or to territorial differences in the prices of lead pigments, or to the use of agency or consignment contracts or arrangements in the sale of white lead-in-oil." *Id.*, at 839. The Commission added that "with certain exceptions, the respondents have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments agreed upon in 1933 and 1934 as herein found from 1934 to the present time." *Id.*, at 849. The respondents admit that they are bound by these findings and we see no reason to disturb them.

II.

The Commission entered an order prohibiting respondents from entering into or carrying out any "planned common course of action," agreement, or conspiracy to sell at prices determined pursuant to a "zone delivered price system," or any other system resulting in identical prices at the points of sale. The order also included a provision, to which respondents strenuously object, directing each of them to cease and desist from

> "quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." *Id.*, at 873–874.

The Commission, in an accompanying opinion, stated that in all cases where it found violations of the law, "it is the Commission's duty to determine to the best of its ability the remedy necessary to suppress such activity and to take every precaution to preclude its revival." *Id.*, at 884. In this case, the opinion pointed out, the

respondents cooperatively revised the pricing practices in the industry by establishing a "uniform zone pricing system." Detailed discussions were carried on which resulted not only in an agreement, but "maps showing the boundaries of the zones to be observed . . . were distributed" by the individual respondents. *Id.*, at 884. Each respondent has "since that time . . . followed the pricing system and adhered to the zone boundaries so discussed and shown on these maps." *Ibid.* Discussing the complaint, the Commission in its opinion further noted that charges were included against each respondent as to its individual use of and adherence to the zone system of selling " 'for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves.' . . . It was the adherence by each of them to this system of pricing that made the combination work. . . . Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture." *Id.*, at 884–885. In its view, the Commission added, the "prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents [defendants] participated." *Id.*, at 884. When and if competition is restored and the indi-

vidual prohibition is no longer necessary, the Commission expressed its intention, upon application, to vacate the latter provision of its order.

III.

At the beginning we must understand the limits of the contested portion of the order. *First,* it is temporary. Though its life expectancy is not definite, it is clear that the Commission was creating a breathing spell during which independent pricing might be established without the hang-over of the long-existing pattern of collusion. *Second,* the order is directed solely at the use of a zone delivered pricing system [4] and no other. This system is a pricing method based on geographic divisions or zones, the boundaries of which are entirely drawn by the seller. His delivered price is the same throughout a particular geographic zone so drawn up by him. Customarily the delivered price is different between zones, though as here, widely separated zones, geographically, might have the same delivered price. It is well to mention here that while this Court has passed upon the validity of basing point systems of sales, *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 (1945), it has not decided the validity of the zone pricing plan used here. *Third,* zone delivered pricing *per se* is not banned by the order. The Commission might have made the order more specific by entering a flat prohibition of the use for a definite period of the device found to be "the very cornerstone of the . . . conspiracy," *i. e.,* zone pricing. See *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 428 (1945), where the corporate defendants were enjoined from "forming or joining any such trade association" for

[4] Our discussion of the zone delivered pricing system should in no way be construed as our approval of its use. We do not reach that question.

a period of five years. But the Commission chose the more flexible sanction, *i. e.*, the limited use of zone delivered pricing. However, it concluded that the future use should be temporarily restricted for the protection of the public. And so, delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing. Considering these conditions with the mechanics of the zone plan, we see that the only way prices can be systematically identical is for the zones of competitors to be so drawn as to be in whole or in part identical and for zone prices to be the same in those zones which coincide or overlap.[5]

Respondents contend that the cease and desist order, as written, excludes the benefits of § 2 (b) of the Clayton Act.[6] While § 2 (b) "does not concern itself with pricing systems . . . [but] only [with] the seller's 'lower' price and [with] that only to the extent that it is made 'in good faith to meet an equally low price of a competitor,'" *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 753 (1945), this section is read into every Commission order. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476 (1952). Since § 2 (b) must, therefore, be read into this order, the respondents are afforded all of the benefits of that section.

IV.

It is the contention of respondents that the contested paragraph of the order effectively bans the noncollusive,

[5] At oral argument, counsel for the Federal Trade Commission was requested by the Court to submit a statement on behalf of the Commission setting forth its view as to the scope of the disputed paragraph of the cease and desist order. In response, the Commission supplied its interpretation which coincides with that set out here.

[6] 49 Stat. 1526, 15 U. S. C. § 13 (b).

individual use of zone pricing, a lawful, competitive sales method, and is therefore beyond the authority of the Commission. Respondents further assert that even if the Commission had such authority its exercise here was entirely improper, unnecessary, and would, in fact, hamper competition in the industry. They stress that the complaint did not include a charge that the individual use of zone pricing was unlawful; that it came into the case after the Trial Examiner had filed his recommended decision and order; and that respondents were denied the opportunity of rebutting the charge by evidence showing zone pricing to be "a logical, economical, and competitive method of doing business." The insertion of the objectionable paragraph, they contend, violates due process in that they had no opportunity to defend. Since § 2 (b) is read into every Commission order and since it would allow respondents to rebut the charge, their contention is completely answered and we shall not deal with it further.

It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them. *Morgan* v. *United States,* 304 U. S. 1 (1938). The record indicates that the respondents were afforded those safeguards. The emphasis that there was no charge, no evidence, no finding to support the inclusion of the objectionable provision in the order is misplaced. Its insertion was nothing more than a mode of implementation, selected by the Commission, to enforce its findings of violations of the Act. Moreover, the record is replete with evidence that counsel supporting the complaint would seek the use of such a method of enforcement. As far back as in early 1947, while the case was before the Examiner, the issue concerning the effect of the zone pricing system used by respondents was before the Commission on motions to dismiss. Admittedly Count II of the complaint dealt with the use of the zone system itself. The Commission overruled the

motions to dismiss, adopting the view of counsel supporting the complaint that its allegations were directed against the effects of the alleged system or method, *i. e.*, the zone pricing plan, and "not against individual instances" of discrimination in pricing. Furthermore, in May 1948, almost five years before the decree was entered, counsel supporting the complaint filed written exceptions to the recommended decision of the Examiner on the ground, among others, that it did not include a provision similar to the one objected to here. If respondents thought rebuttal evidence necessary, the record is bare of any effort on their part to offer it. Nor was any request made to reopen the case for that purpose after it reached the Commission.

We pass on to respondents' major contention questioning the power of the Commission. As the Court has said many times before, the Commission may exercise only the powers granted it by the Act. *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 559 (1926). The relevant sections empower the Commission to prevent the use of unfair methods of competition and authorize it, after finding an unfair method present, to enter an order requiring the offender "to cease and desist" from using such unfair method.

The Court has held that the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist. In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), the Court named the Commission "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, at 612–613. Thereafter, in *Federal Trade Commission* v.

Cement Institute, 333 U. S. 683, 726 (1948), the Court pointed out that the Congress, in passing the Act, "felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation." In the light of this, the Court reasoned, it should not "lightly modify" the orders of the Commission. Again, in *Federal Trade Commission* v. *Ruberoid Co., supra,* at 473, we said that "if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." We pointed out there that Congress had placed the primary responsibility for fashioning orders upon the Commission. These cases narrow the issue to the question: Does the remedy selected have a "reasonable relation to the unlawful practices found to exist"? We believe that it does. First, the simplicity of operation of the plan lends itself to unlawful manipulation; second, it had been used in the industry for almost a quarter of a century; and, third, its originator and chief beneficiary had been previously adjudged a violator of the antitrust laws. *United States* v. *National Lead Co.,* 332 U. S. 319 (1947).

The respondents were found to have plainly disregarded the law. In this respect the Commission correctly considered the circumstances under which the illegal acts occurred. Those in utter disregard of law, as here, "call for repression by sterner measures than where the steps could reasonably have been thought permissible." *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 89–90 (1950). Respondents made no appeal here from some of the findings as to their guilt. Having lost the battle on the facts, they hope to win the war on the type of decree. They fight for the right to continue to use

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individually the very same weapon with which they carried on their unlawful enterprise. The Commission concluded that this must not be permitted. It was "not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than [it] requires . . . ." *International Salt Co.* v. *United States,* 332 U. S. 392, 400 (1947). Although the zone plan might be used for some lawful purposes, decrees often suppress a lawful device when it is used to carry out an unlawful purpose. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436 (1940); *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707 (1944). In such instances the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices. *Ethyl Gasoline Corp.* v. *United States, supra,* at 461; *Local 167, I. B. T.* v. *United States,* 291 U. S. 293 (1934). See also *United States* v. *United States Gypsum Co., supra; United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 188 (1944).[7] We therefore conclude that, under the circumstances here, the Commission was justified in its determination that it was necessary to include some restraint in its order against the individual corporations in order to prevent a continuance of the unfair competitive practices found to exist. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 120 (1937). We shall now examine the restraint imposed.

Respondents point out that in only one other case in the long history of the Commission has a similar order

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[7] We need not discuss the full scope of the powers of the Federal Trade Commission, nor their relative breadth in comparison with those of a court of equity. As this Court said in *May Dept. Stores Co.* v. *Labor Board,* 326 U. S. 376, 390 (1945), "The test . . . is whether the Board might have reasonably concluded . . . that such an order was necessary . . . ."

been entered. They say our restoration of the contested paragraph will effectively prevent competition. In its supplemental memorandum, see note 5, *supra,* the Commission has clearly stated its understanding of the scope and effect of the order. It is our conclusion that the order was not intended to and does not prohibit or interfere with independent delivered zone pricing *per se.* Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition. Furthermore, as we have said, there is read into the order the provision of § 2 (b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions.

Respondents pose hypothetical situations which they say may rise up to plague them. However, "we think it would not be good judicial administration," as our late Brother Jackson said in *International Salt Co.* v. *United States,* 332 U. S. 392, 401 (1947), to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies. And, we might add, if there is a burden that cannot be made lighter after application to the Commission, then respondents must remember that those caught violating the Act must expect some fencing in. *United States* v. *Crescent Amusement Co., supra,* at 187.

Reversed.

BREITHAUPT *v.* ABRAM, WARDEN.

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO.

No. 69. Argued December 12–13, 1956.—Decided February 25, 1957.

Petitioner, while driving a pickup truck on a state highway, was involved in a collision which resulted in the deaths of three persons and his serious injury. While he was lying unconscious in the emergency room of a hospital, the smell of liquor was detected on his breath, and a state patrolman requested that a sample of his blood be taken. An attending physician, using a hypodermic needle, drew a blood sample, which on laboratory analysis contained about .17% alcohol. Thereafter petitioner was convicted in a state court for involuntary manslaughter. At his trial, the evidence of the blood test, together with expert testimony that a person with .17% alcohol in his blood was under the influence of intoxicating liquor, was admitted over petitioner's objection. *Held:* Petitioner was not deprived of due process of law in violation of the Fourteenth Amendment. Pp. 433–440.

(a) In a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the use of evidence obtained by an unreasonable search and seizure violative of the Fourth Amendment nor of compelled testimony violative of the Fifth Amendment, even if the evidence in this case were so obtained. P. 434.

(b) The taking of a blood test by a skilled technician is not "conduct that shocks the conscience," nor such a method of obtaining evidence as offends a "sense of justice." *Rochin* v. *California*, 342 U. S. 165, and *Brown* v. *Mississippi*, 297 U. S. 278, distinguished. Pp. 435–438.

(c) The right of the individual to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions. Pp. 439–440.

58 N. M. 385, 271 P. 2d 827, affirmed.

F. Gordon Shermack, acting under appointment by the Court, 352 U. S. 1032, argued the cause and filed a brief for petitioner.

Richard H. Robinson, Attorney General of New Mexico, and *Walter R. Kegel,* Assistant Attorney General, argued the cause for respondent. With him on the brief were *Paul L. Billhymer,* Assistant Attorney General, and *Dean S. Zinn.*

Mr. Justice Clark delivered the opinion of the Court.

Petitioner, while driving a pickup truck on the highways of New Mexico, was involved in a collision with a passenger car. Three occupants of the car were killed and petitioner was seriously injured. A pint whiskey bottle, almost empty, was found in the glove compartment of the pickup truck. Petitioner was taken to a hospital and while he was lying unconscious in the emergency room the smell of liquor was detected on his breath. A state patrolman requested that a sample of petitioner's blood be taken. An attending physician, while petitioner was unconscious, withdrew a sample of about 20 cubic centimeters of blood by use of a hypodermic needle. This sample was delivered to the patrolman and subsequent laboratory analysis showed this blood to contain about .17% alcohol.

Petitioner was thereafter charged with involuntary manslaughter. Testimony regarding the blood test and its result was admitted into evidence at trial over petitioner's objection. This included testimony of an expert that a person with .17% alcohol in his blood was under the influence of intoxicating liquor. Petitioner was convicted and sentenced for involuntary manslaughter. He did not appeal the conviction. Subsequently, however, he sought release from his imprisonment by a petition for a writ of habeas corpus to the Supreme Court of New Mexico.[1] That court, after argument, denied the writ.

[1] Petitioner sought and was denied a writ of habeas corpus from the District Court for Santa Fe County, New Mexico, on March 7, 1952.

58 N. M. 385, 271 P. 2d 827 (1954). Petitioner contends that his conviction, based on the result of the involuntary blood test, deprived him of his liberty without that due process of law guaranteed him by the Fourteenth Amendment to the Constitution. We granted certiorari, 351 U. S. 906, to determine whether the requirements of the Due Process Clause, as it concerns state criminal proceedings, necessitate the invalidation of the conviction.

It has been clear since *Weeks* v. *United States,* 232 U. S. 383 (1914), that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions. There is argument on behalf of petitioner that the evidence used here, the result of the blood test, was obtained in violation of the Due Process Clause of the Fourteenth Amendment in that the taking was the result of an unreasonable search and seizure violative of the Fourth Amendment. Likewise, he argues that by way of the Fourteenth Amendment there has been a violation of the Fifth Amendment in that introduction of the test result compelled him to be a witness against himself. Petitioner relies on the proposition that "the generative principles" of the Bill of Rights should extend the protections of the Fourth and Fifth Amendments to his case through the Due Process Clause of the Fourteenth Amendment. But *Wolf* v. *Colorado,* 338 U. S. 25 (1949), answers this contention in the negative. See also *Twining* v. *New Jersey,* 211 U. S. 78 (1908); *Palko* v. *Connecticut,* 302 U. S. 319 (1937); *Irvine* v. *California,* 347 U. S. 128 (1954). New Mexico has rejected, as it may, the exclusionary rule set forth in *Weeks, supra. State* v. *Dillon,* 34 N. M. 366, 281 P. 474 (1929). Therefore, the rights petitioner claims afford no aid to him here for the fruits of the violations, if any, are admissible in the State's prosecution.

Petitioner's remaining and primary assault on his conviction is not so easily unhorsed. He urges that the conduct of the state officers here offends that "sense of justice" of which we spoke in *Rochin* v. *California,* 342 U. S. 165 (1952). In that case state officers broke into the home of the accused and observed him place something in his mouth. The officers forced open his mouth after considerable struggle in an unsuccessful attempt to retrieve whatever was put there. A stomach pump was later forcibly used and among the matter extracted from his stomach were found narcotic pills. As we said there, "this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities." *Id.,* at 172. We set aside the conviction because such conduct "shocked the conscience" and was so "brutal" and "offensive" that it did not comport with traditional ideas of fair play and decency. We therefore found that the conduct was offensive to due process. But we see nothing comparable here to the facts in *Rochin.*

Basically the distinction rests on the fact that there is nothing "brutal" or "offensive" in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; [2]

[2] It might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony. In fact, the State of Kansas has by statute declared that any person who operates a motor vehicle on the public highways of that State shall be deemed to have given his consent to submit to a chemical

and certainly the test as administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence.[3] We therefore con-

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test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood. If, after arrest for operation of a motor vehicle while under the influence of intoxicating liquor, the arresting officer has reasonable grounds for the arrest, and the driver refuses to submit to the test, the arresting officer must report this fact to the proper official who shall suspend the operator's permit. Kan. Gen. Stat., 1949 (Supp. 1955), § 8–1001 through § 8–1007.

[3] Forty-seven States use chemical tests, including blood tests, to aid in the determination of intoxication in cases involving charges of driving while under the influence of alcohol. Twenty-three of these States sanction the use of the tests by statute. These, for the most part, are patterned after § 11–902 of the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinances. This section makes it unlawful to operate a motor vehicle while under the influence of intoxicating liquor. The finding of the presence of a certain percentage of alcohol, by weight, in the blood of a person gives rise to a presumption that he was under the influence of intoxicating liquor. The twenty-three state statutory provisions include: Ariz. Rev. Stat. Ann., 1956, § 28–692; Del. Code Ann.,

clude that a blood test taken by a skilled technician is not such "conduct that shocks the conscience," *Rochin, supra,* at 172, nor such a method of obtaining evidence that it offends a "sense of justice," *Brown* v. *Mississippi,* 297 U. S. 278, 285–286 (1936).[4] This is not to say that the

1953 (Cum. Supp. 1956), Tit. 11, § 3507; Ga. Code Ann., 1937 (Cum. Supp. 1955), § 68–1625; Idaho Code, 1948 (Cum. Supp. 1955), § 49–520.2; Burns' Ind. Stat. Ann., 1952 (Cum. Supp. 1955), § 47–2003; Kan. Gen. Stat., 1949 (Supp. 1955), § 8–1001 through § 8–1007; Ky. Rev. Stat. Ann., 1955, § 189.520; Me. Rev. Stat., 1954, c. 22, § 150; Minn. Stat. Ann., 1945 (Cum. Supp. 1956), § 169.12; Neb. Rev. Stat., 1943 (Reissue of 1952), § 39–727.01; N. H. Rev. Stat. Ann., 1955, § 262:20; N. J. Stat. Ann., 1937 (Cum. Supp. 1955), § 39:4–50.1; McKinney's N. Y. Laws, Veh. and Traffic Law, § 70 (5); N. D. Laws 1953, c. 247; Ore. Rev. Stat., 1955, § 483.630; S. C. Code, 1952, § 46–344; S. D. Code, 1939 (Supp. 1952), § 44.0302–1; Tenn. Code Ann., 1955, § 59–1032 to § 59–1033; Utah Code Ann., 1953, § 41–6–44; Va. Code, 1950 (Supp. 1956), § 18–75.1 to § 18–75.3; Wash. Rev. Code, 1951, § 46.56.010; Wis. Laws 1955, c. 510; Wyo. Comp. Stat., 1945 (Cum. Supp. 1955), § 60–414. Other States have accepted the use of chemical tests for intoxication without statutory authority but with court approval. See, *e. g., People* v. *Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953) (blood); *Block* v. *People,* 125 Colo. 36, 240 P. 2d 512 (1951) (blood); *Touchton* v. *Florida,* 154 Fla. 547, 18 So. 2d 752 (1944) (blood); *Illinois* v. *Bobczyk,* 343 Ill. App. 504, 99 N. E. 2d 567 (1951) (breath); *Iowa* v. *Haner,* 231 Iowa 348, 1 N. W. 2d 91 (1941) (blood); *Breithaupt* v. *Abram,* 58 N. M. 385, 271 P. 2d 827 (1954) (blood); *Bowden* v. *State,* 95 Okla. Cr. 382, 246 P. 2d 427 (1952) (blood and urine); *McKay* v. *State,* 155 Tex. Cr. R. 416, 235 S. W. 2d 173 (1950) (breath). Still other States accept the practice of the use of chemical tests for intoxication though there does not appear to have been litigation on the problem. See the summary in a report of the Committee on Tests for Intoxication of the National Safety Council, *1955 Uses of Chemical Tests for Intoxication.*

The fact that so many States make use of the tests negatives the suggestion that there is anything offensive about them. For additional discussion of the use of these blood tests see Inbau, Self-Incrimination (1950), 72–86.

[4] Several States have considered the very problem here presented but none have found that the conduct of the state authorities was

indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such "brutality" as would come under the *Rochin* rule. The chief law-enforcement officer of New Mexico, while at the Bar of this Court, assured us that every proper medical precaution is afforded an accused from whom blood is taken.[5]

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so offensive as to necessitate reversal of convictions based in part on blood tests. *People* v. *Duroncelay,* 146 A. Cal. App. 96, 303 P. 2d 617 (1956); *Block* v. *People,* 125 Colo. 36, 240 P. 2d 512 (1951); *State* v. *Ayres,* 70 Idaho 18, 211 P. 2d 142 (1949) (test results were favorable to accused); *State* v. *Cram,* 176 Ore. 577, 160 P. 2d 283 (1945). See also *State* v. *Sturtevant,* 96 N. H. 99, 70 A. 2d 909 (1950); cf. *United States* v. *Williamson,* 4 U. S. C. M. A. 320, 15 C. M. R. 320 (1954). But see *Iowa* v. *Weltha,* 228 Iowa 519, 292 N. W. 148 (1940); *Wisconsin* v. *Kroening,* 274 Wis. 266, 79 N. W. 2d 810 (1956). But cf. *United States* v. *Jordan,* 7 U. S. C. M. A. 452, 22 C. M. R. 242 (1957).

The withdrawal of blood for use in blood-grouping tests in state criminal prosecutions is widespread. See, *e. g., Maryland* v. *Davis,* 189 Md. 640, 57 A. 2d 289 (1948); *New Jersey* v. *Alexander,* 7 N. J. 585, 83 A. 2d 441 (1951); *Commonwealth* v. *Statti,* 166 Pa. Super. 577, 73 A. 2d 688 (1950).

Many States authorize blood tests in civil actions such as paternity proceedings. See, *e. g.,* the discussion in *Cortese* v. *Cortese,* 10 N. J. Super. 152, 76 A. 2d 717 (1950). Other States authorize such tests in bastardy proceedings. See, *e. g., Jordan* v. *Davis,* 143 Me. 185, 57 A. 2d 209 (1948); *State ex rel. Van Camp* v. *Welling,* 6 Ohio Op. 371, 3 Ohio Supp. 333 (1936). For a general discussion of blood tests in paternity proceedings see Schatkin, Disputed Paternity Proceedings (3d ed. 1953), 193–282.

[5] In explanation, he advised that by regulation the state police are permitted to obtain blood for analysis only when the blood is withdrawn by a physician. He further advised that it is the customary administrative practice among municipalities to allow blood to be taken only by a doctor. In all cases a competent technician is required to make the laboratory analysis incident to the test. We were assured that in no instance had a municipality or the state police permitted the test to be made without these precautions.

The test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.[6] The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous.[7]

As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of

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[6] National Safety Council, *Accident Facts 1956,* 43–71.

[7] Governors' Conference Committee, *Report on Highway Safety* (Nov. 1956); National Committee on Uniform Traffic Laws and Ordinances, *Uniform Vehicle Code* (Rev. 1956); White House Conference on Highway Safety, *Organize Your Community for Traffic Safety* (1954).

alcohol can often by this method be taken out of the confusion of conflicting contentions.

For these reasons the judgment is

Affirmed.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

The judgment in this case should be reversed if *Rochin* v. *California,* 342 U. S. 165, is to retain its vitality and stand as more than an instance of personal revulsion against particular police methods. I cannot agree with the Court when it says, "we see nothing comparable here to the facts in *Rochin.*" It seems to me the essential elements of the cases are the same and the same result should follow.

There is much in the Court's opinion concerning the hazards on our nation's highways, the efforts of the States to enforce the traffic laws and the necessity for the use of modern scientific methods in the detection of crime. Everybody can agree with these sentiments, and yet they do not help us particularly in determining whether this case can be distinguished from *Rochin.* That case grew out of police efforts to curb the narcotics traffic, in which there is surely a state interest of at least as great magnitude as the interest in highway law enforcement. Nor does the fact that many States sanction the use of blood test evidence differentiate the cases. At the time *Rochin* was decided illegally obtained evidence was admissible in the vast majority of States. In both *Rochin* and this case the officers had probable cause to suspect the defendant of the offense of which they sought evidence. In *Rochin* the defendant was known as a narcotics law violator, was arrested under suspicious circumstances and was seen by the officers to swallow narcotics. In neither case, of course, are we concerned with the defendant's guilt or innocence. The sole problem is whether the proceeding

was tainted by a violation of the defendant's constitutional rights.

In reaching its conclusion that in this case, unlike *Rochin,* there is nothing "brutal" or "offensive" the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." This implies that a different result might follow if petitioner had been conscious and had voiced his objection. I reject the distinction.

Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process question here presented. The Court's opinion suggests that an invasion is "brutal" or "offensive" only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—the references to a "considerable struggle" and the fact that the stomach pump was "forcibly used"*—the Court finds *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

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*Actually, the struggle in *Rochin* occurred in the defendant's home after the officers had broken in. He was arrested and taken to a hospital, and there was no evidence that he struggled there.

Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands. We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.

Viewed according to this standard, the judgment should be reversed.

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

The Court seems to sanction in the name of law enforcement the assault made by the police on this unconscious man. If law enforcement were the chief value in our constitutional scheme, then due process would shrivel

and become of little value in protecting the rights of the citizen. But those who fashioned the Constitution put certain rights out of the reach of the police and preferred other rights over law enforcement.

One source of protection of the citizen against state action is the Due Process Clause of the Fourteenth Amendment. Our decisions hold that the police violate due process when they use brutal methods to obtain evidence against a man and use it to convict him. *Rochin* v. *California,* 342 U. S. 165; *Chambers* v. *Florida,* 309 U. S. 227. But the conception of due process is not limited to a prohibition of the use of force and violence against an accused. In *Leyra* v. *Denno,* 347 U. S. 556, we set aside a conviction where subtle, nonviolent methods had been used to exact a confession from a prisoner. For it was obvious that coercion might be the product of subtlety as well as of violence. We should take the same libertarian approach here.

As I understand today's decision there would be a violation of due process if the blood had been withdrawn from the accused after a struggle with the police. But the sanctity of the person is equally violated and his body assaulted where the prisoner is incapable of offering resistance as it would be if force were used to overcome his resistance. In both cases evidence is used to convict a man which has been obtained from him on an involuntary basis. I would not draw a line between the use of force on the one hand and trickery, subterfuge, or any police technique which takes advantage of the inability of the prisoner to resist on the other. Nor would I draw a line between involuntary extraction of words from his lips, the involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids of his body when the evidence obtained is used to convict him. Under our system of government, police cannot compel people to furnish the evidence necessary to send them to prison.

Yet there is compulsion here, following the violation by the police of the sanctity of the body of an unconscious man.

And if the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person in order to get the evidence necessary to convict him, whether they find the person unconscious, give him a pill which puts him to sleep, or use force to subdue him. The indignity to the individual is the same in one case as in the other, for in each is his body invaded and assaulted by the police who are supposed to be the citizen's protector.

I would reverse this judgment of conviction.

Syllabus.

RADOVICH *v.* NATIONAL FOOTBALL LEAGUE ET AL.

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

No. 94. Argued January 17, 1957.—Decided February 25, 1957.

Alleging that respondents conspired to monopolize and control professional football in violation of the Sherman Act, petitioner sued them under § 4 of the Clayton Act for treble damages and injunctive relief. He alleged, *inter alia*, that respondents schedule football games in various cities, including New York, Chicago, Philadelphia and Los Angeles; that a part of the business from which they derive a significant portion of their gross receipts is the transmission of the games over radio and television into nearly every State of the Union; that a part of the conspiracy was to destroy a competitive league by boycotting it and its players; that each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding his contract; that these contracts are enforced by agreement of the clubs to black-list any player violating them and to visit severe penalties on recalcitrant member clubs; that, by blacklisting petitioner, they prevented him from becoming a player-coach in an affiliated league and effectively prevented his employment in organized professional football in the United States; and that this damaged him in the sum of $35,000. *Held:*

1. The rule established in *Federal Baseball Club* v. *National League*, 259 U. S. 200, and *Toolson* v. *New York Yankees*, 346 U. S. 356, is specifically limited to the business of organized professional baseball and does not control this case. Pp. 449–452.

(a) As long as Congress continues to acquiesce, this Court should adhere to—but not extend—the interpretation of the Act made in those cases. P. 451.

(b) If there be error or discrimination in these rulings, the orderly way to eliminate it is by legislation and not by court decision. P. 452.

2. The volume of interstate business involved in organized professional football places it within the provisions of the Antitrust Acts. P. 452.

3. The complaint states a cause of action, and petitioner is entitled to an opportunity to prove his charges. Pp. 446–449, 453–454. 231 F. 2d 620, reversed.

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Maxwell Keith argued the cause for petitioner. With him on the brief were *Joseph L. Alioto* and *Elwood S. Kendrick.*

Philip Elman argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston.*

Marshall E. Leahy and *Bernard I. Nordlinger* argued the cause for respondents. *John F. O'Dea* was with them on a brief for the National Football League et al., respondents.

Leo R. Friedman filed a brief for Klawans et al., respondents.

MR. JUSTICE CLARK delivered the opinion of the Court.

This action for treble damages and injunctive relief, brought under § 4 of the Clayton Act,[1] tests the application of the antitrust laws to the business of professional football. Petitioner Radovich, an all-pro guard formerly with the Detroit Lions, contends that the respondents [2]

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[1] 38 Stat. 731, 15 U. S. C. § 15, reads as follows:

"SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Injunctive relief is provided for by 38 Stat. 737, 15 U. S. C. § 26.

[2] The respondents include the National Football League; its 10 member clubs at the time the complaint was filed: Boston Yanks, New York Giants, Philadelphia Eagles, Los Angeles Rams, Pittsburgh Steelers, Washington Redskins, Chicago Bears, Chicago Cardinals, Detroit Lions, and Green Bay Packers; the now defunct Pacific Coast League; the San Francisco Clippers, a member of the Pacific Coast League; Bert Bell, Commissioner of the National Football League; and J. Rufus Klawans, Commissioner of the Pacific Coast League.

entered into a conspiracy to monopolize and control organized professional football in the United States, in violation of §§ 1 and 2 of the Sherman Act; [3] that part of the conspiracy was to destroy the All-America Conference, a competitive professional football league in which Radovich once played; and that pursuant to agreement, respondents boycotted Radovich and prevented him from becoming a player-coach in the Pacific Coast League. Petitioner alleges that respondents' illegal conduct damaged him in the sum of $35,000, to be trebled as provided by the Act. The trial court, on respondents' motion, dismissed the cause for lack of jurisdiction and failure to state a claim on which relief could be granted. The Court of Appeals affirmed, 231 F. 2d 620, on the basis of *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), applying the baseball rule to all "team sports." It further found that even if such application was erroneous and that *United States* v. *International Boxing Club*, 348 U. S. 236 (1955), applied, Radovich had not grounded his claim on conduct of respondents which was "calculated to prejudice the public or unreasonably restrain interstate commerce." 231 F. 2d, at 623. We granted certiorari, 352 U. S. 818, in order to clarify the application of the *Toolson* doctrine and determine whether the business of football comes within the scope of the Sherman Act. For the reasons hereafter stated we conclude that *Toolson* and *Federal Baseball* do not con-

[3] 26 Stat. 209, 15 U. S. C. § 1, reads in pertinent part:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . ."

26 Stat. 209, 15 U. S. C. § 2, reads in pertinent part:

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ."

trol; that the respondents' activities as alleged are within the coverage of the antitrust laws; and that the complaint states a cause of action thereunder.

I.

Since the complaint was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged. Concisely the complaint states that:

1. Radovich began his professional football career in 1938 when he signed with the Detroit Lions, a National League club. After four seasons of play he entered the Navy, returning to the Lions for the 1945 season. In 1946 he asked for a transfer to a National League club in Los Angeles because of the illness of his father. The Lions refused the transfer and Radovich broke his player contract by signing with and playing the 1946 and 1947 seasons for the Los Angeles Dons, a member of the All-America Conference.[4] In 1948 the San Francisco Clippers, a member of the Pacific Coast League which was affiliated with but not a competitor of the National League, offered to employ Radovich as a player-coach. However, the National League advised that Radovich was black-listed and any affiliated club signing him would suffer severe penalties. The Clippers then refused to sign him in any position. This black-listing effectively prevented his employment in organized professional football in the United States.

2. The black-listing was the result of a conspiracy among the respondents to monopolize commerce in professional football among the States. The purpose of the conspiracy was to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States" in violation of §§ 1 and 2 of the

[4] This Conference operated from 1946 through 1949 at which time it was disbanded.

Sherman Act. It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League.

3. As part of its football business, the respondent league and its member teams schedule football games in various metropolitan centers, including New York, Chicago, Philadelphia, and Los Angeles. Each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract. These contracts are enforced by agreement of the clubs to black-list any player violating them and to visit severe penalties on recalcitrant member clubs. As a further "part of the business of professional football itself" and "directly tied in and connected" with its football exhibitions is the transmission of the games over radio and television into nearly every State of the Union. This is accomplished by contracts which produce a "significant portion of the gross receipts" and without which "the business of operating a professional football club would not be profitable." The playing of the exhibitions themselves "is essential to the interstate transmission by broadcasting and television" and the actions of the respondents against Radovich were necessarily related to these interstate activities.

In the light of these allegations respondents raise two issues: They say the business of organized professional football was not intended by Congress to be included within the scope of the antitrust laws; and, if wrong in this contention, that the complaint does not state a cause of action upon which relief can be granted.

II.

Respondents' contention, boiled down, is that agreements similar to those complained of here, which have for many years been used in organized baseball, have

been held by this Court to be outside the scope of the antitrust laws.[5] They point to *Federal Baseball* and *Toolson, supra,* both involving the business of professional baseball, asserting that professional football has embraced the same techniques which existed in baseball at the time of the former decision.[6] They contend that *stare decisis* compels the same result here. True, the umbrella under which respondents hope to stand is not so large as that contended for in *United States* v. *International Boxing Club, supra,* nor in *United States* v. *Shubert,* 348 U. S. 222 (1955). There we were asked to extend *Federal Baseball* to boxing and the theater. Here respondents say that the contracts and sanctions which baseball and football find it necessary to impose have no counterpart in other businesses and that, therefore, they alone are outside the ambit of the Sherman Act. In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball.* The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change.[7] All this, combined with the flood of litigation that would follow its repudiation, the harass-

[5] No contention is made that the business of professional football has any specific exemption from the antitrust laws.

[6] Since this action was dismissed on the pleadings, there has been no factual determination establishing the claimed similarity between the businesses of baseball and football.

[7] Congress did consider the extension of the baseball rule to other sports. In 1951 four separate bills were introduced to exempt organized professional sports from the antitrust laws. None of them were enacted. See H. R. 4229, 4230, 4231, and S. 1526, 82d Cong., 1st Sess. (1951).

ment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

The Court was careful to restrict *Toolson's* coverage to baseball, following the judgment of *Federal Baseball* only so far as it "determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S., at 357. The Court reiterated this in *United States* v. *Shubert, supra,* at 230, where it said, "In short, *Toolson* was a narrow application of the rule of *stare decisis.*" And again, in *International Boxing Club,* it added, "*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball.* . . . *Toolson* is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions." 348 U. S., at 242. Furthermore, in discussing the impact of the *Federal Baseball* decision, the Court made the observation that that decision "could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise. . . . The controlling consideration in *Federal Baseball* . . . was . . . the degree of interstate activity involved in the particular business under review." *Id.,* at 242–243. It seems that this language would have made it clear that the Court intended to isolate these cases by limiting them to baseball, but since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i. e.,* the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases. We did not extend them to boxing or the theater because we believed

that the volume of interstate business in each—the rationale of *Federal Baseball*—was such that both activities were within the Act. Likewise, the volume of interstate business involved in organized professional football places it within the provisions of the Act.

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses,[8] that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. This is not a new approach. See *Davis* v. *Department of Labor,* 317 U. S. 249, 255 (1942);[9] Compare *Rutkin* v. *United States,* 343 U. S. 130 (1952).

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[8] Consideration of basic differences, if any, between the baseball and football businesses, such as the football draft system, use of league affiliations, training facilities and techniques, etc., is not necessary to this decision.

[9] The concurring opinion uses this language: "Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine." 317 U. S., at 259.

III

We now turn to the sufficiency of the complaint. At the outset the allegations of the nature and extent of interstate commerce seem to be sufficient. In addition to the standard allegations, a specific claim is made that radio and television transmission is a significant, integral part of the respondents' business, even to the extent of being the difference between a profit and a loss. Unlike *International Boxing,* the complaint alleges no definite percentage in this regard. However, the amount must be substantial and can easily be brought out in the proof. If substantial, as alleged, it alone is sufficient to meet the commerce requirements of the Act. See *International Boxing, supra,* at 241.

Likewise, we find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274 (1923), is whether "the claim is wholly frivolous." While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, "we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress . . . ." *Id.,* at 274. See also *United States* v. *Employing Plasterers Assn.,* 347 U. S. 186 (1954).

Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade," *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public [10] and has

[10] In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469 (1940), this Court said: "The end sought was the prevention of restraints to free com-

provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act.[11] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

Respondents' remaining contentions we believe to be lacking in merit.

We think that Radovich is entitled to an opportunity to prove his charges. Of course, we express no opinion as to whether or not respondents have, in fact, violated the antitrust laws, leaving that determination to the trial court after all the facts are in.

Reversed.

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petition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*" (Emphasis supplied.) *Id.*, at 493. In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20 (1912), speaking of the antitrust laws, the Court said: "*The law is its own measure of right and wrong,* of what it permits, or forbids, and *the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." (Emphasis supplied.) *Id.*, at 49.

[11] 38 Stat. 731, 15 U. S. C. § 16, declares that a final judgment against a defendant in proceedings by the Government for violation of the antitrust laws may be introduced by a private litigant in a subsequent treble damage action and establishes *prima facie* a violation of the antitrust laws.

MR. JUSTICE FRANKFURTER, dissenting.

The difficult problem in this case derives for me not out of the Sherman Law but in relation to the appropriate compulsion of *stare decisis*. It does not derive from the Sherman Law because the most conscientious probing of the text and the interstices of the Sherman Law fails to disclose that Congress, whose will we are enforcing, excluded baseball—the conditions under which that sport is carried on—from the scope of the Sherman Law but included football. I say this, fully aware that the Sherman Law's applicability turns on the particular circumstances of activities pursued in trade and commerce among the several States. But whether the conduct of an enterprise is within or without the limits of the Sherman Law is, after all, a question for judicial determination, and conscious as I am of my limited competence in matters athletic, I have yet to hear of any consideration that led this Court to hold that "the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," *Toolson* v. *New York Yankees,* 346 U. S. 356, 357, that is not equally applicable to football.

But considerations pertaining to *stare decisis* do raise a serious question for me. That principle is a vital ingredient of law, for it "embodies an important social policy." *Helvering* v. *Hallock,* 309 U. S. 106, 119. It would disregard the principle for a judge stubbornly to persist in his views on a particular issue after the contrary had become part of the tissue of the law. Until then, full respect for *stare decisis* does not require a judge to forego his own convictions promptly after his brethren have rejected them.

The considerations that governed me two years ago in *United States* v. *International Boxing Club,* 348 U. S. 236,

have not lost their force by reason of the authority that time gives to a single decision. And so I am confronted with the *Toolson* case, *supra,* which guides me to find the present situation within its scope, and the *Boxing* case, *supra,* which, while it looks the other way, left *Toolson* as a living authority. Respect for the doctrine of *stare decisis* does not yet require me to disrespect the views I expressed in the *Boxing* case.

I would affirm.

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN joins, dissenting.

What was foreshadowed by *United States* v. *International Boxing Club,* 348 U. S. 236, has now come to pass. The Court, in holding that professional football is subject to the antitrust laws, now says in effect that professional baseball is *sui generis* so far as those laws are concerned, and that therefore *Federal Baseball Club* v. *National League,* 259 U. S. 200, and *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356, do not control football by reason of *stare decisis.* Since I am unable to distinguish football from baseball under the rationale of *Federal Baseball* and *Toolson,* and can find no basis for attributing to Congress a purpose to put baseball in a class by itself, I would adhere to the rule of *stare decisis* and affirm the judgment below.

If the situation resulting from the baseball decisions is to be changed, I think it far better to leave it to be dealt with by Congress than for this Court to becloud the situation further, either by making untenable distinctions between baseball and other professional sports, or by discriminatory fiat in favor of baseball.

Syllabus.

UNITED STATES GYPSUM CO. *v.* NATIONAL GYPSUM CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 11. Argued November 5–6, 1956.—Decided February 25, 1957.

After this Court, in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, reversed dismissal of the Government's suit to restrain violations of the Sherman Act through uniform patent-licensing agreements containing price-fixing provisions, appellees ceased paying royalties to appellant under those agreements; and they made no further payments until after new agreements without price-fixing provisions were entered into following entry in the antitrust suit of a final decree enjoining use of the old agreements. Subsequently, appellant sued appellees for the use of its patents during that period. It asserted three alternative grounds for recovery: (a) the royalty provisions of the old licensing agreements, (b) the reasonable value of the use of its patents, and (c) damages for patent infringement. On petition of appellees, the antitrust court modified its decree in the antitrust case so as to require appellant to dismiss with prejudice its suits against appellees. The court took no evidence beyond that already in the record in the antitrust proceeding, and the record was barren of any facts with respect to the situation existing in the industry since 1941. *Held:*

1. By virtue of its reservation of jurisdiction in its antitrust decree to make such "directions" and "modifications" as may be appropriate to the "carrying out" and "enforcement" of that decree, the District Court had jurisdiction to grant relief. Pp. 463–464.

2. The enjoining of appellant's suits for royalties under the outlawed licensing agreements was proper; and, upon remand, the District Court, by appropriate modification of its decree in the antitrust case or otherwise, may require appellant to dismiss those claims. Pp. 464–465, 476.

3. The enjoining of appellant's suits for compensation on a *quantum meruit* basis and for damages for patent infringement was not justified upon the record; and the case is remanded to the District Court for the taking of evidence on the issues of misuse of patents and purge of such misuse as they may relate to the period since February 1, 1948. Pp. 465–476.

(a) In the circumstances of this case, the District Court erred in holding that appellant's assertion of claims based upon the outlawed licensing agreements constituted a "fresh" misuse of its patents by appellant. Pp. 466–468.

(b) The District Court's judgment cannot be supported on the ground that the misuse of appellant's patents had not been purged, because (1) the only misuse of appellant's patents ever adjudicated in the antitrust case was that arising from the uniform price-fixing provisions of the licensing agreements, (2) the use of those agreements was terminated upon entry of the 1948 decree in the antitrust case, and (3) the record is bare of any facts relating to the situation in the industry since 1941. Pp. 465, 468–473.

(c) The District Court erred in holding that, regardless of whether they had been purged, the "old" misuse of its patents barred appellant from recovering damages for their infringement. *Hartford Empire Co.* v. *United States*, 323 U. S. 386, 324 U. S. 570, distinguished. Pp. 473–476.

(d) It is appropriate that the issues of misuse and purge since February 1, 1948, should be tried and disposed of by the antitrust court, rather than the courts in which appellant's suits were brought, both because of the relationship of these issues to the decree in the antitrust case and because of the antitrust court's familiarity with what has occurred in these protracted litigations. P. 476.

4. Should the antitrust court conclude that appellant is not barred, by reason of unpurged patent misuse, from recovery of compensation on a *quantum meruit* basis or from recovery of damages for patent infringement, the trial and disposition of all other issues, including any defense of patent invalidity, should then take place in the courts in which appellant's suits against appellees are pending. P. 476.

Reversed and remanded.

Bruce Bromley argued the cause for appellant. With him on the brief were *Cranston Spray, Robert C. Keck* and *Hugh Lynch, Jr.*

Samuel I. Rosenman argued the cause for the National Gypsum Co., appellee. With him on the brief were *Elmer E. Finck, Seymour D. Lewis, Malcolm A. Hoffmann* and *Seymour Krieger.*

Norman A. Miller argued the cause for the Certain-Teed Products Corporation, appellee. With him on the brief were *Donald N. Clausen* and *Herbert W. Hirsh.*

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston and *Edward Knuff* filed a memorandum for the United States, appellee.

MR. JUSTICE HARLAN delivered the opinion of the Court.

United States Gypsum Company appeals from a decree of a three-judge court of the United States District Court for the District of Columbia, entered December 9, 1954. This decree modified a final decree of that court, entered May 15, 1951, against Gypsum, the appellees National Gypsum Company and Certain-teed Products Corporation, and others, in a civil antitrust proceeding instituted by the Government in 1940.[1] The modification was a provision ordering Gypsum to dismiss with prejudice four suits which it had brought in three different federal district courts against National, Certain-teed, and two other co-defendants in the antitrust proceeding, to recover compensation or damages for the *pendente lite* use of certain of its patents during the period February 1, 1948, to May 15, 1951.[2]

At the outset some mention of the prolonged antitrust proceeding is required to put the present post-decree controversy in context. In that proceeding the Government charged Gypsum, National, Certain-teed, and a number

[1] Throughout this opinion United States Gypsum Company will be referred to as "Gypsum," National Gypsum Company as "National," and Certain-teed Products Corporation as "Certain-teed."

[2] The suits against National and Certain-teed were brought in the Northern District of Iowa. The other two suits were brought in the District of New Jersey, against Newark Plaster Company, and in the Southern District of New York, against Ebsary Gypsum Company. These latter suits have been settled and are not before us.

of other corporate and individual defendants with conspiracy to restrain and monopolize interstate commerce in gypsum board and other gypsum products in violation of §§ 1, 2 and 3 of the Sherman Act.[3] The crux of the Government's charges was the alleged illegality of Gypsum's system of industry-wide uniform patent licensing agreements containing clauses giving Gypsum the right to fix prices on gypsum board and products. In 1946, at the close of the Government's case, the District Court dismissed the complaint.[4] On appeal this Court, on March 8, 1948, reversed and remanded the case for further proceedings.[5] Thereafter the District Court, with one dissent,[6] interpreting this Court's decision to mean that Gypsum's multiple uniform price fixing patent licenses were illegal *per se* under the antitrust laws, granted the Government's motion for summary judgment, accepting as true the defendants' proffer of proof. On November 7, 1949, the District Court entered a decree which, among other things, adjudged Gypsum's patent licensing agreements illegal, null and void, enjoined the performance of such agreements, provided for limited compulsory nonexclusive licensing of Gypsum's patents on a reasonable royalty basis, and reserved jurisdiction over the case and parties for certain purposes. On appeals by both the Government and Gypsum, this Court, in 1950, dismissed Gypsum's appeal,[7] affirmed the summary judgment below,[8] and held the Government entitled to broader relief in

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[3] 26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1–3.

[4] 67 F. Supp. 397.

[5] 333 U. S. 364.

[6] The opinion of the court, and the dissenting opinion of the late Judge Stephens, are not officially reported. They appear at pp. 137–140, 478, of the record on this appeal.

[7] 339 U. S. 959.

[8] 339 U. S. 960.

certain respects, remanding the case for that purpose.[9] Meanwhile, in noting probable jurisdiction on the Government's appeal, this Court enjoined the defendants from carrying out the price fixing provisions of their current license agreements, and from entering into any agreements or engaging in concerted action in restraint of trade.[10] This preliminary injunction, entered May 29, 1950, remained in force until the new final decree of the District Court was entered on May 15, 1951.[11]

After this Court's 1948 reversal of the District Court's original order of dismissal, National, Certain-teed, and Gypsum's other co-defendant licensees ceased paying royalties under their license agreements.[12] Following the May 15, 1951, decree, National and Certain-teed, as authorized by Article VI of that decree, entered into new license agreements, effective May 15, for the future use of Gypsum's patents, such licenses containing no price fixing clauses; the royalty rate was the same as under the old licenses, except that the licensee's returns on unpatented gypsum products did not enter into its measure. The new licenses were without prejudice to Gypsum's claim for compensation for the use of the patents during the period February 1, 1948, to May 15, 1951. The respondents not having paid for that period, Gypsum, in 1953, brought suit against them in the Iowa federal court. The complaints in these suits asserted three separate grounds for recovery: (a) the royalty provisions of the old license agreements (Counts I and II); (b) *quantum meruit* for the reasonable value of the use

[9] 340 U. S. 76.

[10] 339 U. S. 960.

[11] The significance of these various holdings as it bears upon the issues in the present controversy is dealt with later. *Infra,* pp. 468–473.

[12] In the case of National and Certain-teed the default period began with the February 1, 1948 royalties, due March 20, 1948.

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of the patents (Counts III and IV);[13] and (c) damages for patent infringement (Count V).

Thereafter, National and Certain-teed, claiming that the institution of the Iowa actions violated the 1951 decree, and that in any event Gypsum was barred from recovery by reason of unpurged misuse of the patents involved, petitioned the antitrust court to enjoin further prosecution of the actions.[14] The Government also filed a separate petition to enjoin Gypsum from maintaining any action based on the illegal license agreements, but took no position on Gypsum's right to recover for the period in question on the grounds of *quantum meruit* or patent infringement.[15] Gypsum's answers to these petitions in substance alleged that the District Court was without jurisdiction to grant the relief sought by the petitioners, and put in issue all of the allegations on which the right to relief was predicated.

The District Court decided that it had jurisdiction to grant relief (one judge dissenting), and, after hearing the parties through briefs and oral argument, but without taking any evidence beyond that already of record in the antitrust proceeding, concluded that the 1951 decree should be modified so as to enjoin the prosecution of Gypsum's suits.[16] The court held that prosecution of

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[13] The lower court, regarding Count III as declaring upon a contract implied in law, described that Count as being for "indebitatus assumpsit." The appellant says it was for "quantum meruit." As nothing here turns on the characterization, we shall refer to both Counts III and IV as "the quantum meruit" Counts.

[14] The Iowa court, upon motions by National and Certain-teed, stayed all proceedings in the two actions pending the determination of the antitrust court now under review.

[15] The Government takes the same position in this Court.

[16] 124 F. Supp. 573. Judge Cole dissented on the jurisdictional ground. 124 F. Supp. 598. On December 9, 1954, the District Court denied reconsideration, Record, p. 1136; and on June 30, 1955, it denied Gypsum's motion for a new trial. 134 F. Supp. 69.

Counts I and II, which declared upon the illegal license agreements, could not be maintained under the terms of the 1951 decree. Although finding that the other three Counts were not barred by that decree, it further held that the suits should be prohibited in their entirety because of Gypsum's unpurged misuse of its patents.[17] There followed the modifying decree of December 9, 1954,[18] from which this appeal was taken. We noted probable jurisdiction. 350 U. S. 946. For the reasons given hereafter we conclude that, except as it related to the two causes of action based on the illegal license agreements (Counts I and II), this proscriptive modification of the 1951 decree was not justified by the record before the District Court.

I.

Preliminarily, we conclude that three aspects of the lower court's holding must be upheld. First, we think that Article X of the 1951 decree, reserving to the anti-trust court jurisdiction, upon application of "any of the parties" to the decree, to make such "directions" and "modifications" as may be appropriate to the "carrying out" and "enforcement" of the decree, provided a fully adequate basis for the jurisdiction exercised below.[19]

[17] The court also held that Count III should be barred because it was "but a left-handed, indirect method for recovering such royalties." The court did not elaborate on this, but since it held that this Count was not "expressly or impliedly" covered by the 1951 decree we think this additional ground requires no separate discussion.

[18] The operative part of the decree reads as follows: "Defendant United States Gypsum Company is hereby ordered and directed to discontinue and to dismiss, with prejudice to United States Gypsum Company, its pending actions as follows: against National Gypsum Company, in the United States District Court for the Northern District of Iowa; against Certain-Teed Products Corporation, in the same District Court . . . ."

[19] Article X reads: "Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of

United States v. *Swift & Co.*, 286 U. S. 106, 114; *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502. See also *Chrysler Corp.* v. *United States*, 316 U. S. 556. Gypsum argues that insofar as the relief granted below was rested upon patent misuse, instead of a construction of the 1951 decree which was the basis of enjoining the prosecution of Counts I and II of Gypsum's suits, the lower court's decision involved a determination of a collateral private controversy between this group of antitrust defendants, rather than a "carrying out" or "enforcement" of the terms of that decree. But we think that whether Gypsum was barred from recovery in these suits by reason of the abuse of its patent rights was a problem sufficiently related to the rationale of the 1951 decree to bring it within the reserved jurisdiction clause. This is especially so because patent misuse was the essence of the old antitrust litigation, and its continuance or renewal were thus issues peculiarly within the province of the antitrust court, whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the courts in which Gypsum had brought suit.

Likewise we conclude that there is no basis for disturbing the District Court's determinations that prosecution of Counts I and II, based on the old license agreements, was not permissible under the 1951 decree,[20] but that its

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the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith."

[20] Article IV of the 1951 decree had adjudicated as to all defendants that these license agreements were "unlawful under the antitrust laws of the United States and illegal, null and void." Article V enjoined the defendants from "performing" such agreements. Cf. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227. It might be well to add that the 1951 decree would similarly

terms did not reach the *quantum meruit* and infringement Counts.[21]

The outcome of this appeal then turns on whether the District Court was right in holding as a matter of law that Gypsum was barred from any kind of recovery for the *pendente lite* use of its patents because of their unpurged misuse. It is now, of course, familiar law that the courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or "purged" as the conventional saying goes. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680. The rule is an extension of the equitable doctrine of "unclean hands" to the patent field. In terms of this case this means that Gypsum may not recover from these appellees for their use of its patents between February 1, 1948, and May 15, 1951, if Gypsum has been guilty of misuse of the patents since 1948, or if the original misuse found in the antitrust litigation remained unpurged. This issue, of course, involves essentially a question of fact. And since the record is barren of any facts with respect to the situation existing in the gypsum industry since 1941, we think that the District Court erred in holding purely as a matter of law that an unpurged misuse had been shown.

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prevent the use of these illegal agreements as defenses by co-defendants National and Certain-teed against the *quantum meruit* and infringement Counts of Gypsum's suits.

[21] As appears, *infra*, p. 474, the Government at one time had sought to bar all such claims for recovery on the patents, but later in effect abandoned that request for relief.

II.

Putting aside the two contract Counts, the enjoining of which we have held was sufficiently supported by the court's finding that they could not be maintained under the terms of the 1951 decree, there are three aspects to the lower court's holding as to the remaining Counts. First, the court held those Counts barred because Gypsum had engaged in "fresh" patent misuse—misuse unrelated to the original antitrust litigation. Secondly, it was held that since the "old" misuse adjudicated in the antitrust proceeding had continued unpurged, recovery must in any case be barred.[22] And finally, the court held that irrespective of purge, the "old" misuse itself was sufficient to bar the patent infringement Count. We discuss each of these holdings in turn.

A.

The "fresh" misuse found by the lower court was simply the fact of the inclusion of Counts I and II in the 1953 suits. These Counts sought recovery of royalties under the illegal licensing agreements. Such inclusion, the court held, was a renewed attempt to enforce these illegal agreements, and as such should be regarded as a new misuse of the patents which barred recovery under the other Counts as well.[23] We do not agree.

The five Counts in Gypsum's complaints were merely alternative legal theories for reaching a single end, namely, recovery for the *pendente lite* use of Gypsum's patents. Had the complaints declared only upon the

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[22] Counts I and II were also held barred on these grounds.

[23] We assume that if the inclusion of Counts I and II constituted a "fresh" patent misuse, the fact that they were not asserted until 1953 would make no difference in their effectiveness to bar recovery for the 1948–1951 period.

quantum meruit and infringement Counts the mere bringing of the suits could then hardly have been regarded as fresh misuse, even though recovery might be defeated by showing some independent unpurged misuse of the patents involved. For as the lower court recognized, such recovery by way of *quantum meruit* or damages for infringement was not "expressly or impliedly" touched by the terms of the 1951 decree. Gypsum explains the inclusion of the two contract Counts as precautionary pleading to fend against the possibility that the defendants, if sued only for *quantum meruit* and infringement, might set up the license agreements in defense.[24] Such alternative pleading is expressly sanctioned by the Federal Rules of Civil Procedure, Rule 8, and, even though that defense has turned out to be untenable in light of the lower court's findings, we think that it distorts the doctrine of patent misuse to hold that recourse to this method of pleading here vitiated the other Counts of the complaints.[25]

Moreover, in view of what transpired before the antitrust court in the hearings relating to the settlement of the 1949 decree, we are by no means satisfied that Gypsum was not entitled to a bona fide guess, at least as a matter of alternative pleading, that the decree would not be interpreted as barring the collection of these interim royalties. At those hearings counsel for one of the defendants, Celotex, without remonstrance by either of these respondents, stated:

> "In order that United States Gypsum will have no misunderstanding of my position, I want them to know that my suggestion [that the decree should

[24] National had in fact pleaded that defense in the suit against it. But see n. 20, *supra*.

[25] In view of this conclusion it is unnecessary to deal with the contention that the lower court's holding also violated 35 U. S. C. § 271 (d).

> declare the licenses 'illegal, null and void'] is in no sense based on any hope or desire on my part to get out of any license fees during any interim period, and if we can agree . . . as far as my client is concerned, we are willing to let the royalty rate [of the new compulsory licenses], whatever it is, agreed upon apply back to the time when we ceased paying royalties. I just want to make it clear to all that we are not attempting by this declaration of illegality of them to find some way of avoiding the license fees which during this [litigation] none of us have paid."

Further, both the Government and the other co-defendants at that time seem to have regarded the "illegal, null and void" provisions of the decree as simply the equivalent of "cancellation" of the licenses. In view of the narrow adjudication of violation by this Court, *infra,* p. 470, we cannot say that Gypsum could not have reasonably entertained the belief that the price fixing provisions of the license agreements would ultimately be held separable from the basic undertaking to pay royalties. Indeed, the new licenses, authorized by the decree, which omitted the price fixing clauses, carried the same royalty rate on products made under the patents.

We conclude that in the circumstances present here it was error to regard the inclusion of the contract Counts as constituting a "fresh" patent misuse on Gypsum's part.

B.

We come next to the holding that the "old" misuse, found in the antitrust proceeding, continued unpurged through the 1948–1951 period. And here we are met immediately by the fact that the record before the antitrust court is completely bare of any facts relating to this period, or indeed any period after 1941. For the Government's proof in the antitrust case, presented from 1940 to 1944, concerned the gypsum industry prior to and until

1941, and no further evidence has ever been introduced into any of these litigations. We thus know literally nothing about the state of the gypsum industry between 1948, when this Court, on evidence not extending beyond 1941, first held that there had been an antitrust violation, and 1951. How, then, can we assume that this earlier violation, adjudicated for the first time in 1948, continued thereafter?

The answer to this question depends on the nature and extent of that violation. According to Gypsum, the only illegality ever adjudicated was the fixing of prices on gypsum materials under the industry-wide uniform price fixing clauses of patent licenses which were found to have been the product of concerted action between Gypsum and its co-defendants. In other words, Gypsum, relying on the 1949 decree, which followed this Court's first decision, and its underlying findings,[26] argues that the maintenance of uniform patent licenses with price fixing clauses was the only patent misuse ever found. It then points out that it offered to prove below that price fixing in the industry stopped in 1941, and that the licenses were rescinded in 1948. Add to this the fact that the 1949 decree, and again this Court's 1950 interlocutory decree, enjoined Gypsum from enforcing these licenses, and, says Gypsum, the inference arises that the only patent misuse ever adjudicated had ceased by 1948—an inference at least sufficient to allow the issue to go to trial on the facts.

According to appellees National and Certain-teed, however, the adjudication of misuse in the antitrust proceeding was much broader, encompassing the regimentation of the entire gypsum industry, the restraint of commerce in unpatented gypsum products, the elimination of jobbers, and the standardization of trade practices through-

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[26] See n. 6, *supra*.

out the industry. This broad view of the character of the antitrust violation rests upon this Court's 1950 decision, which held the 1949 decree too narrow and allowed the Government the broader relief embodied in the 1951 decree.[27] Appellees argue that the fact that this Court felt it necessary to broaden the 1949 decree involved by necessity an adjudication of broad patent misuse, misuse not prohibited by the 1949 decree and therefore left unpurged by it. In other words, the argument runs, the broadening of the decree by this Court necessarily involved a holding that Gypsum was guilty of violations not proscribed by the original decree, violations which existed unpurged during part or all of the 1948–1951 period, since they were first adjudicated by this Court in 1950 and presumptively continued until 1951, when they were finally dealt with by the 1951 decree.

Appellees' argument is ingenious, but incorrect. The course of decisions in the antitrust litigation clearly shows that the only misuse ever *adjudicated* was that arising from the uniform price fixing provisions of the license agreements. In the original suit the only undisputed issue of fact was that Gypsum had given its competitors uniform patent licenses containing a price fixing clause. The Government also charged Gypsum with a variety of other abuses, including price fixing on unpatented articles, elimination of jobbers, and standardization of trade practices. All of these charges were put in issue by Gypsum. On the appeal from the original dismissal of the proceedings, this Court held that the uniform price fixing licenses constituted a *per se* antitrust violation, and also that the

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[27] 340 U. S. 76. This relief included the extension of the injunctive provisions to the entire United States (instead of merely the East) and to all gypsum products (instead of only gypsum board), compulsory licensing for an indefinite period (instead of for only 90 days), such licensing to include after-acquired (instead of only existing) patents.

Government's evidence as to the other matters constituted a *prima facie* case of additional violation.[28] On remand, the District Court, instead of going into a factual trial of these other matters, granted summary judgment on the price fixing violation. This left all of the other matters still at issue. They continued to remain at issue after the ensuing appeals to this Court, for in affirming the summary judgment [29] and broadening the 1949 decree,[30] this Court made it clear that it was proceeding solely on the basis of the narrow antitrust violation found by the District Court: [31]

> "We agree with a statement made by counsel for the Government in argument below that as a 'matter of formulating the decree' many facts offered to be proven would have effect upon the conclusion of a court as to the decree's terms. However, we read the preliminary statement of the District Court . . . as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed-price licenses, accepting as true the underlying facts in defendants' proof by proffer. The trial judges understood the summary judgment to be, as Judge Stephens said, 'limited to that one undisputed question.' Judge Garrett and Judge Jackson agreed. That conclusion entitled the Government only to relief based on that finding and the proffered facts. On that basis we dismissed United States Gypsum's appeal from the decree, and on that basis we examine the Government's objection to the decree.
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[28] 333 U. S. 364.

[29] 339 U. S. 960.

[30] 340 U. S. 76.

[31] As we have seen, *supra,* pp. 460–461, the Court dismissed Gypsum's appeal from the 1949 decree. 339 U. S. 959.

> "[A decree] is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. . . .
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> ". . . We turn then to the Government's proposals for modification of the decree on the assumption that only a violation through concerted industry license agreements has been proven, but recognizing, as is conceded by defendants, that relief, to be effective, must go beyond the narrow limits of the proven violation." 340 U. S., at 87–89, 90.[32]

Thus we see that the only patent misuse that has ever been established in this long-drawn-out litigation is concerted price fixing under the former patent licenses, and that the 1950 holding of this Court was not an adjudication of other violations but only an application of the well-known principle that relief in antitrust cases may range beyond the narrow area of proven violations. Nothing, therefore, in the broadening of the decree supports the inference that the acts prohibited therein and left open in the 1949 decree continued in the *pendente lite* period or, in fact, had ever taken place. Perhaps Gypsum did engage in broad regimentation of the industry, as charged in the Government's 1940 complaint, and

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[32] That this Court's expansion of the 1949 decree did not involve a corresponding holding of broader violation is illustrated by what was done with respect to the geographical area covered by the decree. The Government's complaint charged Gypsum with violation only in the *eastern* part of the United States. There was never any claim, much less proof, that Gypsum engaged in any improper activities in the *West*. Yet the Court granted the Government's prayer that the 1949 decree be broadened to cover the whole United States. This was done not because it was alleged or proved that Gypsum had done anything illegal in the West, but simply on the theory that effective relief required that the decree be broader than the "proven violation."

perhaps such misuse or its effects continued through 1951. But there is nothing in this record to show that any such hypothesis is true, and no part of it has ever been proved. The question is one of fact, and Gypsum is entitled to go to trial on it.

Nor is it enough to sustain the judgment below to say, as appellees do, that the conceded "old" misuse, consisting of industry-wide price fixing through uniform patent licenses, should be presumed to have continued unpurged into the 1948–1951 period. The record shows, without dispute so far, that for seven years before the beginning of the 1948–1951 period Gypsum had not engaged in price fixing, and that for two of those three years price fixing had been under injunction. These factors raised a sufficient inference of purge prior to the critical period to entitle Gypsum to go to trial on the point and to prevent the court from granting what in effect was summary judgment. Cf. *United States* v. *Oregon State Medical Society,* 343 U. S. 326. Nor do we think this conclusion is overcome by the lower court's findings that the "five acts" of purge offered by Gypsum were not sufficient to establish purge. We express no opinion upon the merits of these findings, for their sufficiency can hardly be judged in isolation from the facts as to competitive conditions in the gypsum industry during the 1941–1951 period, on which the record is silent. And other alleged antitrust violations are not now available to appellees as acts of misuse, for as to them Gypsum has not yet had its day in court.

We conclude, therefore, that the judgment below cannot be supported on the basis of the claimed unpurged "old" misuse.

C.

We pass lastly to the lower court's holding that the "old" misuse, without regard to purge, barred the infringement Count of Gypsum's suits. In effect this holding

was that, because "of the practical and legal situation," proscription of this Count should be added by relation back, as it were, to the relief already accorded by the 1951 decree. Admittedly such relief was neither obtained nor sought by the Government in either the 1949 or 1951 decree proceedings. To be sure one of the prayers for relief in the Government's antitrust complaint in 1940 had been that the defendants should be enjoined from bringing any action for infringement of any of the patents involved or from attempting to collect in any way royalties or fees for their use until all misuse had been abandoned and its consequences dissipated. In the subsequent 1949 and 1951 decree and appellate proceedings, however, this item of proposed relief was never adverted to, much less pressed upon the courts. And even in the 1953–1954 modification proceedings, and now, the Government does not contend that Gypsum is precluded from maintaining the infringement Count. The conclusion seems inescapable that the Government's original request for such relief was in effect withdrawn. In this state of affairs we think this relief should not have been added to the decree in 1954, in the absence of proof of intervening circumstances indicating its need in the public interest. Cf. *Hughes* v. *United States,* 342 U. S. 353. There was no such proof, and without it the proscription of the infringement Count amounted to the imposition of an unwarranted penalty on Gypsum.

Nor do we think that anything in the *Hartford-Empire* cases, 323 U. S. 386, 324 U. S. 570, to which the lower court attached much weight, justifies what was done here. The basic difference between *Hartford* and this case is that in *Hartford* the injunction against infringement suits on Hartford's misused patents was part of the *original* relief granted the Government, whereas here that relief was added, without the taking of any evidence as to justifying intervening circumstances, some five years after the orig-

inal decree was entered in the District Court, and three years after its enlargement pursuant to the 1950 decision of this Court,[33] which made no mention of this type of relief.

Moreover, the factors justifying such relief in *Hartford* were quite different from those involved here, in that the litigated findings of fact as to Hartford's violation of the antitrust laws were much broader than anything found here. See *supra,* p. 470. Beyond this, in *Hartford* only infringement suits against nondefendants were enjoined, and not, as here, suits against co-defendants; and despite the breadth of Hartford's violations, this Court held that Hartford was entitled to *quantum meruit* compensation for the *pendente lite* use of its patents unless *further* violations of the antitrust laws during that period were shown. No such violations on Gypsum's part were shown or claimed by the Government or appellees, except for the inclusion of the contract Counts in Gypsum's suits, a contention which has already been met. And although the Court in *Hartford* struck down royalty-free compulsory licensing as part of the relief, the District Court here in effect held these appellees entitled to three years' free use of Gypsum's patents. We thus find no parallel between this case and *Hartford.*[34]

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[33] 340 U. S. 76.

[34] National makes a further contention as to the *quantum meruit* Counts. It argues that these Counts in any event were properly proscribed because they related to an illegal transaction. But the rule on which National relies applies only where the *quantum meruit* claim declares upon an implied agreement which, had it been reduced to an express contract, would itself have been illegal; that is, a contract where the kind of consideration moving between the parties is wholly against public policy, as, for example, a contract to commit murder. The implied contract here was not of that character, for certainly an express contract simply for reasonable compensation for the use of Gypsum's patents would not have been illegal.

Our conclusions then are these: The enjoining of Counts I and II of Gypsum's Iowa suits was proper, and upon remand the District Court may, by appropriate modification of the decree of May 15, 1951, or otherwise, require Gypsum to discontinue and dismiss such Counts with prejudice. The enjoining of Counts III, IV and V of those suits was not justified upon this record, and as to them the case should be remanded to the District Court for the taking of evidence upon the issues of misuse and purge as they may relate to the period since February 1, 1948. We think it appropriate that these issues should be tried and disposed of by the antitrust court rather than the Iowa court, both because of reasons already given, *supra,* pp. 463–464, and because of the antitrust court's familiarity with what has occurred in these protracted litigations.[35] However, should the antitrust court conclude that Gypsum is not barred fom recovery on Counts III, IV or V by reason of unpurged patent misuse, we think that the trial and disposition of all other issues, including any defense of patent invalidity, should then take place in the District Courts in which the two suits are pending. There is no reason why the three-judge court should be burdened with such issues.

Accordingly, we reverse the judgment below and remand the case to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

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[35] We recognize that the composition of the three-judge court has completely changed since the main antitrust case was tried. Even so, the present court has acquired an intimate knowledge of the record.

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

I would affirm the judgment of the United States District Court.

For many years appellees used patents belonging to the appellant, United States Gypsum Company, under certain license agreements. On March 8, 1948, this Court decided that on the record before it these license agreements constituted a conspiracy between Gypsum and its licensees to violate the Sherman Act. 333 U. S. 364. Appellees then ceased paying royalties under their license agreement until May 15, 1951, on which date the United States District Court rendered a final decree holding the license agreements null and void. On this latter date new patent licenses were obtained from Gypsum which did not contain the illegal provisions and were not part of a conspiracy to violate the Sherman Act. This is a suit to make appellees pay for the use of Gypsum's patents during the period of February 1, 1948, to May 1951. Gypsum seeks payment in five separate counts. Counts one and two assert claims under the old outlawed license agreements. I agree with the Court's holding that Gypsum cannot recover on these counts. I also agree that the patent misuse rule which bars recovery "is an extension of the equitable doctrine of 'unclean hands' to the patent field." I disagree with the Court's holding that Gypsum is not barred from attempting to recover for the use of its patents during the period on the other three counts of "quantum meruit," "indebitatus assumpsit," and "infringement."

In declining to permit Gypsum to recover under the license agreements the Court here necessarily does so on the ground that the licenses were a part of an unlawful conspiracy to violate the Sherman Act. That conspiracy

404165 O—57——37

existed as long as the illegal agreements remained in existence.[1] And the agreements could and did continue to exist whether or not their inseparable parts,[2] such as the price-fixing provisions, were enforced from time to time. Any attempt to enforce directly or indirectly any part of the illegal agreements shows that the agreements and the conspiracy were still in existence. The present holding clearly indicates their continuing existence during the period in question. The majority appears to recognize this coexistence of the license agreements and the conspiracy when it bars a recovery for the use of the patents so long as the suits are for "royalties" under the contracts. But under the Court's holding persons who misuse their patents hereafter, and who could not, under our prior cases, recover compensation for patent use because of their illegal agreements, may now, in some instances, be able to recover full compensation by labeling their causes of action "indebitatus assumpsit" or "quantum meruit." To permit a Sherman Act conspirator to recover for patent use under any label from a co-conspirator where the licensing agreement for that patent was held void as an integral part of the conspiracy runs counter to the doctrine of "unclean hands." That doctrine rests basically on the idea that the law leaves wrong-doers where it finds them. The Court does not do so here. Appellant and appellees have been found guilty of an unlawful conspiracy to violate the Sherman Act. Gypsum's patents were an essential part of that conspiracy. But by giving its lawsuits appropriate labels it has obtained

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[1] "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59.

[2] *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402, 407.

an opportunity to seek compensation for the use of tools it supplied to violate the law. I agree with the District Court that to allow recovery on these differently labeled counts "is but a left-handed, indirect method for recovering the royalties provided in the illegal license agreements." As I see it this permits "a licensor to be protected on an illegal contract merely because he chose one remedy rather than another on the same substantive issue." *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394, 399–400. I think the Court's holding seriously weakens the patent misuse doctrine and thereby makes enforcement of the Sherman Act far more difficult.[3]

[3] Some of the cases in which courts have utilized the doctrine to break up illegal combinations and practices are *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *United States* v. *National Lead Co.*, 332 U. S. 319; *Hartford-Empire Co.* v. *United States*, 324 U. S. 570.

PENNSYLVANIA RAILROAD CO. ET AL. *v.* RYCHLIK.

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

No. 56. Argued December 10–11, 1956.—Decided February 25, 1957.

Under § 2, Eleventh (a) and (c) of the Railway Labor Act, petitioners, a railroad and a union, entered into a union-shop contract requiring trainmen employed by the railroad to become and remain members of the petitioner union or another union "national in scope" and "organized in accordance with" the Act. A trainman employed by the railroad was a member of the petitioner union; but he resigned from that union and joined a competing union which he believed to be "national in scope" and "organized in accordance with" the Act, but which had never qualified under § 3, First, as one of the unions eligible to elect the labor members of the National Railroad Adjustment Board. After hearings, a System Board of Adjustment established under § 3, Second, determined that the trainman's new union did not satisfy the union-shop provision of the contract, and the railroad discharged him. He sued for an injunction compelling petitioner union to accept him as a member and the railroad to accept him as an employee. *Held:* Section 2, Eleventh (c) makes available for alternative membership under such a contract only such unions as have already qualified as electors under § 3, First; and the trainman did not state a claim on which relief can be granted. Pp. 481–497.

(a) The purpose of § 2, Eleventh (c) was to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts. Pp. 489, 492.

(b) The purpose was not to give employees a blanket right to join unions other than the designated bargaining representative of their craft. Pp. 488, 493.

(c) Nor was it the purpose to benefit rising new unions by permitting them to recruit members among employees who are represented by another union. Pp. 488–489, 492–493.

(d) Once a union has lawfully established itself for a period of time as the authorized bargaining representative of the em-

ployees under a union-shop contract, Congress has never deemed it to be the "right" of employees to choose between that union and a competing union. P. 494.

(e) Under § 2, Eleventh (c), an employee has available to him alternative membership only in such unions as have already qualified as electors under § 3. Pp. 494–496.

229 F. 2d 171, reversed and remanded.

Richard N. Clattenburg argued the cause for the Pennsylvania Railroad Co., petitioner. With him on the brief were *John B. Prizer, Percy R. Smith* and *Hugh B. Cox.*

Henry Kaiser argued the cause for the Brotherhood of Railroad Trainmen, petitioner. With him on the brief were *Gerhard P. Van Arkel, Eugene Gressman* and *Wayland K. Sullivan.*

Norman M. Spindelman and *Meyer Fix* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Rankin* and *Assistant Attorney General Hansen* for the United States, *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *Richard R. Lyman* for the Railway Labor Executives' Association, and *Clarence E. Weisell* and *Harold N. McLaughlin* for the Brotherhood of Locomotive Engineers.

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner Brotherhood of Railroad Trainmen is the collective bargaining representative for trainmen employed by the petitioner Railroad. In accordance with Section 2, Eleventh (a) and (c) of the Railway Labor Act,[1] the Brotherhood and the Railroad negotiated a

[1] 64 Stat. 1238 (1951), 45 U. S. C. § 152, Eleventh (a) and (c). These and other pertinent provisions of the statute are discussed later.

union-shop contract in 1952, which required trainmen employed by the Railroad to become members of and retain membership in the Brotherhood or in another labor organization "national in scope" and "organized in accordance with" the Railway Labor Act. Respondent Rychlik was employed as a trainman by the Railroad and was a member in good standing of the Brotherhood until February 1953. At that time he resigned from the Brotherhood and joined the United Railroad Operating Crafts (UROC), a competing union which respondent believed in good faith to be "national in scope" and "organized in accordance with" the Act, and therefore available for alternative membership under Section 2, Eleventh and the union-shop provision of the contract, even though UROC had never qualified itself under Section 3, First of the Act as one of the unions "national in scope" eligible to elect the labor members of the National Railroad Adjustment Board.[2] On July 31, 1954, Rychlik, continuing his membership in UROC, also joined the Switchmen's Union of North America, concededly a union "national in scope" within the meaning of the statute and the contract.

Following his resignation from the Brotherhood, Rychlik was charged with violation of the union-shop agreement. He received two hearings before a "System Board of Adjustment," a body established under the agreement, pursuant to Section 3, Second of the Act,[3] to settle contract disputes, and composed of two representa-

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[2] 48 Stat. 1189 (1934), 45 U. S. C. § 153, First.

[3] 48 Stat. 1193 (1934), 45 U. S. C. § 153, Second. This Section authorizes carriers and unions to set up "system, group, or regional boards of adjustment" to decide disputes otherwise within the jurisdiction of the National Railroad Adjustment Board, with a right in any party, dissatisfied with such an arrangement, to return to the jurisdiction of the Adjustment Board upon 90 days' notice. No such election was made here.

tives each from the Railroad and the Brotherhood.[4] This Board determined that membership in UROC did not satisfy the union-shop provision of the contract, which mirrored the requirements of the Act, and that therefore Rychlik had failed to maintain continuous union membership in accordance with the contract, not having joined the Switchmen's Union until some 16 months after resigning from the Brotherhood. Accordingly, Rychlik was discharged by the Railroad.

Rychlik, on behalf of himself and other employees of the Railroad similarly situated, thereupon brought this class suit in the United States District Court for the Western District of New York, seeking an injunction compelling petitioners to accept him as a member of the Brotherhood and an employee of the Railroad. He alleged that his discharge violated Section 2, Eleventh of the Railway Labor Act, and that the System Board's determination to the contrary could not be final and binding, since the presence on that Board of two representatives of the Brotherhood created an inherent and fatal bias which vitiated the proceeding. The District Court granted petitioners' motion to dismiss the complaint for lack of jurisdiction and for failure to state a cause of action.[5] The Court of Appeals for the Second Circuit

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[4] The first hearing was on August 27, 1953, at which time the Board postponed decision pending further exploration into the status of UROC. The second hearing was on August 23, 1954. In the interim, Rychlik, on July 31, 1954, had joined the Switchmen's Union, and presented evidence of that membership at the second hearing. Rychlik's employment was continued until shortly after the Board's adverse decision on January 3, 1955.

[5] 128 F. Supp. 449. The District Court, holding in effect that its jurisdiction to review the System Board was limited to ascertaining whether the Board had acted within the scope of its statutory and contract authority and whether its decision was free of fraud or corruption and the hearing consonant with procedural due process, found that no such infirmities had been shown, and in particular that

reversed and remanded for review on the merits of the System Board's decision that membership in UROC did not satisfy the Act.[6] Accepting the premise that Section 2, Eleventh (c) conferred on respondent a right to belong to any union which is, *in fact*, "national in scope" and organized in accordance with the Railway Labor Act, even though it has not qualified under Section 3, First of the Act as an elector of labor representatives on the National Railroad Adjustment Board,[7] the court held (1) that, although the System Board had jurisdiction over this dispute between Rychlik and the Brotherhood,[8] its decision that UROC was not a union "national in scope" was subject to full review on the merits, because of the bias which must be attributed to a body half of whose members represented the Brotherhood, a party in interest; and (2) that this bias was not cured by the availability of the alternative procedure provided by Section 3, First of the Act, whereby it can be established that a union is "national in scope" and organized in accordance with the Act.[9] Because of a conflict be-

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the presence of two Brotherhood representatives on the System Board did not automatically vitiate its proceedings. It further held that Rychlik's belated membership in the Switchmen's Union did not satisfy the statutory and contract requirements of continuous maintenance of membership in a qualified union, and that the court need not decide whether UROC was a labor organization "national in scope," since, under Section 3, First (f) of the Railway Labor Act, determination of that question was within the exclusive competence of the National Mediation Board. See pp. 487–488, *infra*.

[6] 229 F. 2d 171.

[7] The briefs below show that the validity of this premise was not challenged by any of the parties before the Court of Appeals.

[8] As to this issue the Court of Appeals relied on its previous decision in *United Railroad Operating Crafts* v. *Wyer*, 205 F. 2d 153.

[9] Neither in the Court of Appeals, nor here, has Rychlik claimed that his membership in the Switchmen's Union made his discharge illegal. In both courts he has stood only upon his membership in UROC.

tween the decision of the court below and an earlier decision of the Court of Appeals for the Sixth Circuit,[10] and the importance of these questions in the administration of the Railway Labor Act, we granted certiorari. 351 U. S. 930.

On our view of the case we do not reach either question decided by the Court of Appeals, for we disagree with its premise as to the meaning of Section 2, Eleventh (c). For reasons hereafter given, we hold that Section 2, Eleventh (c) allows alternative union membership only in those unions which have already qualified under Section 3, First of the Act, as electors of the union representatives on the National Railroad Adjustment Board, and not membership in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Railway Labor Act. Since UROC was not so qualified, respondent had no federal right to join it in lieu of the authorized bargaining representative under the union-shop provision of the Railroad-Brotherhood contract. His discharge by petitioners therefore did not give rise to a federal cause of action.[11]

In order to clarify the reasons for these conclusions, a brief outline of the relevant provisions of the Railway Labor Act is necessary. Section 2, Eleventh (a) of that Act authorizes railroads and labor unions to establish a union shop, that is, an agreement requiring as a condition of continued employment that employees join the union designated as their authorized bargaining representative.[12] Section 2, Eleventh (c) then provides that in the

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[10] *Pigott* v. *Detroit, Toledo and Ironton R. Co.*, 221 F. 2d 736.

[11] No contention is made that, apart from the statute, respondent had a cause of action on the union-shop contract itself, that is, that the contract conferred on him rights wider than those given as a matter of federal right by the statute. On such a cause of action federal jurisdiction would depend on showing diversity of citizenship.

[12] "Notwithstanding any other provisions of this Act . . . any carrier or carriers as defined in this Act and a labor organization

case of *operating* employees the union-shop provision of a contract will be satisfied if an employee is 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 . . . ." [13]

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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." 64 Stat. 1238 (1951), 45 U. S. C. § 152, Eleventh (a).

[13] Italics supplied. The full text of the section is: "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 hostling service . . . 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 [checkoff] 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

Section 3, First establishes the National Railroad Adjustment Board (NRAB), an agency designed to settle disputes arising under collective bargaining agreements. Subsection (a) provides that this Board shall consist of 36 members, 18 selected by the carriers, and 18 "by such labor organizations of the employees, *national in scope,* as have been or may be *organized in accordance with the provisions of section 2 . . . .*" [14] Subsection (f) then states that if a dispute arises as to the right of a union to participate in the election of the labor representatives on the NRAB, the Secretary of Labor will notify the Mediation Board if he feels the claim has merit.[15] The Mediation Board then constitutes a "board of three," consisting of one representative of the claimant union, one representative of the unions already entitled to elect the labor members of the NRAB, and one neutral member selected by the Mediation Board. This board of three then decides whether the claimant union is entitled to be an elector for the NRAB, that is, whether it is "organized in accordance with section 2 . . . and

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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." 64 Stat. 1238 (1951), 45 U. S. C. § 152, Eleventh (c).

[14] 48 Stat. 1189 (1934), 45 U. S. C. § 153, First (a). (Italics supplied.)

[15] The National Mediation Board was set up by Section 4, First of the Act. 48 Stat. 1193 (1934), 45 U. S. C. § 154, First. It is an independent federal agency with three members, appointed by the President with the advice and consent of the Senate. Its function, in the main, is to try to settle "major" disputes in the railroad industry, which are not within the jurisdiction of the NRAB.

is otherwise properly qualified to participate in the selection . . . ." [16]

At first glance the language of Section 2, Eleventh (c) would appear to be disarmingly clear: union-shop contracts are satisfied if the employee belongs to any union which happens to be national in scope and organized in accordance with the Act. And if that be its meaning we would then have to deal with the questions reached by the Court of Appeals. However, as so often happens, when the language of the statute is read, not in a vacuum, but in the light of the policies this Section was intended to serve,[17] it becomes clear that the purpose of Congress was not, as respondent contends, to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative, or to help

[16] The full text of subsection (f) is: "In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding." 48 Stat. 1190 (1934), 45 U. S. C. § 153, First (f).

[17] See Frankfurter, *Some Reflections on the Reading of Statutes*, in The Record of the Association of the Bar of the City of New York, Volume 2, No. 6 (1947).

dissident or rising new unions recruit new members. Rather, the sole aim of the provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative. And this right is given only to those unions which have already qualified as being "national in scope" and "organized in accordance with" the Act for the purpose of electing the union members of the NRAB under Section 3.

I.

The purposes to be served by Section 2 are clearly revealed by its history. Until 1951 the Railway Labor Act did not permit union-shop contracts in the industry.[18] In that year the Congress, persuaded by the established unions that it is unfair to allow nonunion employees to enjoy benefits obtained by the union's efforts in collective bargaining without paying any of the costs, passed Section 2, Eleventh of the Act, which authorized the union shop.[19] However, the hearings on the bill [20] revealed a problem, peculiar to the railroad industry, in establishing the union

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[18] In 1934 a prohibition against the union shop and the checkoff was put into the Railway Labor Act at the request of the unions themselves, since employers had used these devices to establish and maintain company unions. See S. Rep. No. 2262, 81st Cong., 2d Sess., pp. 2–3 (1950); Hearings before the House Committee on Interstate and Foreign Commerce, on H. R. 7789, 81st Cong., 2d Sess., pp. 3–4, 7–8, 16–17 (1950).

[19] See *id.*, at pp. 10, 28, 29, 37; H. R. Rep. No. 2811, 81st Cong., 2d Sess., p. 4 (1950).

[20] Hearings before the House Committee on Interstate and Foreign Commerce, on H. R. 7789, 81st Cong., 2d Sess. (1950); Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, on S. 3295, 81st Cong., 2d Sess. (1950).

shop. Labor in this industry is organized largely on craft rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen, and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time, or a conductor might have to serve temporarily as brakeman. Under the ordinary union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits.[21]

So Congress faced the problem of reconciling the union shop with some protection to employees who shifted from one craft to another one represented by a different labor organization under a union-shop contract.[22] The solution, of course, was evident: to provide that if a fireman, for example, is temporarily promoted to engineer, he can satisfy the union-shop contract of the engineers although still remaining a member of the union representing the firemen.

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[21] House Hearings, *supra,* at pp. 30–31, 32–33, 35–36, 42–43, 78–81, 126, 192–194; Senate Hearings, *supra,* at pp. 18–19, 67–68, 69, 73, 78–79. See also Levinson, *Union Shop Under the Railway Labor Act,* 6 Labor L. J. 441, 443–448 (1955).

[22] See H. R. Rep. No. 2811, *supra,* at pp. 5–6.

As a result, the Committee reporting the bill to the Senate offered on the Senate floor the following amendment to subsection (a) of Section 2, Eleventh:

> "*Provided further,* That no such [union shop] agreement shall require membership in more than one labor organization." [23]

Senator Hill, manager of the bill, explained the Committee amendment:

> "This proviso was attached because some question was raised as to the status, under this bill, of employees who are temporarily promoted or demoted from one closely related craft or class to another. This practice, with minor exceptions, occurs only among the train- and engine-service employees. Thus a fireman may be promoted to a position as engineer for a short time and then due to a reduction in force be returned to his former position as fireman. It is the intention of this proviso to assure that in the case of such promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred." [24]

Due to a temporary adjournment of the Senate, no action was taken on this amendment. When the bill was again taken up, however, a substitute amendment, which had been drafted by the railroad brotherhoods, was offered by Senators Hill and Taft.[25] The language of this substitute was that of the present Section 2,

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[23] 96 Cong. Rec. 15735.

[24] *Id.*, at 15736.

[25] *Id.*, at 16268.

Eleventh (c), providing that the requirement of membership under a union-shop contract is satisfied if the employee belongs to "any one of the labor organizations, national in scope, organized in accordance with this Act." [26] Senator Hill explained that the purpose of this substitute was the same as that of the previous amendment:

> "[The amendment does] nothing more nor less than what the committee desires to do, and what was the intent of the committee in offering its amendment, that no employee of a railroad should be required to belong to more than one labor organization. The only difference between the committee amendment and the amendments now before the Senate, which have been agreed upon by all the railroad organizations, is that the amendments now before the Senate spell out in much more detail the purposes of the committee amendment than did the committee amendment. But the intent and the purpose . . . are exactly the same." [27]

This amendment passed as introduced [28] and now forms subsection (c).

It thus becomes clear that the only purpose of Section 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts.[29] The aim of the Section, which was

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[26] See n. 13, *supra*.

[27] 96 Cong. Rec. 16268. See also *id.*, at 16261, 16328–16330.

[28] *Id.*, at 16268.

[29] Had Congress wanted to confer blanket "union-shopping" rights on employees, it presumably would have allowed nonmembers of a union to join *any* union (qualified under Section 2, Eleventh) at the time a union-shop agreement was first put into effect. However, the next-to-last proviso of Section 2, Eleventh (c) states that when

drafted by the established unions themselves,[30] quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility. This is made particularly clear when the provision is taken in the context of American labor relations in general. The National Labor Relations Act contains no parallel to subsection (c), and employees under a union-shop contract governed by that Act must join and maintain membership in the union designated as the bargaining representative or suffer discharge.[31] Similarly, subsection (c) does not apply to *nonoperating* employees, where the problem of seasonal intercraft movement does not exist. Railroad employees

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a union-shop provision is first signed, employees not belonging to a qualified union may be required to join that union which represents the craft in which they are employed at the time the agreement becomes effective. See n. 13, *supra*. Thus when this agreement between petitioners was first put into effect, Rychlik, had he belonged to no union at all, would have been required to join the Brotherhood specifically, and could not have chosen to join even such competing unions which are concededly national in scope, not to speak of UROC. In other words, this proviso completely negates the argument that the purpose of the statute was to allow employees to *choose* between unions.

[30] See Senator Hill's statement, 96 Cong. Rec. 16329: "The representatives of the railway organizations sat around a table together and worked out the details of the amendment, and then brought it to the Senator from Ohio and the Senator from Alabama, and we saw that the amendment was exactly similar to the committee amendment, except that it spelled out in more detail the safeguards which were deemed necessary in order to properly do the job."

[31] See Levinson, *supra*, n. 21.

404165 O—57——38

such as clerks working under a union-shop contract have no right at all to join a union other than the bargaining representative. In other words, once a union has lawfully established itself for a period of time as the authorized bargaining representative of the employees under a union-shop contract, Congress has never deemed it to be a "right" of employees to choose between membership in it and another competing union. If Congress intended to confer such a right, it would scarcely have denied the right to nonoperating employees of the railroads or industrial employees under the National Labor Relations Act. The purpose of Section 2, Eleventh (c) was simply to solve the problem of intercraft mobility under railroad union-shop contracts.

II.

There next arises for consideration the manner in which Congress achieved this purpose. Section 2, Eleventh (c) provides that for operating employees a union-shop contract can be satisfied by membership in "any one of the labor organizations, national in scope, organized in accordance with this Act . . . ." At first blush this would appear to confer on employees a blanket right to choose between alternative unions which are, in the abstract, national in scope and organized in accordance with the Act. But when taken in the context of the Railway Labor Act as a whole, it becomes apparent that this language refers to a certain *group* of unions, a group already constituted. For the language was borrowed from Section 3, First of the Act, which had been on the books for some 17 years, and which establishes precisely the same qualifications for those unions which are permitted to elect the labor members of the NRAB. Subsection (a) of Section 3, First provides that unions may become electors if they are "national in scope" and are "organized in accordance

with" the Act.[32] Subsection (f) then spells out an impartial administrative method of tripartite arbitration whereby it can be decided whether a particular union meets these qualifications.[33] In other words, by writing into Section 2, Eleventh (c), standards identical to those of Section 3, Congress in Section 2 was evidently making reference to those unions which had qualified as electors under Section 3 through the administrative procedure there expressly provided.[34] This reference to an already constituted group of unions is emphasized by the fact that Congress in Section 2, Eleventh (c) did not say that an employee under a union-shop contract could join "any" labor organization which was national in scope and organized in accordance with the Act; rather it said that such an employee could join *"any one of the"* labor organizations which are national in scope and organized in accordance with the Act. In short, Congress in Section 2 was referring to a group of

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[32] See n. 14, *supra*. The "organized in accordance" language refers to Section 2, Fourth, which prohibits company unions, and which had also been on the books since 1934. 48 Stat. 1187 (1934), 45 U. S. C. § 152, Fourth.

[33] See n. 16, *supra*.

[34] Respondent argues that the standards of Section 3 are not the same as those of Section 2, Eleventh (c), and that therefore the latter provision cannot refer to the unions qualified under the former. He points out that Section 3, First (f) makes it the duty of the board of three to determine whether the claimant union is "organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board," and argues that the words "otherwise properly qualified" must refer to qualifications not listed in Section 2, Eleventh (c). But we think it clear that these words merely incorporate by reference the qualifications listed in Section 3, First (a) for union electors, and the latter section defines these qualifications in terms identical to the union-shop section. See 69 Harv. L. Rev. 1512, 1514.

unions already defined and constituted under the Section 3 procedures. And therefore an employee has available to him alternative membership only in such unions as have already qualified as electors under Section 3.

III.

This interpretation of the Act solves the problem which Congress faced without conferring on employees "floating" rights which Congress did not intend to grant. For the problem of intercraft mobility vanishes if the promoted fireman can remain in the firemen's brotherhood, even though his new craft is represented by a different union; and the firemen's brotherhood will, of course, already have qualified under the Act as an elector under Section 3. Furthermore, this interpretation avoids troublesome questions which would arise were we to hold that employees have a right to belong to any union which happens to be national in scope and organized in accordance with the Act. For, while Section 3, First provides an impartial administrative scheme to deal with precisely this question, Section 2, Eleventh (c), assuming it does not refer to an already defined group of unions qualified under Section 3, is silent on the procedure to determine whether a union meets its requirements. An entire new administrative scheme would have to be fashioned by the courts out of thin air to deal with this question, or the courts themselves would have to deal with it without prior administrative action. If System Boards, for example, are to be given jurisdiction to make such determinations, is there to be judicial review? What is to be the scope of such review? How is the inherent bias of the established-union members of these boards to be overcome? Would the determination of one Board (or one Circuit) that such a union as UROC is "national in scope" be binding on another Board or another Circuit?

Moreover, to sanction such a "floating" right in employees would make only for confusion and uncertainty in labor relations in the railroad industry. No employee could with safety join an alternative union, for he could not know until after-the-fact adjudication whether that union meets the requirements of Section 2. On the other hand, interpreting Section 2 to refer to those unions which have already qualified as electors under Section 3 means that an employee will always know or can easily ascertain the unions which he can join as an alternative to his bargaining representative. A new union, such as UROC, could make itself available for such alternative membership by seeking certification as an elector through the impartial procedure of Section 3, First (f). And the decision of the "board of three" provided by that Section would be prospective, uniform throughout the nation, and would be the ruling of an administrative body established to deal with precisely this question.

We hold, therefore, that Section 2, Eleventh (c) of the Act makes only such unions available for alternative membership under a union-shop contract, such as this one, as have already qualified as electors for the labor members of the NRAB under Section 3, First. Since UROC has not so qualified, respondent has not stated a claim on which relief can be granted. The decision below must therefore be reversed and the case remanded to the District Court with instructions to dismiss the complaint.

Reversed and remanded.

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

MR. JUSTICE FRANKFURTER, concurring.

The decision below, if allowed to stand, would tend to dislocate the scheme that Congress has seen fit to devise for the regulation of industrial relations on railroads, and

so I join in reversing the judgment. But I get there by a different route from the Court's. In my view of the Railway Labor Act, the District Court had no jurisdiction of this action and the complaint should be dismissed for want of it, not on the merits.

The governing outlook for construing the Railway Labor Act is hospitable realization of the fact that it is primarily an instrument of industrial government for railroading by the industry itself, through the concentrated agencies of railroad executives and the railroad unions. (For details, see the dissenting opinions in *Elgin, Joliet & Eastern R. Co.* v. *Burley,* 325 U. S. 711, 749; 327 U. S. 661, 667.) The dominant inference that the Court has drawn from this fact is exclusion of the courts from this process of collaborative self-government. See, *e. g., General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323; *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561; *Slocum* v. *Delaware, Lackawanna & Western R. Co.,* 339 U. S. 239. Neither *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, nor *Order of Railway Conductors* v. *Swan,* 329 U. S. 520, is fairly to be deemed an exception to the general principle and, in any event, those cases involve circumstances not relevant to the present situation.

There is one qualification to the principle I have stated, or, rather, there is a counter-principle to be respected. This is the doctrine established by *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192. The short of it is that since every railroad employee is represented by union agents who sit on a System Board of Adjustment, such representatives are in what amounts to a fiduciary position: they must not exercise their power in an arbitrary way against some minority interest. The fact of a general conflict of interest between a minority of union members and representatives designated by the majority does not of itself vitiate the presupposition of self-government and

does not of itself subject the System Board action to judicial review. Conflict between a majority and a minority is a commonplace in the whole collective bargaining process. But the bargaining representatives owe a judicially enforceable duty of fairness to all the components of the working force when a specific claim is in controversy.

The determination of the System Board on the merits is not open to judicial review, even on so-called legal questions. It is not for a court to say that a complaint against the System Board must fail because the System Board rightly held against the complainant. Right or wrong, a court has no jurisdiction to review what the System Board did, unless a complainant asserts arbitrariness and seeks to enforce the limited protection established in the *Steele* case. It is not for a court to decide as an abstract issue what procedure a union must or may pursue to establish its status as an organization "national in scope," within § 2, Eleventh (c) of the Railway Labor Act, nor whether or when an individual claiming through such a rival union may assert its claim for his benefit. (As bearing on the legal complexities raised by such interrelationship between a member and an organization, see the opinion of Mr. Justice Jackson in *Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 183.)

For Rychlik to have brought himself within the *Steele* case it would have been necessary to charge that the System Board had made its determination arbitrarily and that on the basis of this arbitrary determination he had been discharged. On such a claim, and only on such a claim, would he have been entitled to judicial relief. In the absence of such a claim, the District Court was without jurisdiction to entertain the complaint.

ROGERS *v.* MISSOURI PACIFIC RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 28. Argued November 7, 1956.—Decided February 25, 1957.

In an action in a Missouri state court under the Federal Employers' Liability Act, brought against respondent railroad by petitioner, who was injured in a fall from a culvert while working in a section gang burning weeds beside the track and watching a passing train for hotboxes, the jury awarded damages to petitioner. The State Supreme Court reversed upon the ground that petitioner's evidence did not support the finding of respondent's liability. This Court granted certiorari. *Held:* The evidence was sufficient to support the jury finding for petitioner, and the judgment is reversed. Pp. 501–511.

1. Under the Federal Employers' Liability Act, the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury. Pp. 505–509.

2. Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination in cases under the Act, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. P. 509.

3. The fact that Congress has not substituted a scheme of workmen's compensation cannot relieve this Court of its obligation to effectuate the existing Act by granting certiorari to correct improper administration of the Act and to prevent its erosion by narrow and niggardly construction. P. 509.

4. When this Court has granted certiorari in a Federal Employers' Liability Act case, the litigants are entitled to the same measure of review on the merits as in every other case. P. 509.

5. In actions under the Act, Congress has vested the power of decision exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Pp. 504–505, 509–510.

6. Special and important reasons for the grant of certiorari in these cases exist when lower federal and state courts persistently deprive litigants of their right to a jury determination. P. 510.

284 S. W. 2d 467, reversed.

Mark D. Eagleton argued the cause for petitioner. With him on the brief was *Eugene K. Buckley.*

Donald B. Sommers argued the cause for respondent. With him on the brief was *Thomas T. Railey.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in the Circuit Court of St. Louis awarded damages to the petitioner in this action under the Federal Employers' Liability Act.[1] The Supreme Court of Missouri reversed upon the ground that the petitioner's evidence did not support the finding of respondent's liability.[2] This Court granted certiorari to consider the question whether the decision invaded the jury's function.[3]

Petitioner was a laborer in a section gang, working on July 17, 1951, along a portion of respondent's double-track line which, near Garner, Arkansas, runs generally north and south. The tracks are on ballast topping the surface of a dirt "dump" with sloping sides, and there is a path about a yard wide bordering each side of the surface between the crest of the slope and the edge of the ballast. Weeds and vegetation, killed chemically preparatory to burning them off, covered the paths and slopes. Petitioner's foreman assigned him to burn off the weeds and vegetation—the first time he was given that task in the two months he had worked for the respondent. He testified that it was customary to burn off such vegetation with a flame thrower operated from a car running on the tracks. Railroad witnesses testified, however, that the respondent discontinued the use of flame throwers at least

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[1] 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*

[2] 284 S. W. 2d 467.

[3] 350 U. S. 964.

a year earlier because the fires started by them sometimes spread beyond the railroad right of way.

Petitioner was supplied with a crude hand torch and was instructed to burn off the weeds and vegetation along the west path and for two or three feet down the west slope. The events leading to his mishap occurred after he proceeded with the work to a point within thirty to thirty-five yards of a culvert adjoining the path.

Petitioner testified, without contradiction, that the foreman instructed him and other members of the section gang to stop what they were doing when a train passed and to take positions off the tracks and ties to observe the journals of the passing train for hotboxes. The instructions were explicit not to go on either of the tracks or to stand on or near the ends of the ties when a train was passing on a far track. This was a safety precaution because "the sound of one train would deaden the sound of another one that possibly would come from the other way."

On this day petitioner heard the whistle of a train which was approaching from behind him on the east track. He promptly "quit firing" and ran north to a place on the path near the mentioned culvert. He was standing a few feet from the culvert observing the train for hotboxes when he became enveloped in smoke and flames. The passing train had fanned the flames of the burning vegetation and weeds, carrying the fire to the vegetation around his position. He threw his arm over his face, retreated quickly back on the culvert and slipped and fell from the top of the culvert, suffering the serious injuries for which he sought damages in this suit.

The complaint alleges negligence in that petitioner was "required to work at a place in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and

requiring plaintiff to move away from said danger." Negligence was also alleged in that the surface of the culvert was not properly maintained because, instead of the usual flat surface giving firm footing for workmen, the surface was "covered with loose and sloping gravel which did not provide adequate or sufficient footing for plaintiff to thus move or work under the circumstances."

We think that the evidence was sufficient to support the jury finding for the petitioner. The testimony that the burning off of weeds and vegetation was ordinarily done with flame throwers from cars on the tracks and not, as here, by a workman on foot using a crude hand torch, when that evidence is considered with the uncontradicted testimony that the petitioner was where he was on this narrow path atop the dirt "dump" in furtherance of explicit orders to watch for hotboxes, supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury. These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did.[4] Common experience teaches both that a passing train will fan the flames of a fire, and that a person suddenly enveloped in flames and smoke will instinctively react by retreating from the danger and in the process pay scant heed to other dangers which may imperil him. In this view, it was an irrelevant consideration whether the immediate reason for his slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence.

The Missouri Supreme Court based its reversal upon its finding of an alleged admission by the petitioner that

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[4] *Lillie* v. *Thompson,* 332 U. S. 459.

he knew it was his primary duty to watch the fire. From that premise the Missouri court reasoned that petitioner was inattentive to the fire and that the emergency which confronted him "was an emergency brought about by himself." [5] It said that if, as petitioner testified, the immediate cause of his fall was that loose gravel on the surface of the culvert rolled out from under him, yet it was his inattention to the fire which caused it to spread and obliged petitioner "to move blindly away and fall," and this was "something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert." [6]

We interpret the foregoing to mean that the Missouri court found as a matter of law that the petitioner's conduct was the sole cause of his mishap. But when the petitioner agreed that his primary duty was to watch the fire he did not also say that he was relieved of the duty to stop to watch a passing train for hotboxes. Indeed, no witness testified that the instruction was countermanded. At best, uncertainty as to the fact arises from the petitioner's testimony, and in that circumstance not the court, but the jury, was the tribunal to determine the fact.

We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner,[7] the decision was exclusively for the jury to make.[8] The jury was instructed to return a verdict for the respondent if it was found that negligence of

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[5] 284 S. W. 2d, at 472.

[6] *Ibid.*

[7] *Myers* v. *Reading Co.*, 331 U. S. 477.

[8] "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35.

the petitioner was the sole cause of his mishap.[9] We must take it that the verdict was obedient to the trial judge's charge and that the jury found that such was not the case but that petitioner's injury resulted at least in part from the respondent's negligence.

The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs sup-

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[9] The jury was not charged that contributory negligence, if any, was to be considered merely in diminution of any damages. 35 Stat. 66, 45 U. S. C. § 53. Instruction No. 2 was as follows:

"The Court instructs the jury that under the law applicable to this case it was the duty of the plaintiff to exercise ordinary care for his own safety, at all times, while performing his duties as an employee of the defendant.

"In this connection, the Court instructs the jury that if you find and believe from the evidence that on July 17, 1951 the plaintiff, James C. Rogers, while an employee of the defendant and while burning weeds on a portion of defendant's right-of-way near 'Garner Crossing' near the City of Garner, Arkansas, did move about on said railroad right-of-way with his arm over his eyes, and did move backwards and sidewards without looking in the direction in which he was walking, and if you further find that under the circumstances mentioned in the evidence the plaintiff, in exercising ordinary care for his own safety, could have and should have looked in the direction in which he was walking, but failed to do so and, if you further find that the plaintiff in failing to do so did not exercise ordinary care for his own safety and was guilty of negligence and that such negligence, if any was the sole proximate cause of his injuries, if any, and that such alleged injuries, if any, were not directly contributed to or caused by any negligence of the defendant in any of the particulars submitted to you in other instructions herein, then, in that event, the plaintiff is not entitled to recover against the defendant, and you will find your verdict in favor of the defendant."

port with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that "the injury would not have occurred but for the negligence" of his employer, and that "[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred." [10] That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[11] It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.[12] Judicial

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[10] 284 S. W. 2d, at 471.

[11] *Coray* v. *Southern Pacific Co.*, 335 U. S. 520.

[12] ". . . [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 35 Stat. 66, 45 U. S. C. § 53.

appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.[13] Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence.[14] (Emphasis added.)

The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant.[15] The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law

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[13] Proof of violation of certain safety-appliance statutes without more proves negligence and also eliminates contributory negligence as a consideration for any purpose. Note 11, *supra*. The only issue then remaining is causation. *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430; *Myers* v. *Reading Co.*, 331 U. S. 477.

Moreover, "[w]hat constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs." *Urie* v. *Thompson*, 337 U. S. 163, 174.

[14] ". . . [E]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury . . . or . . . death . . . resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . . ." (Emphasis added.) 35 Stat. 65, 45 U. S. C. § 51; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 523–524.

[15] For a comprehensive survey of the history of the FELA, see Griffith, The Vindication of a National Public Policy Under the Federal Employers' Liability Act, 18 Law & Contemp. Prob. 160.

defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.[16] The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial,[17] from which the jury may with reason make that inference.

The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence.[18] Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts developed concepts of assumption of risk [19] and of the coverage of the law,[20] which defeated

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[16] *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.

[17] Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *The Robert Edwards*, 6 Wheat. 187, 190.

[18] While the primary reason was a protest against undue comment by trial judges as to the facts, the original 1906 Act provided: "All questions of negligence and contributory negligence shall be for the jury." 34 Stat. 232. Hearings before Senate Committee on Interstate Commerce on H. R. 239, 59th Cong., 1st Sess. 68–69. The inclusion in the 1908 statute of another provision, "All questions of fact relating to negligence shall be for the jury to determine," was proposed but not adopted. The view prevailed that this would be surplusage in light of the Seventh Amendment embodying the common-law tradition that fact questions were for the jury. Hearings before Senate Committee on Education and Labor on S. 5307, 60th Cong., 1st Sess. 8–9, 45–46.

[19] *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492.

[20] *Tipton* v. *Atchison, T. & S. F. R. Co.*, 298 U. S. 141; *Illinois Central R. Co.* v. *Behrens*, 233 U. S. 473.

employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap.[21]

Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.[22] Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. Similarly, once certiorari is granted, the fact that the case arises under the Federal Employers' Liability Act cannot in any wise justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case.[23]

The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence

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[21] 53 Stat. 1404. For this Court's interpretation of these amendments, see *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (assumption of risk); *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493 (coverage); *Reed* v. *Pennsylvania R. Co.*, 351 U. S. 502 (coverage).

[22] *Jacob* v. *New York City*, 315 U. S. 752.

[23] We adopt the reasoning in this regard of Part I of MR. JUSTICE HARLAN'S opinion concurring in No. 46 and dissenting in this case and in Nos. 42 and 59. *Post*, p. 559.

action, has required this Court to review a number of cases.[24] In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case.[25] The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases [26] where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination.

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[24] See Appendix to opinion of MR. JUSTICE DOUGLAS in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 71; Note, 69 Harv. L. Rev. 1441.

[25] Rule 19 authorizes this Court to review by certiorari the judgment of a lower federal or state court "where there are special and important reasons therefor," such as deciding a federal question of substance in a way probably not in accord with, or in conflict with, applicable decisions of this Court.

[26] This Court found that a jury question was presented, and reversed in the following cases: *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407; *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430; *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Anderson* v. *Atchison, T. & S. F. R. Co.*, 333 U. S. 821; *Lillie* v. *Thompson*, 332 U. S. 459; *Myers* v. *Reading Co.*, 331 U. S. 477; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649; *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452; *Lavender* v. *Kurn*, 327 U. S. 645; *Keeton* v. *Thompson*, 326 U. S. 689; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Seago* v. *New York Cent. R. Co.*, 315 U. S. 781; *Jenkins* v. *Kurn*, 313 U. S. 256.

The Court found that no question for the jury was presented, and affirmed in the following cases: *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573; *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329; *Brady* v. *Southern R. Co.*, 320 U. S. 476.

We have considered the remaining questions not passed upon by the Supreme Court of Missouri, and find them to be unsubstantial. Accordingly, we remand the case for proceedings not inconsistent with this opinion.

The judgment is

Reversed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE REED would affirm the judgment of the Supreme Court of Missouri.

[For dissenting opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 524.]

[For opinion of MR. JUSTICE HARLAN, dissenting in this case, see *post*, p. 559.]

WEBB *v.* ILLINOIS CENTRAL RAILROAD CO.

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

No. 42. Argued December 3, 1956.—Decided February 25, 1957.

In an action in a Federal District Court under the Federal Employers' Liability Act, brought against respondent railroad by petitioner, who was injured in a fall while working as a brakeman when he slipped on a clinker in a cinder roadbed, the jury awarded damages to petitioner. The Court of Appeals reversed on the ground that petitioner's evidence was insufficient to allow a jury determination of respondent's alleged negligence, and that respondent's motion for a directed verdict should have been granted. This Court granted certiorari. *Held:* The evidence was sufficient to go to the jury on the issue of respondent's negligence and to support a jury finding of the negligence alleged; and the judgment is reversed. Pp. 512–517.

(a) The test of a jury case under the Act is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury. *Rogers* v. *Missouri Pacific R. Co., ante,* p. 500. Pp. 515–516.

228 F. 2d 257, reversed.

Robert J. Rafferty argued the cause for petitioner. With him on the brief was *Carl L. Yaeger.*

Herbert J. Deany argued the cause for respondent. With him on the brief were *Joseph H. Wright, Robert S. Kirby* and *William F. Bunn.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is an action under the Federal Employers' Liability Act,[1] in which certiorari was granted to consider whether the Court of Appeals for the Seventh Circuit

[1] 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*

erred in reversing a judgment for damages awarded to the petitioner in the District Court for the Northern District of Illinois.[2] The ground for the reversal was that the evidence was insufficient to allow a jury determination of the respondent's alleged negligence, so that respondent's motion for a directed verdict should have been granted.[3]

The petitioner, working as a brakeman on July 12, 1952, injured his kneecap in a fall on a cinder roadbed at a point some 15 feet from a house track switch at Mount Olive, Illinois. He was alongside a track connecting to the switch and slipped on an unnoticed and partially covered cinder "about the size of [his] fist" embedded in the level but soft roadbed.

It is conceded that the clinker in the roadbed created a hazardous condition giving rise to respondent's liability under the Act if the proofs raised a jury question of respondent's alleged negligence in causing or permitting the clinker to be there. The Court of Appeals viewed the evidence as insufficient to raise a jury question because the petitioner did not adduce proofs showing what standard procedures were followed to prevent large clinkers from being used in road ballast and in inspecting roadbeds for hazards to firm footing. We do not think that the petitioner's evidence was lacking in such proofs even if we assume, and we question, that he had that burden. On the contrary, we think there were probative facts in the evidence to justify with reason a jury finding of the negligence alleged.

"[I]n passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to sup-

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[2] 351 U. S. 905.

[3] 228 F. 2d 257.

port the case of a litigant against whom a peremptory instruction has been given." [4] We think the jury could have found from the proofs that, 3 weeks before the mishap, respondent elevated the house switch and the connecting tracks some 5 inches, using 15 cubic yards of cinder and chat ballast. Petitioner testified without objection, based on his knowledge and experience gleaned from 27 years of railroading, that the railroad's custom and practice was to take precautions to prevent the presence of large clinkers in a railroad bed, both because "it doesn't give good footing; and it cannot be tamped in under the ties for support." Moreover, the respondent's evidence supplied additional facts. The section foreman in charge of the repair work testified that he did not screen the ballast for large clinkers but merely visually inspected the ballast as it was shoveled by four laborers onto "the push-cart" before being taken to the site. His testimony was that the largest cinder he saw would be "say two inches in diameter. . . . Of course, I have no way of knowing exactly, but about." In this posture of the proofs, there is ample evidence for a jury to determine whether the procedure followed satisfied the standard to be expected from a prudent man in light of the hazard to be prevented.

We also think that a jury question was presented by the evidence bearing on the adequacy of respondent's roadbed inspection practices used to discover hazards to firm footing. As the jury might find that the clinker was in the ballast used in the repair work, so also the jury might find, from the fact that it was in the roadbed for three weeks, that inspection was not properly made. There was evidence from which it could have been found that the clinker was not discovered either by the foreman in semiweekly inspections of the location, made in part

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[4] *Wilkerson* v. *McCarthy*, 336 U. S. 53, 57.

to discover and remove hazards to workmen, or by a track inspector and a track supervisor making less frequent inspections. It was for the jury to weigh the evidence and to decide whether or not the inspections satisfied respondent's duty to provide the petitioner with a safe place to work.

The Court of Appeals said: "That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation." [5] In this connection the Court of Appeals mentioned two other possible sources of the clinker. One was the L. & N. Railroad, whose main line and house tracks immediately adjoined and were connected to the respondent's house switch by a cross-over track. Another was that some stranger may have brought the clinker onto respondent's unfenced right-of-way. That there were other possible sources of the clinker would not, of course, justify a directed verdict in light of our conclusion that the evidence supports with reason a jury finding that the respondent negligently caused the clinker to be in the ballast used in the repair work and failed to use proper care to discover and remove it.[6] Indeed, we do not think that the evidence would reasonably support a finding that the clinker came from another source.

Although we do not think that the case presents an issue of causation, if the quoted language of the Court

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[5] 228 F. 2d, at 259.

[6] Some speculation may have entered into the jury's decision. However, this Court has stated: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." *Lavender* v. *Kurn*, 327 U. S. 645, 653.

of Appeals is read as holding that a jury finding could not reasonably be made that respondent's negligence "in whole or in part" caused the petitioner's injury, then what we said in *Rogers* v. *Missouri Pacific R. Co.*, *ante*, p. 500, at 505–507, also decided today, is pertinent:

> ". . . But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. . . .
>
> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

We have considered the remaining questions, not passed upon by the Court of Appeals, and find them to be unsubstantial. Accordingly, we remand the case for proceedings in conformity with this opinion.

The judgment is

Reversed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE REED would affirm the judgment of the Court of Appeals.

[For dissenting opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 524.]

[For opinion of MR. JUSTICE HARLAN, dissenting in this case, see *post*, p. 559.]

HERDMAN *v.* PENNSYLVANIA RAILROAD CO.

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

No. 46. Argued December 4, 1956.—Decided February 25, 1957.

In an action under the Federal Employers' Liability Act, brought against respondent railroad by petitioner, who was injured when a freight train on which he was a conductor made an emergency stop to avoid striking an automobile, the Federal District Court entered judgment on a directed verdict in favor of respondent. The Court of Appeals affirmed on the ground that there was a complete absence of probative facts to support the conclusion of negligence. This Court granted certiorari. *Held:* A jury question of negligence (under the doctrine of *res ipsa loquitur*) was not presented by the proofs in this case, and the judgment is affirmed. Pp. 518–520.

228 F. 2d 902, affirmed.

Donald S. McNamara argued the cause for petitioner. On the brief was *J. Paul McNamara.*

John A. Eckler argued the cause for respondent. With him on the brief was *Robert L. Barton.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In this Federal Employers' Liability Act [1] case, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court for the Southern District of Ohio, which was entered on a directed verdict in favor of the respondent. The Court of Appeals agreed with the District Court that there was a complete absence of probative facts to support the conclusion of negligence.[2]

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[1] 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.*

[2] 228 F. 2d 902.

This Court granted certiorari to determine whether the petitioner was erroneously deprived of a jury determination of his case.[3]

The petitioner was the conductor in charge of a 67-car freight train which on February 1, 1951, was en route from Richmond, Indiana, to Columbus, Ohio. He was in the caboose at the end of the train when it came to a sudden stop about three miles before a scheduled stop in Dayton, Ohio. He brought this action for damages for injuries allegedly suffered from a fall in the caboose which occurred when the train stopped. He testified: "Well, we were coming through there at a slow like speed and I don't know what went wrong, the train went in emergency and threw me into this table and tore it up and I was up on the floor with my flagman on top of me, when we finally got straightened up." He immediately left the caboose and satisfied himself that the stop was not caused by a mechanical failure of the braking equipment, but rather that the engineer had applied the brakes to bring the train to a stop. At the end of the run, he filed his routine conductor's report of the incident. He read that report into the record, without objection, during his cross-examination. The report states: "CN 28, Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile engineman applied air in emergency causing rough stop. I was standing in cabin observing air gauge and when stop was made knocked me to floor of cabin bruising my hip." He also stated that the engineer had told him that there were school children in the automobile. There was no evidence that the stop was made with any special or unusual severity.

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[3] 351 U. S. 906.

The sole issue raised is whether a jury question was presented by the evidence under the doctrine of *res ipsa loquitur*. We agree with the lower courts that a jury question of negligence was not presented by the proofs. The proofs do not meet the tests laid down by this Court in *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452. The employee's injuries in the *Jesionowski* case resulted from a derailment. This Court held that derailments are "extraordinary, not usual, happenings," so that when they occur "a jury may fairly find that they occurred as a result of negligence." [4]

In this case, there is no evidence to show that unscheduled and sudden stops of trains are unusual or extraordinary occurrences. In fact, the only evidence was petitioner's testimony that they are not unusual or extraordinary. He testified: "We got to expect them or think about them." The facts of this occurrence thus do not warrant the inference that the respondent was negligent.

The judgment is

Affirmed.

[For dissenting opinion of Mr. Justice Frankfurter, see *post*, p. 524.]

[For opinion of Mr. Justice Harlan, concurring in this case, see *post*, p. 559.]

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[4] *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452, 458.

FERGUSON *v.* MOORE-McCORMACK LINES, INC.

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

No. 59. Argued December 10, 1956.—Decided February 25, 1957.

Petitioner, an employee on a passenger ship of respondent, was injured in the course of his employment while using a sharp butcher knife to remove ice cream from a container in which it was frozen hard. In an action under the Jones Act, under which the standard of liability is that of the Federal Employers' Liability Act, the Federal District Court entered judgment on a jury verdict awarding damages to petitioner. The Court of Appeals reversed, holding that a motion for a directed verdict for respondent should have been granted. This Court granted certiorari. *Held:* There was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner an adequate tool with which to perform his task, and the judgment is reversed. Pp. 521–524.

228 F. 2d 891, reversed.

George J. Engelman argued the cause and filed a brief for petitioner.

William A. Wilson argued the cause for respondent. With him on the brief were *Wilbur E. Dow, Jr.* and *Frederick Fish.*

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

Petitioner was injured in 1950 while serving as a second baker on respondent's passenger ship *Brazil.* Among his duties, he was required to fill orders of the ship's waiters for ice cream. On the day of the accident, he had received an order from a ship's waiter for 12 portions of ice cream. When he got half way down in the two-and-one-half-gallon ice-cream container from which he was

filling these orders, the ice cream was so hard that it could not be removed with the hemispherical scoop with which he had been furnished. Petitioner undertook to remove the ice cream with a sharp butcher knife kept nearby, grasping the handle and chipping at the hard ice cream. The knife struck a spot in the ice cream which was so hard that his hand slipped down onto the blade of the knife, resulting in the loss of two fingers of his right hand.

Petitioner brought this suit under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, to recover for his injuries, which were alleged to be the result of respondent's negligence. At the close of petitioner's case, respondent's motion for a directed verdict was denied. Respondent offered no evidence. After the jury returned a verdict of $17,500 for the petitioner, respondent moved to set aside the verdict. This motion was also denied and judgment entered for the petitioner in accordance with the jury verdict. The Court of Appeals reversed, holding that it was "not within the realm of reasonable foreseeability" that petitioner would use the knife to chip the frozen ice cream. 228 F. 2d 891, 892. We granted certiorari. 351 U. S. 936.

We conclude that there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task.

Petitioner testified that the hard ice cream could have been loosened safely with an ice chipper. He had used such an instrument for that purpose on other ships. He was not, however, furnished such an instrument. There was evidence that the scoop with which he had been furnished was totally inadequate to remove ice cream of the consistency of that which he had to serve. And, there was evidence that its extremely hard consistency was produced by the failure of another member of the crew

to transfer it from the deep freeze to a tempering chest in sufficient time to allow all of it to become disposable by means of the scoop when the time came for it to be served. There was no showing that any device was close at hand which would have safely performed the task. Finally, there was evidence that petitioner had been instructed to give the waiters prompt service.

Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (*Jacob* v. *New York City,* 315 U. S. 752; *Schulz* v. *Pennsylvania R. Co.,* 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. See *Schulz* v. *Pennsylvania R. Co.,* 350 U. S. 523, 526. Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers* v. *Missouri Pacific R. Co., ante,* p. 500, decided this day, is relevant here:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. "Courts

should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function." *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62.

Reversed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE REED would affirm the judgment of the Court of Appeals.

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

MR. JUSTICE FRANKFURTER, dissenting.*

> *"The Federal Employers Liability Act gives to railroad employees a somewhat liberalized right of recovery for injuries on the job. A great number of cases under the Act have been brought to the Supreme Court, many of them cases in which the court of appeals had set aside, on the evidence, verdicts for the employees. Despite the human appeal of these cases, Brandeis never allowed himself to regard them as the proper business of the appellate jurisdiction of the Supreme Court."*
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> Paul A. Freund, The Liberalism of Justice Brandeis, address at a meeting of the American Historical Association in St. Louis, December 28, 1956.

In so discharging his judicial responsibility, Mr. Justice Brandeis did not disclose an idiosyncrasy in a great judge. His attitude expressed respect for the standards

*[NOTE: This dissenting opinion applies also to No. 28, *Rogers* v. *Missouri Pacific R. Co.*, *ante*, p. 500; No. 42, *Webb* v. *Illinois Central R. Co.*, *ante*, p. 512; and No. 46, *Herdman* v. *Pennsylvania R. Co.*, *ante*, p. 518.]

formulated by the Court in carrying out the mandate of Congress regarding this Court's appellate jurisdiction in cases arising under the Federal Employers' Liability Act. For he began his work on the Court [1] just after Congress had passed the Act of September 6, 1916, 39 Stat. 726, relieving the Court of its obligatory jurisdiction over Federal Employers' Liability Act decisions by the highest state courts and the Circuit Courts of Appeals. Mr. Justice Brandeis' general outlook on the formulation by the Supreme Court of the public law appropriate for an evolving society has more and more prevailed; his concept of the role of the Supreme Court in our judicial system, and his consequent regard for the bearing on the judicial product of what business comes to the Court and how the Court deals with it, have often been neglected in the name of "doing justice" in individual cases. To him these were not technicalities, in the derogatory sense, for the conduct of judicial business. He deemed wise decisions on substantive law within the indispensable area of the Court's jurisdiction dependent on a limited volume of business and on a truly deliberative process.

One field of conspicuous disregard of these vital considerations is that large mass of cases under the Federal Employers' Liability Act in which the sole issue is the sufficiency of the evidence for submission to the jury.[2]

[1] He formally took his seat on June 5, 1916 (241 U. S. III), but did not begin active participation in the Court's work until the beginning of the October Term, 1916.

[2] Throughout this opinion I have dealt with the issue of granting certiorari in this type of case almost entirely in terms of the Federal Employers' Liability Act because the greatest abuse of the certiorari policy has occurred in that field. The problem is not confined to that Act, however, since the same or similar issues arise under other Acts, such as the Jones Act, 41 Stat. 1007, the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2671–2680, the Safety Appliance Act, 27 Stat. 531, the Boiler Inspection Act, 45 U. S. C. § 22 *et seq.*, the Suits in Admiralty Act, 46 U. S. C. § 741 *et seq.*, and

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For many years, I reluctantly voted on the merits of these negligence cases that had been granted review. In the last ten years, and more particularly within the past few years, as the Court has been granting more and more of these petitions, I have found it increasingly difficult to acquiesce in a practice that I regard as wholly incompatible with the certiorari policy embodied in the 1916 Act, the Judiciary Act of 1925, 43 Stat. 936, and the Rules formulated by the Court to govern certiorari jurisdiction for its own regulation and for the guidance of the bar. I have therefore felt compelled to vote to dismiss petitions for certiorari in such cases as improvidently granted without passing on the merits.[3] In these cases I indicated briefly the reasons why I believed that this Court should not be reviewing decisions in which the sole issue is the sufficiency of the evidence for submission to the jury. In view of the increasing number of these cases that have been brought here for review—this dissent is to four decisions of the Court—and in view of the encouragement thereby given to continuing resort to this Court, I deem it necessary to enlarge upon the considerations that have guided me in the conviction that writs in this class of cases are "improvidently granted." [4]

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the Lucas Act, 60 Stat. 902 (see *Buffalo Faultless Pants Co.* v. *United States*, 142 F. Supp. 594). Indeed, one of the decisions to which this dissent is written, No. 59, arises under the Jones Act.

[3] *Hill* v. *Atlantic Coast Line R. Co.*, 336 U. S. 911; *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 437; *Affolder* v. *New York, C. & St. L. R. Co.*, 339 U. S. 96, 101; *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 578; *Anderson* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807. See *McAllister* v. *United States*, 348 U. S. 19, 23 (Suits in Admiralty Act); *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 527 (Jones Act). See also *Wilkerson* v. *McCarthy*, 336 U. S. 53, 64; *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, 209; *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 410.

[4] "Improvidently granted" is a term of art simply meaning that on full consideration it becomes manifest that the case is not the

At the outset, however, I should deal briefly with a preliminary problem. It is sometimes said that the "integrity of the certiorari process" as expressed in the "rule of four" (that is, this Court's practice of granting certiorari on the vote of four Justices) requires all the Justices to vote on the merits of a case when four Justices have voted to grant certiorari and no new factor emerges after argument and deliberation. There are two reasons why there can be no such requirement. Last Term, for example, the Court disposed of 1,361 petitions for certiorari. With such a volume of certiorari business, not to mention the remainder of the Court's business, the initial decision to grant a petition for certiorari must necessarily be based on a limited appreciation of the issues in a case, resting as it so largely does on the partisan claims in briefs of counsel. See *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.,* 242 U. S. 430, 434; *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508, 509. The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits. The assumption that we know no more after hearing and deliberating on a case than after reading the petition for certiorari and the response is inadmissible in theory and not true in fact. Even an FELA case sometimes appears in quite a different light after argument than it appeared on the original papers. Surely this must be acknowledged regarding one of today's cases, No. 46, and see *McCarthy* v. *Bruner,* certiorari granted, 322 U. S. 718, certiorari dismissed, 323 U. S. 673. The course of argument and the briefs on the merits may disclose that a case appearing on the

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type of case that should have been brought here. The term is the counterpart of the phrase "improvidently taken," as used by Congress in 28 U. S. C. § 2103, governing appeals from state courts that are improvidently taken.

surface to warrant a writ of certiorari does not warrant it, see *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387,[5] or may reveal more clearly that the only thing in controversy is an appraisal of facts on which this Court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below.

But there is a more basic reason why the "integrity of the certiorari process" does not require me to vote on the merits of these cases. The right of a Justice to dissent from an action of the Court is historic. Of course self-restraint should guide the expression of dissent. But dissent is essential to an effective judiciary in a democratic society, and especially for a tribunal exercising the powers of this Court. Not four, not eight, Justices can require another to decide a case that he regards as not properly before the Court. The failure of a Justice to persuade his colleagues does not require him to yield to their views, if he has a deep conviction that the issue is sufficiently important. Moreover, the Court operates ultimately by majority. Even though a minority may bring a case here for oral argument, that does not mean that the majority has given up its right to vote on the ultimate disposition of the case as conscience directs. This is not a novel doctrine. As a matter of practice, members of the Court have at various times exercised this right of refusing to pass on the merits of cases that in their view should not have been granted review.

This does not make the "rule of four" a hollow rule. I would not change the practice. No Justice is likely to vote to dismiss a writ of certiorari as improvidently granted after argument has been heard, even though he has not been convinced that the case is within the rules of the Court governing the granting of certiorari.

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[5] See discussion of this point in *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, and cases there collected at p. 78, n. 2.

In the usual instance, a doubting Justice respects the judgment of his brethren that the case does concern issues important enough for the Court's consideration and adjudication. But a different situation is presented when a class of cases is systematically taken for review. Then a Justice who believes that such cases raise insignificant and unimportant questions—insignificant and unimportant from the point of view of the Court's duties—and that an increasing amount of the Court's time is unduly drained by adjudication of these cases cannot forego his duty to voice his dissent to the Court's action.

The "rule of four" is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review, the theory being that if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance. This is a fair enough rule of thumb on the assumption that four Justices find such importance on an individualized screening of the cases sought to be reviewed. The reason for deference to a minority view no longer holds when a class of litigation is given a special and privileged position.

The history of the Federal Employers' Liability Act reveals the continuing nature of the problem of review by this Court of the vast litigation under that Act in both the federal and state courts. The initial Federal Employers' Liability Act, 34 Stat. 232, was declared unconstitutional in the first *Employers' Liability Cases,* 207 U. S. 463. The second Employers' Liability Act, 35 Stat. 65, drafted to meet the constitutional infirmity found in the first Act, was sustained in the *Second Employers' Liability Cases,* 223 U. S. 1. Under the general statutory scheme of review of litigation by the Supreme Court in force at that time, all cases arising

under the Federal Employers' Liability Act, whether coming from the state or federal courts, were reviewable in the Supreme Court by writ of error, that is, as a matter of right. After the constitutionality of the Act had been sustained, cases began to flow to the Supreme Court and within a few years the Court was threatened with an avalanche of litigation under the Act. In the 1915 Term, the Court delivered opinions in 19 cases involving an assessment of the evidence to determine whether submission to the jury was warranted. See Appendices A and B, and starred footnote to Appendix A, *post,* pp. 548, 549.

To relieve the Court of this burden of reviewing the large volume of insignificant litigation under the Federal Employers' Liability Act was one of the principal reasons for passage of the Act of September 6, 1916, 39 Stat. 726. See S. Rep. No. 775, 64th Cong., 1st Sess.; H. R. Rep. No. 794, 64th Cong., 1st Sess. In thus freeing the Court from unrestricted access to it of cases that have no business here, Congress assimilated Federal Employers' Liability Act litigation to those other categories of cases—*e. g.,* diversity, patent, admiralty, criminal cases—that Congress had in 1891, 26 Stat. 826, 828, withdrawn from this Court's obligatory jurisdiction. Believing review in the state appellate systems or in the newly created Circuit Courts of Appeals sufficient, it made the lower courts' decisions final also in this class of litigation in all but the unusual cases raising significant legal questions. Thereafter such cases could be reviewed by the Supreme Court only on certiorari to "secure uniformity of decision" between the Circuit Courts of Appeals and "to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . . These remarks, of course, apply

also to applications for certiorari to review judgments and decrees of the highest courts of States." *Magnum Co.* v. *Coty,* 262 U. S. 159, 163–164. (See also *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 257–258: certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.") The statement for the Court by Mr. Chief Justice Taft in the *Coty* case indicates the strict criteria governing certiorari policy observed by the Court, except occasionally in FELA cases, previous to the Act of 1925, by which Congress put the Court's docket for all practical purposes in its own keeping. (For a more detailed history of the origin of certiorari jurisdiction, see Frankfurter and Landis, Business of The Supreme Court, cc. II, III, V, and VII.)

The vast extension of discretionary review by the Supreme Court on writ of certiorari contained in the Judges Bill of 1925, 43 Stat. 936, led the Court to promulgate formal rules, and not rely on admonitions in opinions, regarding conditions under which petitions for certiorari would be granted. The present Rule 19 of the Revised Rules of the Supreme Court contains the substance of the original Rule 35 (5) of the Revised Rules of 1925, 266 U. S. 645, 681, and perhaps in view of the issue in these cases it is not unwarranted to set forth the full text of that rule:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by

this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Of course, cases raising questions that are not evidentiary, questions that fairly involve the construction or scope of the statute are appropriate for review here. See, *e. g., Minneapolis & St. L. R. Co.* v. *Bombolis,* 241 U. S. 211; *Southern Pacific Co.* v. *Gileo,* 351 U. S. 493; *Reed* v. *Pennsylvania R. Co.,* 351 U. S. 502. But the ordinary negligence case under the Federal Employers' Liability Act does not satisfy the criteria that define the "special and important reasons" when a writ of certiorari will be granted, and this may perhaps best be appreciated by summarizing the course of proceedings in each of the four cases now before us.

In No. 28, the petitioner brought suit for damages, alleging negligence on the part of respondent railroad in providing an unsafe place to work and an unsafe method

for doing his work. Petitioner was engaged in burning weeds on respondent's right of way with a hand torch. He heard a whistle indicating an approaching train. He ran thirty to thirty-five yards along the track from the fire and, thinking himself far enough from the fire danger, stood near a drainage culvert watching the passing train for "hotboxes." The train caused the fire to come "right up in [his] face." Petitioner backed away with his arm over his face and fell down the incline of the culvert. There was considerable testimony concerning the circumstances of the accident, the methods of burning weeds, the duties of railroad workers, the condition of the right of way, in particular the condition of the culvert, and petitioner's knowledge of those conditions. Respondent's motions for a directed verdict at the close of petitioner's case and at the close of all the evidence were denied. The case was submitted to the jury, which returned a verdict for petitioner.

On appeal, the Missouri Supreme Court reversed. 284 S. W. 2d 467. Considering the evidence from a standpoint most favorable to the petitioner, it held that there was insufficient evidence of negligence on the part of respondent, and that even if there were sufficient evidence of negligence, there was no evidence to show that such negligence contributed to petitioner's injury.

In No. 42, petitioner brought suit for injuries suffered as a result of respondent railroad's alleged failure to use ordinary care in furnishing him with a reasonably safe place to work. There was little dispute over the circumstances of the accident, which are set forth in the opinion of the Court of Appeals for the Seventh Circuit, 228 F. 2d 257, 258:

> "Plaintiff had been employed by defendant in various capacities since about 1925 and was, on July 2, 1952, when the accident occurred, working as a brakeman, being assigned to the crew of a local

> freight run between the cities of East St. Louis and Clinton, Illinois. During the course of his duties, in a switching operation at Mount Olive, he noticed that a wheat car in the train was leaking. While the other crew members continued with the task of picking up cars to be incorporated into the train, he started back to the caboose to get some waste to plug the hole in the leaking car. He turned and, on the first step he took, tripped and fell with his left leg buckled under him. He thereby sustained a serious injury to his left kneecap. The accident occurred on the roadbed of defendant's 'house track' at a point about one foot from the end of the ties. After plaintiff fell, he looked to see what had caused him to fall and saw a clinker 'about the size of my fist' which was partly out of the ground, and a hole beside the clinker. . . . Plaintiff stated that he looked 'at the ground' before he stepped but did not see the clinker. He stated further that the footing on the roadbed looked level but was a little soft."

Defendant's motions for a directed verdict at the close of petitioner's case and at the close of all the evidence were denied, and the jury returned a verdict for petitioner. The Court of Appeals reversed. It held that the possibility that "defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation." The Court of Appeals also stated that "there is a total want of evidence as to what constitutes reasonable prudence under the proved circumstances," and that the record "is equally lacking in evidence to prove that defendant had actual or constructive notice of the dangerous condition." *Id.*, at 259, 260.

In No. 46, petitioner appealed to the Court of Appeals for the Sixth Circuit from a directed verdict for respond-

ent railroad. He gave the only testimony with respect to the accident and testified that, while the train was proceeding slowly, it made a sudden stop which threw him to the floor of the caboose where he was riding. The official report of the accident, which he signed, stated that the stop was made to avoid striking an automobile at a grade crossing. Petitioner gave some further testimony about the operation of air brakes, the frequency of emergency braking in his experience, and other methods of slowing down the train than by emergency braking. On this record, the Court of Appeals found a complete absence of probative facts to warrant submission of the case to the jury, and it affirmed the judgment of the District Court. 228 F. 2d 902.

No. 59 was an appeal under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, whose standard of liability is explicitly that of the Federal Employers' Liability Act in this type of case; this case therefore presents the same problem for the Court as the other three. Petitioner had obtained a judgment, which was reversed by the Court of Appeals for the Second Circuit for failure of proof of negligence. The facts and reasons for reversal are set forth in the opinion of that court:

> "Plaintiff was a baker engaged at the time of the accident in serving ice cream in the galley on C deck of defendant's SS Brazil. Using the standard ice cream scoop provided for the purpose, plaintiff disposed of the contents of a half used tub and had worked his way about half way down a full additional tub. There he found the ice cream 'as hard as a brickbat,' and the scoop became useless. So it occurred to plaintiff that about a foot and a half from where he was serving and 'kept underneath the griddle' was a butcher knife, about eighteen inches long and as sharp as a razor, which might be used to chip the ice cream into small pieces. He was chipping

away when his hand slipped and he was badly cut, resulting later in the loss of two fingers of his right hand.

". . . The negligence [of defendant] is supposed to stem from a failure to provide a safe place to work and safe tools and appliances. Reliance is also placed upon the fact that plaintiff had been directed to fill the orders brought into the galley by the waiters and it is said that there must have been something wrong with the refrigeration system or the ice cream would not have been so hard.

"But no one in authority told plaintiff to use the butcher knife, which was customarily used in cutting French bread. The knife was properly in the galley and there was nothing defective about it. But it was never designed for or intended to be used as a dagger or ice pick for chipping frozen ice cream. And that it would be put to such use was not within the realm of reasonable foreseeability . . . .

"There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted." 228 F. 2d 891.

In all good conscience, what "special and important" reason for granting certiorari do the facts in any one of these cases disclose? In three of them, the trial judge had allowed a case to go to the jury, and three unanimous reviewing courts—two Courts of Appeals and one state Supreme Court—had reversed for lack of evidence. In each of these cases, this Court has combed the record and found that there was sufficient evidence for the case to go to the jury, although in No. 28 the Court found evidence of negligence in the fact that "[c]ommon experience" teaches "that a passing train will fan the flames of a fire," whereas in No. 46 the Court found insufficiency of evidence to go to the jury because "there is no evidence to

show that unscheduled and sudden stops of trains are unusual or extraordinary occurrences." In No. 46, the Court therefore affirms the judgment of the Court of Appeals, which had affirmed the direction of a verdict for defendant.

In any event, the Court in these four cases has merely reviewed evidence that has already been reviewed by two lower courts, and in so doing it ignores its own strictures to the bar that "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U. S. 220, 227. See also *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508; *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 178. Constant complaints have been made by successive Chief Justices about the large number of frivolous petitions that are filed each Term, "frivolous" meaning that the issues are not deserving of consideration for review when judged by the Court's instructions to the bar. See the remarks of Chief Justice Taft, in 35 Yale L. J. 1, 3–4; Chief Justice Hughes, in 20 A. B. A. J. 341; Chief Justice Vinson, in 69 S. Ct. v, VI–VII. If the Court does not abide by its Rules, how can it expect the bar to do so? Standards must be enforced to be respected. If they are merely left as something on paper, they might as well be written on water.

The rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court, and is as equally applicable to negligence cases as to any other type of case. Perhaps a word should be said about the basis of the cause of action under the Federal Employers' Liability Act. Liability under the Act is based on negligence.[6] As far as the sub-

[6] The attempts to substitute a workmen's compensation law are detailed in Miller, The Quest for a Federal Workmen's Compensation Law, 18 Law and Contemporary Problems 188.

stantive cause of action is concerned, this is the historic cause of action for negligence as it has developed from the common law. It involves the same general concept on which is based every "negligence case" in the state courts and in the multitudinous cases in the federal courts on diversity of citizenship in which the question is merely one of common-law negligence; that is, it is the familiar type of litigation that is part of the day-to-day business of state and federal trial judges.

The 1908 Act denied the railroads the benefit of certain common-law defenses and the 1939 amendment, 53 Stat. 1404, abolished the defense of assumption of risk, but the fact that a right to recover is not barred by what theretofore was a defense does not change the basis of the right. This has been recognized in the opinions of this Court in which it has reversed lower courts on the question of the sufficiency of the evidence. The Court has never intimated that the concept of negligence, undefined in the statute, has some special or esoteric content as used in the Act or is anything other than a statutory absorption of the common-law concept.[7]

"One's deep sympathy is of course aroused by a victim of the hazards of negligence litigation in situations like the one before us. But the remedy for an obsolete and uncivilized system of compensation for loss of life or limb of crews on ships and trains is not intermittent disregard of the considerations which led Congress to entrust this Court with the discretion of certiorari jurisdiction. The remedy is an adequate and effective system of workmen's

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[7] See, *e. g.*, *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69: "The basis of liability under the Act is and remains negligence." (Concurring opinion of DOUGLAS, J.) To be sure, on the question of causality, the statute has tried to avoid issues about "sole proximate cause," meeting the requirement of a causal relation with the language that the injury must result "in whole or in part" from the employer's negligence. See, *e. g.*, *Illinois Central R. Co.* v. *Skaggs*, 240 U. S. 66, 69–70.

compensation," adequate in amount and especially prompt in administration. *McAllister* v. *United States,* 348 U. S. 19, 23–24 (separate opinion). It deserves to be recorded that Professor John Chipman Gray, a legal scholar with social insight, taught his students fifty years ago, before the first workmen's compensation law had been enacted, that it is anachronistic to apply the common-law doctrine of negligence to injuries suffered by railroad employees rather than have society recognize such injuries as inevitable incidents of railroading and provide compensation on that basis. The persistence of this archaic and cruel system is attributable to many factors. Inertia of course. But also it is merely one illustration of the lag of reform because of the opposition of lawyers who resist change of the familiar, particularly when they have thriven under some outworn doctrine of law.[8] Finally, one cannot acquit the encouragement given by this Court for seeking success in the lottery of obtaining heavy verdicts of contributing to the continuance of this system of compensation whose

[8] See Elihu Root's address to the American Bar Association in 1914: "Lawyers are essentially conservative. They do not take kindly to change. They are not naturally reformers. Their time is occupied mainly in thinking and arguing about what the law of the particular case is; about what the facts of the case are. The most successful lawyers are, as a rule, continually engrossed in their own cases and they have little time and little respect for the speculative and hypothetical. The lawyers who have authority as leaders of opinion are men, as a rule, who have succeeded in their profession, and men naturally tend to be satisfied with the conditions under which they are succeeding." Root, Addresses on Government and Citizenship, 479, 484. See also Gibson, The Venue Clause and Transportation of Lawsuits, 18 Law and Contemporary Problems 367, for some statistics bearing on the interest of lawyers in the continuance of the present system. The author cites the example of one specialist in personal injury litigation whose administrator collected a minimum of $1,111,935 in fees from 150 lawsuits pending at the date of the lawyer's death.

essential injustice can hardly be alleviated by the occasional "correction" in this Court of ill-success.

Rather than paraphrase, I shall repeat what I have already said about negligence cases and certiorari policy in *Wilkerson* v. *McCarthy,* 336 U. S. 53, 64, 66: "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances. For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees [9] may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. . . ." See also *Carter* v. *Atlanta & St. A. B. R. Co.,* 338 U. S. 430, 437; *McAllister* v. *United States,* 348 U. S. 19, 23.

The Court finds justification for granting certiorari in an alleged conflict of these decisions of the Courts of Appeals for the Second, Sixth, and Seventh Circuits and the Supreme Court of Missouri with the applicable deci-

[9] An archaic system, I might add, that encourages pursuit of big verdicts in individual cases, a preoccupation that has attained the dignity of full documentation of sensational methods by which a jury's feelings may be exploited.

sions of this Court. All that can fairly be said is that these courts found that there was not evidence to bring these cases within the recognized rules for submitting a case to the jury. In none of them is there any intimation or atmospheric indication of unwillingness to enforce the governing rules of the Act as laid down by this Court. These rules are well known. That there should be differences of opinion in their application is almost inevitable.[10] But once Congress in 1916 commanded that the ordinary Federal Employers' Liability Act case, like other essentially private litigation, should reach a final decision in the Courts of Appeals or the state appellate tribunals, this Court should never have granted certiorari to assess the evidence in any of them.[11] I would not continue a bad practice to aid a few plaintiffs because there was once a bad practice that aided a few defendants. One still does not commit two wrongs to "do right."

This is not the supreme court of review for every case decided "unjustly" by every court in the country. The

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[10] "If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge." *Wilkerson* v. *McCarthy,* 336 U. S. 64, 65 (concurring).

[11] Any notion that the practice of directing verdicts offends the Seventh Amendment was laid to rest in *Galloway* v. *United States,* 319 U. S. 372.

Court's practice in taking these Federal Employers' Liability Act cases discriminates against other personal injury cases, for example those in the federal courts on diversity jurisdiction. Similar questions of negligence are involved there and the opportunity for swallowing up more of the Supreme Court's energy is very great indeed. While 1,332 cases were commenced under the Federal Employers' Liability Act in the Federal District Courts in the fiscal year 1956 and 2,392 cases under the Jones Act, 11,427 personal injury cases were begun under the diversity jurisdiction in the District Courts. Annual Report of the Director of the Administrative Office of the United States Courts—1956, pp. 52–53. The Court may well have had this discrimination in mind when it granted certiorari in the diversity case of *Gibson* v. *Phillips Petroleum Co.*, 352 U. S. 874, and decided it on the merits. A few more such decisions and a flood of petitions from this source may confidently be expected. Whether or not it be true that we are a litigious people, it is a matter of experience that clients, if not lawyers, have a strong urge to exhaust all possibility of further appeal, particularly when judicially encouraged to do so. Disappointed litigants and losing lawyers like to have another go at it, and why should they not try when certiorari was granted in cases like these?

It is not enough, however, to deal with this problem on an abstract, theoretical basis. The statistical history of the Federal Employers' Liability Act, as set forth in the tables in the appendices to this opinion, gives concrete evidence of the recurring nature of the problem and the time-consuming nature of the litigation. In the early years of the Act, when review by this Court was on writ of error, there was a large number of cases in which sufficiency of evidence was at issue. Contrary to general belief, however, employees fared well in this type of case. Of the 42 cases decided by the Court raising that issue,

a judgment for the plaintiff was reversed for evidentiary reasons in only three cases and a judgment for the defendant railroad upheld in only seven. In the other 32 cases, judgments for plaintiffs were affirmed or judgments for defendants reversed.

Once easy access to this Court was shut off by the discretionary power of review over these cases that was given to the Court in 1916, few FELA decisions were rendered, and only four, of which one was on writ of error, dealing with the sufficiency of the evidence, in the five-year period covered by the 1918 through the 1922 Terms. During the next ten years, however, the Court concerned itself more and more with the Act, but during this era the railroads tended to prevail. Thirty-five decisions were rendered from the 1923 Term through the 1932 Term. In 27 of these a judgment for a plaintiff was reversed for evidentiary reasons; in another the Court affirmed the reversal of a judgment for a plaintiff; and in another the Court reversed the reversal of a directed verdict for a railroad. (For a review of certiorari policy under the FELA during this period, see Frankfurter and Landis, Business of the Supreme Court at October Term, 1931, 46 Harv. L. Rev. 226, 240–253.)

Thereafter, during the remaining eight Terms of Mr. Chief Justice Hughes, the number of sufficiency-of-the-evidence cases under the Act that were granted review fell off considerably. Only seven decisions were rendered during that period. The next nine-year period, however, saw a large increase again, with 27 decisions during the 1941 through 1949 Terms. Unlike the previous experience with the Act, it was not efforts of railroads seeking to reverse judgments in favor of injured workers that constituted the major portion of the business during this period, but rather efforts by injured workers to upset judgments for railroads. And they were successful. Judgments for railroads were sustained in only four

cases. In all the others, the Court reversed a judgment of a lower court that either had reversed a jury verdict for a plaintiff or had affirmed a judgment for a railroad.

In the following four Terms, business again slackened and only two cases concerning sufficiency of the evidence were decided under the Act. We now seem to have entered again on a period of renewed activity by the Court in this field. Two decisions were rendered in the 1954 Term, three in the 1955 Term, four thus far this Term, and two additional petitions for certiorari have already been granted this Term.

A further indication of the tendency in recent Court decisions is provided by a study of petitions for certiorari in FELA cases from the 1938 through the 1954 Terms. This study disclosed that of the 260 petitions filed, sufficiency of the evidence of negligence or of causation for submission to the jury was the predominant question in 149. Seventy-eight of these petitions were filed by the employee and all of the 37 granted petitions were from this group, except one in which the writ was later dismissed as improvidently granted. *McCarthy* v. *Bruner,* certiorari granted, 322 U. S. 718, certiorari dismissed, 323 U. S. 673. Certiorari Policy in FELA Cases, 69 Harv. L. Rev. 1441, 1445–1446.

These figures tell only a small part of the story. While this opinion concerns itself principally with cases under the Federal Employers' Liability Act, the same kind of question arises under many other statutes. See footnote 2, *supra.* And experience leaves no doubt, though the fact cannot be established statistically, that by granting review in these cases, the Court encourages the filing of petitions for certiorari in other types of cases raising issues that likewise have no business to be brought here. Moreover, the considerations governing discharge of the Court's function involve only in part quantitative factors. Finally, and most important, granting review in

one or two cases that present a compassionate appeal on this ground and one or two that present a compassionate appeal on that ground and one or two that present a compassionate appeal on a third ground inevitably makes that drain upon the available energy of the Court that is so inimical to the fullest investigation of, the amplest deliberation on, the most effective opinion-writing and the most critical examination of draft opinions in, the cases that have unquestioned claims upon the Court.

It is impossible to read the 106 written opinions of the Supreme Court dealing with this type of issue, see Appendices A and B, without feeling that during different periods the Court, while using the same generalities in speaking about the relation of judge and jury to the cause of action for negligence, has applied those principles differently from time to time to the facts of different cases. The divided views on this Court today with respect to the application of those principles merely reflect the divided views of state and federal judges throughout the country on problems of negligence. As long as there is a division of functions between judge and jury, there will be division of opinion concerning the correctness of trial judges' actions in individual cases. But since the law obviously does not remain "settled" in this field very long, one does not have to be a prophet to be confident that the Court, if it continues its present certiorari policy, will one day return to its attitude of the 1920's in these individual cases. With a changed membership, the Court might tomorrow readily affirm all four of the cases that it decides today. There is nothing in the Federal Employers' Liability Act to say which view is correct. The Act expressed a social policy, and it expressed that policy in terms of a familiar, but elusively inapt, common-law cause of action. It is suggested in effect that the history of FELA litigation in this Court reveals a shift in mood, philosophy if one pleases, towards the Federal Employers' Liability Act—

that at one time the chief concern may be lively regard for what are conceived to be unfair inroads upon the railroads' exchequer [12] while at another period the preoccupation may be with protection of employees and their families, so far as money damages can do so, against the inherent hazards of their indispensable labor. Be that as it may, the desire to engraft a philosophy, either philosophy, upon an outmoded, unfair system of liability should not lead the Court to bend the rules by which it is governed in other cases in the exercise of its discretionary jurisdiction.

This unvarnished account of Federal Employers' Liability Act litigation in this Court relating to sufficiency of the evidence for submission of cases to the jury is surely not an exhilarating story. For the Supreme Court of the United States to spend two hours of solemn argument, plus countless other hours reading the briefs and record and writing opinions, to determine whether there was evidence to support an allegation that it could reasonably be foreseen that an ice-cream server on a ship would use a butcher's knife to scoop out ice cream that was too hard to be scooped with a regular scoop, is surely to misconceive the discretion that was entrusted to the wisdom of the Court for the control of its calendar. The Court may or may not be "doing justice" in the four insignificant cases it decides today; it certainly is doing injustice to the significant and important cases on the calendar and to its own role as the supreme judicial body of the country.

It is, I believe, wholly accurate to say that the Court will be enabled to discharge adequately the vital, and, I feel, the increasingly vital, responsibility it bears for the

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[12] "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted." *Atchison, T. & S. F. R. Co.* v. *Saxon,* 284 U. S. 458, 459.

general welfare only if it restricts its reviewing power to the adjudication of constitutional issues or other questions of national importance, including therein settlement of conflict among the circuits. Surely it was this conviction, born of experience, that led the Court to ask of Congress that of the great mass of litigation in the state and federal courts only those cases should be allowed to be brought here that this Court deemed fit for review. Such was the jurisdictional policy accepted by Congress when it yielded to the Court's realization of the conditions necessary for its proper functioning.

For one thing, as the current United States Reports compared with those of even a generation ago amply prove, the types of cases now calling for decision to a considerable extent require investigation of voluminous literature far beyond the law reports and other legal writings. If it is to yield its proper significance, this vast mass of materials, often confused and conflicting, must be passed through the sieve of reflection. Judicial reflection is a process that requires time and freedom from the pressure of having more work to do than can be well done. It is not a bit of quixotism to believe that, of the 63 cases scheduled for argument during the remaining months of this Term, there are a half dozen that could alone easily absorb the entire thought of the Court for the rest of the Term.

The judgments of this Court are collective judgments. Such judgments are especially dependent on ample time for private study and reflection in preparation for discussion in Conference. Without adequate study, there cannot be adequate reflection; without adequate reflection, there cannot be adequate discussion; without adequate discussion, there cannot be that full and fruitful interchange of minds that is indispensable to wise decisions and persuasive opinions by the Court. Unless the Court vigorously enforces its own criteria for granting review of

cases, it will inevitably face an accumulation of arrears or will dispose of its essential business in too hurried and therefore too shallow a way.

I would dismiss all four writs of certiorari as improvidently granted.

[For opinion of MR. JUSTICE HARLAN, see *post*, p. 559.]

APPENDIX A.

DECISIONS RELATING TO SUFFICIENCY OF THE EVIDENCE UNDER THE FELA, TERM BY TERM.*

1911	1	1918	1
1912	2	1919	2
1913	4	1920	1
1914	4	1921	0
1915	19	1922	0
1916	6	1923	3**
1917	5	1924	2

*This table restricts itself to decisions on the sufficiency of the evidence relating to the substantive cause of action for submission to the jury. It does not take into account other sufficiency-of-the-evidence cases, *e. g.*, was an employee engaged in interstate commerce, that raise somewhat different problems but are all too often also outside the appropriate bounds of certiorari jurisdiction.

In some of the cases resulting in an affirmance of a judgment for an employee, sufficiency of the evidence was only one of the questions considered. It is impossible to ascertain why certiorari was granted, but these cases are included in the table because the Court did not restrict its grant of certiorari to the other issues, as it frequently does, and did consider the sufficiency-of-the-evidence question.

**These figures include 1 summary *per curiam* disposition on the merits in the 1923 Term, 1 in the 1928 Term, 1 in the 1939 Term, 1 in the 1940 Term, 1 in the 1941 Term, 2 in the 1945 Term, 1 in the 1946 Term, 4 in the 1947 Term, 2 in the 1948 Term, 2 in the 1954 Term, and 3 in the 1955 Term. See 69 Harv. L. Rev. 1441, 1446, n. 30. The Reports have not been examined for summary dispositions on the merits prior to 1938. That practice did not become established in these cases until then, and prior to that time was at most desultory.

1925	4	1941	1**
1926	0	1942	3
1927	6	1943	2
1928	6**	1944	2
1929	4	1945	3**
1930	1	1946	4**
1931	7	1947	4**
1932	2	1948	6**
1933	1	1949	2
1934	1	1950	1
1935	1	1951	0
1936	0	1952	1
1937	0	1953	0
1938	1	1954	2**
1939	1**	1955	3**
1940	2**	1956	4

**See footnote on p. 548.

APPENDIX B.

DECISIONS RELATING TO SUFFICIENCY OF THE EVIDENCE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

(* *Indicates Summary Disposition Per Curiam.*)

1911 Term.

Texas & P. R. Co. v. *Howell,* 224 U. S. 577; affirmance of judgment for plaintiff affirmed.

1912 Term.

Troxell v. *Delaware, L. & W. R. Co.,* 227 U. S. 434; reversal of judgment for plaintiff reversed.

Norfolk & W. R. Co. v. *Earnest,* 229 U. S. 114; judgment for plaintiff affirmed.

1913 Term.

Young v. *Central R. Co. of N. J.*, 232 U. S. 602; remand for entry of judgment n. o. v. for defendant modified and affirmed.

Grand Trunk Western R. Co. v. *Lindsay*, 233 U. S. 42; affirmance of judgment for plaintiff affirmed.

Southern R. Co. v. *Bennett*, 233 U. S. 80; affirmance of judgment for plaintiff affirmed.

Southern R. Co. v. *Gadd*, 233 U. S. 572; affirmance of judgment for plaintiff affirmed.

1914 Term.

Yazoo & M. V. R. Co. v. *Wright*, 235 U. S. 376; affirmance of judgment for plaintiff affirmed.

McGovern v. *Philadelphia & R. R. Co.*, 235 U. S. 389; directed verdict for defendant reversed.

Seaboard Air Line R. Co. v. *Padgett*, 236 U. S. 668; affirmance of judgment for plaintiff affirmed.

Central Vermont R. Co. v. *White*, 238 U. S. 507; affirmance of judgment for plaintiff affirmed.

1915 Term.

Chicago, R. I. & P. R. Co. v. *Devine*, 239 U. S. 52; affirmance of judgment for plaintiff affirmed.

Seaboard Air Line R. Co. v. *Koennecke*, 239 U. S. 352; affirmance of judgment for plaintiff affirmed.

Reese v. *Philadelphia & R. R. Co.*, 239 U. S. 463; affirmance of nonsuit affirmed.

Chicago, R. I. & P. R. Co. v. *Wright*, 239 U. S. 548; affirmance of judgment for plaintiff affirmed.

Kanawha & M. R. Co. v. *Kerse*, 239 U. S. 576; judgment for plaintiff affirmed.

Seaboard Air Line R. Co. v. *Horton*, 239 U. S. 595; affirmance of judgment for plaintiff affirmed.

Illinois Central R. Co. v. *Skaggs,* 240 U. S. 66; affirmance of judgment for plaintiff affirmed.

Great Northern R. Co. v. *Wiles,* 240 U. S. 444; reversal of judgment n. o. v. for defendant reversed.

Great Northern R. Co. v. *Knapp,* 240 U. S. 464; affirmance of judgment for plaintiff affirmed.

Jacobs v. *Southern R. Co.,* 241 U. S. 229; affirmance of judgment for defendant affirmed.

Baugham v. *New York, P. & N. R. Co.,* 241 U. S. 237; affirmance of judgment for defendant affirmed.

Louisville & N. R. Co. v. *Stewart,* 241 U. S. 261; affirmance of judgment for plaintiff affirmed.

Seaboard Air Line R. Co. v. *Renn,* 241 U. S. 290; affirmance of judgment for plaintiff affirmed.

Chesapeake & O. R. Co. v. *De Atley,* 241 U. S. 310; affirmance of judgment for plaintiff reversed.

Southern R. Co. v. *Gray,* 241 U. S. 333; affirmance of judgment for plaintiff reversed.

Chesapeake & O. R. Co. v. *Proffitt,* 241 U. S. 462; affirmance of judgment for plaintiff affirmed.

Chicago & N. W. R. Co. v. *Bower,* 241 U. S. 470; affirmance of judgment for plaintiff affirmed.

San Antonio & A. P. R. Co. v. *Wagner,* 241 U. S. 476; affirmance of judgment for plaintiff affirmed.

Spokane & I. E. R. Co. v. *Campbell,* 241 U. S. 497; affirmance of judgment for plaintiff affirmed.

1916 Term.

Atlantic City R. Co. v. *Parker,* 242 U. S. 56; affirmance of judgment for plaintiff affirmed.

Baltimore & O. R. Co. v. *Whitacre,* 242 U. S. 169; affirmance of judgment for plaintiff affirmed.

St. Joseph & G. I. R. Co. v. *Moore,* 243 U. S. 311; affirmance of judgment for plaintiff affirmed.

New York Central & H. R. R. Co. v. *Tonsellito,* 244 U. S. 360; affirmance of judgment for plaintiff affirmed.

Southern R. Co. v. *Puckett,* 244 U. S. 571; affirmance of judgment for plaintiff affirmed.

Washington R. & Elec. Co. v. *Scala,* 244 U. S. 630; affirmance of judgment for plaintiff affirmed.

1917 Term.

Boldt v. *Pennsylvania R. Co.,* 245 U. S. 441; affirmance of judgment for defendant affirmed.

Union Pacific R. Co. v. *Huxoll,* 245 U. S. 535; affirmance of judgment for plaintiff affirmed.

Great Northern R. Co. v. *Donaldson,* 246 U. S. 121; affirmance of judgment for plaintiff affirmed.

Nelson v. *Southern R. Co.,* 246 U. S. 253; reversal of judgment for plaintiff affirmed.

Union Pacific R. Co. v. *Hadley,* 246 U. S. 330; affirmance of judgment for plaintiff affirmed.

1918 Term.

Gillis v. *New York, N. H. & H. R. Co.,* 249 U. S. 515; affirmance of directed verdict for defendant affirmed.

1919 Term.

Chicago, R. I. & P. R. Co. v. *Ward,* 252 U. S. 18; affirmance of judgment for plaintiff affirmed.

Boehmer v. *Pennsylvania R. Co.,* 252 U. S. 496; affirmance of directed verdict for defendant affirmed.

1920 Term.

Southern Pacific Co. v. *Berkshire,* 254 U. S. 415; affirmance of judgment for plaintiff reversed.

1923 Term.

Frese v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1; reversal of judgment for plaintiff affirmed.

Davis v. *Wolfe,* 263 U. S. 239; affirmance of judgment for plaintiff affirmed.

Davis v. *Matthews,* 263 U. S. 686;* affirmance of judgment for plaintiff affirmed.

1924 Term.

Davis v. *Kennedy,* 266 U. S. 147; affirmance of judgment for plaintiff reversed.

Baltimore & O. R. Co. v. *Groeger,* 266 U. S. 521; affirmance of judgment for plaintiff reversed for new trial; evidence found sufficient for submission to jury.

1925 Term.

Minneapolis, St. P. & S. S. M. R. Co. v. *Goneau,* 269 U. S. 406; affirmance of judgment for plaintiff affirmed.

Chesapeake & O. R. Co. v. *Nixon,* 271 U. S. 218; affirmance of judgment for plaintiff reversed.

St. Louis-San Francisco R. Co. v. *Mills,* 271 U. S. 344; affirmance of judgment for plaintiff reversed.

Chicago, M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472; affirmance of judgment for plaintiff reversed.

1927 Term.

Atlantic Coast Line R. Co. v. *Southwell,* 275 U. S. 64; affirmance of judgment for plaintiff reversed.

Missouri Pacific R. Co. v. *Aeby,* 275 U. S. 426; affirmance of judgment for plaintiff reversed.

Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455; affirmance of judgment for plaintiff reversed.

Toledo, St. L. & W. R. Co. v. *Allen,* 276 U. S. 165; affirmance of judgment for plaintiff reversed.

Kansas City Southern R. Co. v. *Jones,* 276 U. S. 303; affirmance of judgment for plaintiff reversed.

Chesapeake & O. R. Co. v. *Leitch,* 276 U. S. 429; affirmance of judgment for plaintiff reversed.

1928 Term.

Unadilla Valley R. Co. v. *Caldine,* 278 U. S. 139; affirmance of judgment for plaintiff reversed.

Western & A. R. Co. v. *Hughes,* 278 U. S. 496; affirmance of judgment for plaintiff affirmed.

Atlantic Coast Line R. Co. v. *Tyner,* 278 U. S. 565;* affirmance of judgment for plaintiff reversed.

Delaware, L. & W. R. Co. v. *Koske,* 279 U. S. 7; affirmance of judgment for plaintiff reversed.

Atlantic Coast Line R. Co. v. *Davis,* 279 U. S. 34; affirmance of judgment for plaintiff reversed.

Atlantic Coast Line R. Co. v. *Driggers,* 279 U. S. 787; affirmance of judgment for plaintiff reversed.

1929 Term.

Chesapeake & O. R. Co. v. *Mihas,* 280 U. S. 102; affirmance of judgment for plaintiff reversed.

New York Central R. Co. v. *Ambrose,* 280 U. S. 486; affirmance of judgment for plaintiff reversed.

New York Central R. Co. v. *Marcone,* 281 U. S. 345; affirmance of judgment for plaintiff affirmed.

Atchison, T. & S. F. R. Co. v. *Toops,* 281 U. S. 351; affirmance of judgment for plaintiff reversed.

1930 Term.

Atlantic Coast Line R. Co. v. *Powe,* 283 U. S. 401; affirmance of judgment for plaintiff reversed.

1931 Term.

Chesapeake & O. R. Co. v. *Kuhn,* 284 U. S. 44; affirmance of judgment for plaintiff reversed.

Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458; affirmance of judgment for plaintiff reversed.

Missouri Pacific R. Co. v. *David,* 284 U. S. 460; affirmance of judgment for plaintiff reversed.

Atlantic Coast Line R. Co. v. *Temple,* 285 U. S. 143; affirmance of judgment for plaintiff reversed.

Southern R. Co. v. *Youngblood,* 286 U. S. 313; affirmance of judgment for plaintiff reversed.

Southern R. Co. v. *Dantzler,* 286 U. S. 318; affirmance of judgment for plaintiff reversed.

St. Louis S. W. R. Co. v. *Simpson,* 286 U. S. 346; affirmance of judgment for plaintiff reversed.

1932 Term.

Rocco v. *Lehigh Valley R. Co.,* 288 U. S. 275; reversal of judgment for plaintiff reversed.

Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333; reversal of directed verdict for defendant reversed.

1933 Term.

Northwestern Pacific R. Co. v. *Bobo,* 290 U. S. 499; affirmance of judgment for plaintiff reversed.

1934 Term.

Swinson v. *Chicago, St. P., M. & O. R. Co.,* 294 U. S. 529; directed verdict for defendant reversed.

1935 Term.

Chicago G. W. R. Co. v. *Rambo,* 298 U. S. 99; affirmance of judgment for plaintiff reversed.

1938 Term.

Great Northern R. Co. v. *Leonidas,* 305 U. S. 1; affirmance of judgment for plaintiff affirmed.

1939 Term.

Keys v. *Pennsylvania R. Co.,* 308 U. S. 529;* reversal of judgment for plaintiff reversed.

1940 Term.

Jenkins v. *Kurn,* 313 U. S. 256; reversal of judgment for plaintiff reversed.

Steeley v. *Kurn,* 313 U. S. 545;* reversal of judgment for plaintiff reversed.

1941 Term.

Seago v. *New York Central R. Co.,* 315 U. S. 781;* affirmance of judgment for defendant reversed.

1942 Term.

Tiller v. *Atlantic Coast Line R. Co.,* 318 U. S. 54; affirmance of directed verdict for defendant reversed.

Bailey v. *Central Vermont R. Co.,* 319 U. S. 350; reversal of judgment for plaintiff reversed.

Owens v. *Union Pacific R. Co.,* 319 U. S. 715; reversal of judgment for plaintiff reversed.

1943 Term.

Brady v. *Southern R. Co.,* 320 U. S. 476; reversal of judgment for plaintiff affirmed.

Tennant v. *Peoria & P. U. R. Co.,* 321 U. S. 29; reversal of judgment for plaintiff reversed.

1944 Term.

Tiller v. *Atlantic Coast Line R. Co.,* 323 U. S. 574; reversal of judgment for plaintiff reversed.

Blair v. *Baltimore & O. R. Co.,* 323 U. S. 600; reversal of entry of judgment for defendant reversed; sufficient evidence to support jury verdict for plaintiff.

1945 Term.

Keeton v. *Thompson,* 326 U. S. 689;* reversal of judgment for plaintiff reversed.

Lavender v. *Kurn,* 327 U. S. 645; reversal of judgment for plaintiff reversed.

Cogswell v. *Chicago & E. I. R. Co.,* 328 U. S. 820;* reversal of judgment for plaintiff reversed.

1946 Term.

Jesionowski v. *Boston & M. R. Co.,* 329 U. S. 452; reversal of judgment for plaintiff reversed.

Ellis v. *Union Pacific R. Co.,* 329 U. S. 649; reversal of judgment for plaintiff reversed.

Pauly v. *McCarthy,* 330 U. S. 802;* reversal of judgment for plaintiff reversed.

Myers v. *Reading Co.,* 331 U. S. 477; affirmance of judgment n. o. v. for defendant reversed.

1947 Term.

Lillie v. *Thompson,* 332 U. S. 459;* affirmance of dismissal of complaint reversed.

Hunter v. *Texas Electric R. Co.,* 332 U. S. 827;* affirmance of judgment for defendant affirmed.

Anderson v. *Atchison, T. & S. F. R. Co.,* 333 U. S. 821;* affirmance of judgment for defendant reversed.

Eubanks v. *Thompson,* 334 U. S. 854;* reversal of judgment for plaintiff reversed.

1948 Term.

Eckenrode v. *Pennsylvania R. Co.,* 335 U. S. 329; affirmance of judgment n. o. v. for defendant affirmed.

Coray v. *Southern Pacific Co.,* 335 U. S. 520; affirmance of directed verdict for defendant reversed.

Penn v. *Chicago & N. W. R. Co.,* 335 U. S. 849;* reversal of judgment for plaintiff reversed.

Wilkerson v. *McCarthy,* 336 U. S. 53; affirmance of directed verdict for defendant reversed.

404165 O—57——42

Reynolds v. *Atlantic Coast Line R. Co.*, 336 U. S. 207;* affirmance of judgment for defendant on demurrer affirmed.

Hill v. *Atlantic Coast Line R. Co.*, 336 U. S. 911;* affirmance of nonsuit reversed.

1949 Term.

Carter v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430; affirmance of judgment for defendant reversed.

Affolder v. *New York, C. & St. L. R. Co.*, 339 U. S. 96; reversal of judgment for plaintiff reversed.

1950 Term.

Moore v. *Chesapeake & O. R. Co.*, 340 U. S. 573; affirmance of judgment for defendant n. o. v. affirmed.

1952 Term.

Stone v. *New York, C. & St. L. R. Co.*, 344 U. S. 407; reversal of judgment for plaintiff reversed.

1954 Term.

Smalls v. *Atlantic Coast Line R. Co.*, 348 U. S. 946;* reversal of judgment for plaintiff reversed.

O'Neill v. *Baltimore & O. R. Co.*, 348 U. S. 956;* reversal of judgment for plaintiff reversed.

1955 Term.

Anderson v. *Atlantic Coast Line R. Co.*, 350 U. S. 807;* reversal of judgment for plaintiff reversed.

Strickland v. *Seaboard Air Line R. Co.*, 350 U. S. 893;* reversal of judgment for plaintiff reversed.

Cahill v. *New York, N. H. & H. R. Co.*, 350 U. S. 898,* 351 U. S. 183; reversal of judgment for plaintiff reversed.

MR. JUSTICE HARLAN, concurring in No. 46 and dissenting in Nos. 28, 42 and 59.*

I.

I am in full agreement with what my Brother FRANKFURTER has written in criticism of the Court's recurring willingness to grant certiorari in cases of this type. For the reasons he has given, I think the Court should not have heard any of these four cases. Nevertheless, the cases having been taken, I have conceived it to be my duty to consider them on their merits, because I cannot reconcile voting to dismiss the writs as "improvidently granted" with the Court's "rule of four." In my opinion due adherence to that rule requires that once certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted. In these instances I am unable to say that such considerations exist, even though I do think that the arguments on the merits underscored the views of those of us who originally felt that the cases should not be taken because they involved only issues of fact, and presented nothing of sufficient general importance to warrant this substantial expenditure of the Court's time.

I do not think that, in the absence of the considerations mentioned, voting to dismiss a writ after it has been granted can be justified on the basis of an inherent right of dissent. In the case of a petition for certiorari that right, it seems to me—again without the presence of intervening factors—is exhausted once the petition has

*[NOTE: No. 46 is *Herdman* v. *Pennsylvania R. Co., ante,* p. 518; No. 28 is *Rogers* v. *Missouri Pacific R. Co., ante,* p. 500; No. 42 is *Webb* v. *Illinois Central R. Co., ante,* p. 512; and No. 59 is *Ferguson* v. *Moore-McCormack Lines, ante,* p. 521.]

been granted and the cause set for argument.[1] Otherwise the "rule of four" surely becomes a meaningless thing in more than one respect. *First,* notwithstanding the "rule of four," five objecting Justices could undo the grant by voting, after the case has been heard, to dismiss the writ as improvidently granted—a course which would hardly be fair to litigants who have expended time, effort, and money on the assumption that their cases would be heard and decided on the merits. While in the nature of things litigants must assume the risk of "improvidently granted" dismissals because of factors not fully apprehended when the petition for certiorari was under consideration, short of that it seems to me that the Court would stultify its own rule if it were permissible for a writ of certiorari to be annulled by the later vote of five objecting Justices. Indeed, if that were proper, it would be preferable to have the vote of annulment come into play the moment after the petition for certiorari has been granted, since then at least the litigants would be spared useless effort in briefing and preparing for the argument of their cases. *Second,* permitting the grant of a writ to be thus undone would undermine the whole philosophy of the "rule of four," which is that any case warranting consideration in the opinion of such a substantial minority of the Court will be taken and disposed of. It appears to me that such a practice would accomplish just the contrary of what representatives of this Court stated to Congress as to the

[1] In some instances where the Court has granted certiorari and simultaneously summarily disposed of the case on the merits, individual Justices (including the writer) have merely noted their dissent to the grant without reaching the merits. See, *e. g., Anderson* v. *Atlantic Coast Line R. Co.,* 350 U. S. 807; *Cahill* v. *New York, N. H. & H. R. Co.,* 350 U. S. 898. Even here, I am bound to say, it would probably be better practice for a Justice, who has unsuccessfully opposed certiorari, to face the merits, and to dissent from the summary disposition rather than from the grant of certiorari if he is not prepared to reach the merits without full-dress argument.

"rule of four" at the time the Court's certiorari jurisdiction was enlarged by the Judiciary Act of 1925.[2] In effect the "rule of four" would, by indirection, become a "rule of five." *Third,* such a practice would, in my opinion, be inconsistent with the long-standing and desirable custom of not announcing the Conference vote on petitions for certiorari. For in the absence of the intervening circumstances which may cause a Justice to vote to dismiss a writ as improvidently granted, such a disposition of the case on his part is almost bound to be taken as reflecting his original Conference vote on the petition. And if such a practice is permissible, then by the same token I do not see how those who voted in favor of the petition can reasonably be expected to refrain from announcing their Conference votes at the time the petition is acted on.

My Brother FRANKFURTER states that the course he advocates will not result in making of the "rule of four" an empty thing, suggesting that in individual cases "a doubting Justice" will normally respect "the judgment of his brethren that the case does concern issues important enough for the Court's consideration and adjudication," and that it is only "when a class of cases is systematically taken for review" that such a Justice "cannot forego his duty to voice his dissent to the Court's action." However, it seems to me that it is precisely in that type of situation where the exercise of the right of dissent may well result in nullification of the "rule of four" by the action of five Justices. For differences of view as to the desirability of the Court's taking particular "classes" of cases—the situation we have here—are prone to lead to more or less definite lines of cleavage among the Justices, which past experience has shown may well

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[2] See Burton, *Judging Is Also Administration,* 21 Temple Law Quarterly 77, 84–85, and n. 23 (1947).

involve an alignment of four Justices who favor granting certiorari in such cases and five who do not. If in such situations it becomes the duty of one Justice among the disagreeing five not to "forego" his right to dissent, then I do not see why it is not equally the duty of the remaining four, resulting in the "rule of four" being set at naught. I thus see no basis in the circumstance that a case is an "individual" one rather than one of a "class" for distinctions in what may be done by an individual Justice who disapproves of the Court's action in granting certiorari.

Although I feel strongly that cases of this kind do not belong in this Court, I can see no other course, consistent with the "rule of four," but to continue our Conference debates, with the hope that persuasion or the mounting calendars of the Court will eventually bring our differing brethren to another point of view.

II.

Since I can find no intervening circumstances which would justify my voting now to dismiss the writs in these cases as improvidently granted, I turn to the merits of the four cases before us. I agree with, and join in, the Court's opinion in No. 46. I dissent in Nos. 28, 42 and 59. No doubt the evidence in the latter three cases can be viewed both as the three courts below did and as this Court does. So far as I can see all this Court has done is to substitute its views on the evidence for those of the Missouri Supreme Court and the two Courts of Appeals, and that is my first reason for dissenting. In my view we should not interfere with the decisions of these three courts in the absence of clear legal error, or some capricious or unreasonable action on their part. Nothing of that kind has been shown here. I would apply to cases of this type the reasoning of the Court in *Labor Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498,

502–503, dealing with review of decisions of the National Labor Relations Board by the Courts of Appeals:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with [that] normal and primary responsibility . . . . The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here . . . .
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

For my part, to overturn the judgments below simply involves second-guessing the Missouri Supreme Court, the Court of Appeals for the Seventh Circuit, and the Court of Appeals for the Second Circuit, on questions of fact on which they brought to bear judgments neither capricious nor unreasonable, and on which they made a "fair assessment of a record."

I dissent also for another reason. No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a

reasoning man to infer both negligence and causation by *reasoning from the evidence. Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts. However, in judging these cases, the Court appears to me to have departed from these long-established standards, for, as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts. I cannot agree with such a standard, for I consider it a departure from a wise rule of law, not justified either by the provision of the FELA making employers liable for injuries resulting "in whole or in part" from their negligence, or by anything else in the Act or its history, which evinces no purpose to depart in these respects from common-law rules.

For these reasons I think the judgments in Nos. 28, 42 and 59, as well as that in No. 46, should be affirmed.

MR. JUSTICE BURTON concurs in Part I of this opinion.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN concur in Part I of this opinion except insofar as it disapproves of the grant of the writ of certiorari in these cases.

JOHNSON *v.* UNITED STATES.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 531, Misc.—Decided March 4, 1957.

1. Under 28 U. S. C. § 1915, which provides that an appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith, a convicted defendant is not barred from showing that such a certification was unwarranted and that an appeal should be allowed. Pp. 565–566.
2. Although a certification by a District Court under 28 U. S. C. § 1915 that an appeal is not taken in good faith carries great weight, it is the duty of a Court of Appeals, upon a proper showing, to set such a certification aside. P. 566.
3. To a convicted defendant who challenges a trial court's certification under 28 U. S. C. § 1915, a Court of Appeals must afford the aid of counsel unless he insists on being his own; and either the defendant or assigned counsel must be enabled to show that the grounds for seeking an appeal are not frivolous and do not justify the finding that the appeal is not sought in good faith. P. 566.
4. Although it is not required in every such case that the United States must furnish the defendant with a stenographic transcript of the trial, it is essential that he be assured some appropriate means of making manifest the basis of his claim that the trial court's certification was unwarranted. P. 566.

238 F. 2d 565, judgment vacated and case remanded.

William H. Timbers for petitioner.

Solicitor General Rankin, Assistant Attorney General Olney and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted, as is leave to proceed *in forma pauperis.*

By the Act of June 25, 1910, 36 Stat. 866, as now enlarged in 28 U. S. C. § 1915, Congress provided for pro-

ceedings *in forma pauperis* on appeal unless "the trial court certifies in writing that it [the appeal] is not taken in good faith." Such certification is not final in the sense that the convicted defendant is barred from showing that it was unwarranted and that an appeal should be allowed. Of course, certification by the judge presiding at the trial carries great weight but, necessarily, it cannot be conclusive. Upon a proper showing a Court of Appeals has a duty to displace a District Court's certification. Moreover, a Court of Appeals must, under *Johnson* v. *Zerbst,* 304 U. S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his own. Finally, either the defendant or his assigned counsel must be enabled to show that the grounds for seeking an appeal from the judgment of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith. This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith. See *Miller* v. *United States,* 317 U. S. 192, 198.

Since here the Court of Appeals did not assign counsel to assist petitioner in prosecuting his application for leave to appeal *in forma pauperis* and since it does not appear that the Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining whether the District Court's certification was warranted, the judgment below must be vacated and the case remanded to the Court of Appeals for proceedings not inconsistent with this opinion.

So ordered.

Syllabus.

UNITED STATES *v.* INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW–CIO).

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

No. 44. Argued December 3–4, 1956.—Decided March 11, 1957.

18 U. S. C. § 610 prohibits any corporation or labor organization from making "a contribution or expenditure in connection with" any election for federal office. An indictment of appellee, a labor organization, under this section charged appellee with having used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections. The District Court dismissed the indictment as not alleging a statutory offense. On appeal to this Court under the Criminal Appeals Act, *held:* The judgment of dismissal is reversed. Pp. 568–593.

(a) On review under the Criminal Appeals Act of a district court judgment dismissing an indictment on the basis of statutory interpretation, this Court must take the indictment as it was construed by the district judge. P. 584.

(b) It was to embrace precisely the kind of indirect contributions alleged in the indictment that Congress amended the section to proscribe "expenditures." P. 585.

(c) The Senate and House committee reports and the Senate debate support the conclusion that the section was understood to proscribe the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party. Pp. 585–587.

(d) *United States* v. *C. I. O.*, 335 U. S. 106, distinguished. Pp. 588–589.

(e) In the circumstances of this case, the Court does not pass upon the constitutional issues. Pp. 589–593.

138 F. Supp. 53, reversed and remanded.

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay.*

Joseph L. Rauh, Jr. argued the cause for appellee. With him on the brief were *Harold A. Cranefield, John Silard, Norma Zarky, Kurt Hanslowe* and *Redmond H. Roche, Jr.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The issues tendered in this case are the construction and, ultimately, the constitutionality of 18 U. S. C. § 610, an Act of Congress that prohibits corporations and labor organizations from making "a contribution or expenditure in connection with" any election for federal office. This is a direct appeal by the Government from a judgment of the District Court for the Eastern District of Michigan dismissing a four-count indictment that charged appellee, a labor organization, with having made expenditures in violation of that law. Appellee had moved to dismiss the indictment on the grounds (1) that it failed to state an offense under the statute and (2) that the provisions of the statute "on their face and as construed and applied" are unconstitutional. The district judge held that the indictment did not allege a statutory offense and that he was therefore not required to rule upon the constitutional questions presented. 138 F. Supp. 53. The case came here, 351 U. S. 904, under the Criminal Appeals Act of 1907, as amended, 18 U. S. C. § 3731.

It is desirable at the outset to quote the statute in its entirety:

> "It is unlawful for any national bank, or any corporation organized by authority of any law of

Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes,

> wages, rates of pay, hours of employment, or conditions of work." 18 U. S. C. § 610, taken from the Act of June 23, 1947, 61 Stat. 136, 159.

Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us. Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society.

The concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life. The impact of the abuses resulting from this concentration gradually made itself felt by a rising tide of reform protest in the last decade of the nineteenth century. The Sherman Law was a response to the felt threat to economic freedom created by enormous industrial combines. The income tax law of 1894 reflected congressional concern over the growing disparity of income between the many and the few.

No less lively, although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption. The matter is not exaggerated by two leading historians:

> "The nation was fabulously rich but its wealth was gravitating rapidly into the hands of a small portion of the population, and the power of wealth threatened to undermine the political integrity of the Republic." 2 Morison and Commager, The Growth of the American Republic (4th ed. 1950), 355.

In the '90's many States passed laws requiring candidates for office and their political committees to make public

the sources and amounts of contributions to their campaign funds and the recipients and amounts of their campaign expenditures. The theory behind these laws was that the spotlight of publicity would discourage corporations from making political contributions and would thereby end their control over party policies. But these state publicity laws either became dead letters or were found to be futile. As early as 1894, the sober-minded Elihu Root saw the need for more effective legislation. He urged the Constitutional Convention of the State of New York to prohibit political contributions by corporations:

> "The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it." Quoted in Hearings before House Committee on Elections, 59th Cong., 1st Sess. 12; see Root, Addresses on Government and Citizenship (Bacon and Scott ed. 1916), 143.

Concern over the size and source of campaign funds so actively entered the presidential campaign of 1904

that it crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of "big money" campaign contributions. A few days after the election of 1904, the defeated candidate for the presidency said:

> "The greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?" Quoted, Hearings, *supra,* at 56.

President Theodore Roosevelt quickly responded to this national mood. In his annual message to Congress on December 5, 1905, he recommended that:

> "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts." 40 Cong. Rec. 96.

Grist was added to the reformers' mill by the investigation of the great life insurance companies conducted by the Joint Committee of the New York Legislature, the Armstrong Committee, under the guidance of Charles Evans Hughes. The Committee's report, filed early in 1906, revealed that one insurance company alone had contributed almost $50,000 to a national campaign committee in 1904 and had given substantial amounts in preceding presidential campaigns. The Committee concluded:

> "Contributions by insurance corporations for political purposes should be strictly forbidden. Neither executive officers nor directors should be allowed to use the moneys paid for purposes of insurance in support of political candidates or platforms. . . .

> Whether made for the purpose of supporting political views or with the desire to obtain protection for the corporation, these contributions have been wholly unjustifiable. In the one case executive officers have sought to impose their political views upon a constituency of divergent convictions, and in the other they have been guilty of a serious offense against public morals. The frank admission that moneys have been obtained for use in State campaigns upon the expectation that candidates thus aided in their election would support the interests of the companies, has exposed both those who solicited the contributions and those who made them to severe and just condemnation." Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate the Affairs of Life Insurance Companies, 397 (1906).

Less than a month later the Committee on Elections of the House of Representatives began considering a number of proposals designed to cleanse the political process. Some bills prohibited political contributions by certain classes of corporations; some merely required disclosure of contributions; and others made bribery at elections a federal crime. The feeling of articulate reform groups was reflected at a public hearing held by the Committee. Perry Belmont, leader of a nation-wide organization advocating a federal publicity bill, stated:

> ". . . this thing has come to the breaking point. We have had enough of it. We don't want any more secret purchase of organizations, which nullifies platforms, nullifies political utterances and the pledges made by political leaders in and out of Congress." Hearings before House Committee on Elections, 59th Cong., 1st Sess. 12.

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This view found strong support in the testimony of Samuel Gompers, President of the American Federation of Labor, who said, with respect to the publicity bill:

> "Whether this bill meets all of the needs may be questioned; that is open to discussion; but the necessity for some law upon the subject is patent to every man who hopes for the maintenance of the institutions under which we live. It is doubtful to my mind if the contributions and expenditures of vast sums of money in the nominations and elections for our public offices can continue to increase without endangering the endurance of our Republic in its purity and in its essence.
>
> ". . . If the interests of any people are threatened by corruption in our public life or corruption in elections, surely it must of necessity be those, that large class of people, whom we for convenience term the wageworkers.
>
> "I am not in a mood, and never am, to indulge in denunciations or criticism, but it does come to me sometimes that one of the reasons for the absence of legislation of a liberal or sympathetic or just character, so far as it affects the interest of the wage-earners of America, can be fairly well traced with the growth of the corruption funds and the influences that are in operation during elections and campaigns . . . . I am under the impression that the patience of the American workingmen is about exhausted—
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> . . . . .
>
> ". . . [If] we are really determined that our elections shall be free from the power of money and its lavish use and expenditure without an accounting to the conscience and the judgment of the people of America, we will have to pass some measure of this kind." *Id.*, at 28–31.

President Roosevelt's annual message of 1906 listed as the first item of congressional business a law prohibiting political contributions by corporations. 41 Cong. Rec. 22. Shortly thereafter, in 1907, Congress provided:

> "That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator." 34 Stat. 864.

As the historical background of this statute indicates, its aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.

This Act of 1907 was merely the first concrete manifestation of a continuing congressional concern for elections "free from the power of money." (See statement of Samuel Gompers, *supra.*) The 1909 Congress witnessed unsuccessful attempts to amend the Act to proscribe the contribution of anything of value and to extend its application to the election of state legislatures. The Congress of 1910 translated popular demand for further curbs upon the political power of wealth into a publicity law that required committees operating to influence the results of congressional elections in two or more States to report all contributions and disbursements and to identify contributors and recipients of substantial sums. That law also required persons who spent more than $50 annually

for the purpose of influencing congressional elections in more than one State to report those expenditures if they were not made through a political committee. 36 Stat. 822. At the next session that Act was extended to require all candidates for the Senate and the House of Representatives to make detailed reports with respect to both nominating and election campaigns. The amendment also placed maximum limits on the amounts that congressional candidates could spend in seeking nomination and election, and forbade them from promising employment for the purpose of obtaining support. 37 Stat. 25. And in 1918 Congress made it unlawful either to offer or to solicit anything of value to influence voting. 40 Stat. 1013.

This Court's decision in *Newberry* v. *United States,* 256 U. S. 232, invalidating federal regulation of Senate primary elections, led to the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, a comprehensive revision of existing legislation. The debates preceding that Act's passage reveal an attitude important to an understanding of the course of this legislation. Thus, Senator Robinson, one of the leaders of the Senate, said:

> "We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably

> an evil which ought to be dealt with, and dealt with intelligently and effectively." 65 Cong. Rec. 9507–9508.

One of the means chosen by Congress to deal with this evil was § 313 of the 1925 Act, which strengthened the 1907 statute (1) by changing the phrase "money contribution" to "contribution" (§ 302 (d) defined "contribution" broadly); (2) by extending the prohibition on corporate contributions to the election to Congress of Delegates and Resident Commissioners; and (3) by penalizing the recipient of any forbidden contribution as well as the contributor.

When, in 1940, Congress moved to extend the Hatch Act, 53 Stat. 1147, which was designed to free the political process of the abuses deemed to accompany the operation of a vast civil administration, its reforming zeal also led Congress to place further restrictions upon the political potentialities of wealth. Section 20 of the law amending the Hatch Act made it unlawful for any "political committee," as defined in the Act of 1925, to receive contributions of more than $3,000,000 or to make expenditures of more than that amount in any calendar year. And § 13 made it unlawful "for any person, directly or indirectly, to make contributions in an aggregate amount in excess of $5,000, during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office" or any committee supporting such a candidate. The term "person" was defined to include any committee, association, organization or other group of persons. 54 Stat. 767. In offering § 13 from the Senate floor Senator Bankhead said:

> "We all know that money is the chief source of corruption. We all know that large contributions

> to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue." 86 Cong. Rec. 2720.

The need for unprecedented economic mobilization propelled by World War II enormously stimulated the power of organized labor and soon aroused consciousness of its power outside its ranks. Wartime strikes gave rise to fears of the new concentration of power represented by the gains of trade unionism. And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process. Thus, in 1943, when Congress passed the Smith-Connally Act to secure defense production against work stoppages, contained therein was a provision extending to labor organizations, for the duration of the war, § 313 of the Corrupt Practices Act. 57 Stat. 163, 167. The testimony of Congressman Landis, author of this measure, before a subcommittee of the House Committee on Labor makes plain the dominant concern that evoked it:

> "The fact that a hearing has been granted is a high tribute to the ability of the Labor Committee to recognize the fact that public opinion toward the conduct of labor unions is rapidly undergoing a change. The public thinks, and has a right to think, that labor unions, as public institutions should be

granted the same rights and no greater rights than any other public group. My bill seeks to put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years.

. . . . . .

". . . One of the matters upon which I sensed that the public was taking a stand opposite to that of labor leaders was the question of the handling of funds of labor organizations. The public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials.

. . . . . .

". . . The source of much of the national trouble today in the coal strike situation is that ill-advised political contribution of another day [referring, apparently, to the reported contribution of over $400,000 by the United Mine Workers in the 1936 campaign, see S. Rep. No. 151, 75th Cong., 1st Sess.]. If the provision of my bill against such an activity has [*sic*] been in force when that contribution was made, the Nation, the administration, and the labor unions would be better off." Hearings before a Subcommittee of the House Committee on Labor on H. R. 804 and H. R. 1483, 78th Cong., 1st Sess. 1, 2, 4.

Despite § 313's wartime application to labor organizations Congress was advised of enormous financial outlays said to have been made by some unions in connection with the national elections of 1944. The Senate's Special Committee on Campaign Expenditures investigated, *inter alia,* the role of the Political Action Committee of the Congress of Industrial Organizations. The Committee

found "no clear-cut violation of the Corrupt Practices Act on the part of the Political Action Committee" on the ground that it had made direct contributions only to candidates and political committees involved in state and local elections and federal primaries, to which the Act did not apply, and had limited its participation in federal elections to political "expenditures," as distinguished from "contributions" to candidates or committees. S. Rep. No. 101, 79th Cong., 1st Sess. 23. The Committee also investigated, on complaint of Senator Taft, the Ohio C. I. O. Council's distribution to the public at large of 200,000 copies of a pamphlet opposing the re-election of Senator Taft and supporting his rival. In response to the C. I. O.'s assertion that this was not a proscribed "contribution" but merely an "expenditure of its own funds to state its position to the world, exercising its right of free speech . . . ," the Committee requested the Department of Justice to bring a test case on these facts. *Id.*, at 59. It also recommended extension of § 313 to cover primary campaigns and nominating conventions. *Id.*, at 81. A minority of the Committee, Senators Ball and Ferguson, advocated further amendment of § 313 to proscribe "expenditures" as well as "contributions" in order to avoid the possibility of emasculation of the statutory policy through a narrow judicial construction of "contributions." *Id.*, at 83.

The 1945 Report of the House Special Committee to Investigate Campaign Expenditures expressed concern over the vast amounts that some labor organizations were devoting to politics:

> "The scale of operations of some of these organizations is impressive. Without exception, they operate on a Nation-wide basis; and many of them have affiliated local organizations. One was found to have an annual budget for 'educational' work ap-

> proximating $1,500,000, and among other things regularly supplies over 500 radio stations with 'briefs for broadcasters.' Another, with an annual budget of over $300,000 for political 'education,' has distributed some 80,000,000 pieces of literature, including a quarter million copies of one article. Another, representing an organized labor membership of 5,000,000, has raised $700,000 for its national organizations in union contributions for political 'education' in a few months, and a great deal more has been raised for the same purpose and expended by its local organizations." H. R. Rep. No. 2093, 78th Cong., 2d Sess. 3.

Like the Senate Committee, it advocated extension of § 313 to primaries and nominating conventions, *id.*, at 9, and noted the existence of a controversy over the scope of "contribution." *Id.*, at 11. The following year the House Committee made a further study of the activities of organizations attempting to influence the outcome of federal elections. It found that the Brotherhood of Railway Trainmen and other groups employed professional political organizers, sponsored partisan radio programs and distributed campaign literature. H. R. Rep. No. 2739, 79th Cong., 2d Sess. 36–37. It concluded that:

> "The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?

> "The committee is firmly convinced, after a thorough study of the provisions of the act, the legislative history of the same, and the debates on the said provisions when it was pending before the House, that the act was intended to prohibit such expenditures." *Id.*, at 40.

Accordingly, to prevent further evasion of the statutory policy, the Committee attached to its recommendation that the prohibition of contributions by labor organizations be made permanent the additional proposal that the statute

> "be clarified so as to specifically provide that expenditures of money for salaries to organizers, purchase of radio time, and other expenditures by the prohibited organizations in connection with elections, constitute violations of the provisions of said section, whether or not said expenditures are with or without the knowledge or consent of the candidates." *Id.*, at 46. (Italics omitted.)

Early in 1947 the Special Committee to Investigate Senatorial Campaign Expenditures in the 1946 elections, the Ellender Committee, urged similar action to "plug the existing loophole," S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 38–39, and Senator Ellender introduced a bill to that effect.

Shortly thereafter, Congress again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power. Section 304 of the labor bill introduced into the House by Representative Hartley in 1947, like the Ellender bill, embodied the changes recommended in the reports of the Senate and House Committees on Campaign Expenditures. It sought to amend § 313 of the Corrupt Practices Act to proscribe any "expenditure" as well

as "any contribution," to make permanent § 313's application to labor organizations and to extend its coverage to federal primaries and nominating conventions. The Report of the House Committee on Education and Labor, which considered and approved the Hartley bill, merely summarized § 304, H. R. Rep. No. 245, 80th Cong., 1st Sess. 46, and this section gave rise to little debate in the House. See 93 Cong. Rec. 3428, 3522. Because no similar measure was in the labor bill introduced by Senator Taft, the Senate as a whole did not consider the provisions of § 304 until they had been adopted by the Conference Committee. In explaining § 304 to his colleagues, Senator Taft, who was one of the conferees, said:

> "I may say that the amendment is in exactly the same words which were recommended by the Ellender committee, which investigated expenditures by Senators in the last election. . . . In this instance the words of the Smith-Connally Act have been somewhat changed in effect so as to plug up a loophole which obviously developed, and which, if the courts had permitted advantage to be taken of it, as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations. If 'contribution' does not mean 'expenditure,' then a candidate for office could have his corporation friends publish an advertisement for him in the newspapers every day for a month before election. I do not think the law contemplated such a thing, but it was claimed that it did, at least when it applied to labor organizations. So, all we are doing here is plugging up the hole which developed, following the recommendation by our own Elections Committee, in the Ellender bill." 93 Cong. Rec. 6439.

After considerable debate, the conference version was approved by the Senate, and the bill subsequently became law despite the President's veto. It is this section of the statute that the District Court held did not reach the activities alleged in the indictment.

On review under the Criminal Appeals Act of a district court judgment dismissing an indictment on the basis of statutory interpretation, this Court must take the indictment as it was construed by the district judge. *United States* v. *Borden Co.*, 308 U. S. 188. The court below summarized the allegations of the indictment at the outset of its opinion:

> "Here the specific charge is that the 'expenditure' violation came in connection with the selection of candidates for a senator and representatives to the United States Congress during the 1954 primary and general elections. It is alleged that defendant paid a specific amount from its general treasury fund to Luckoff and Wayburn Productions, Detroit, Michigan, to defray the costs of certain television broadcasts sponsored by the Union from commercial television station WJBK.
>
> "It is charged that the broadcasts urged and endorsed selection of certain persons to be candidates for representatives and senator to the Congress of the United States and included expressions of political advocacy intended by defendant to influence the electorate and to affect the results of the election.
>
> "It is further charged that the fund used came from the Union's dues, was not obtained by voluntary political contributions or subscriptions from members of the Union, and was not paid for by advertising or sales." 138 F. Supp., at 54.

Thus, for our purposes, the indictment charged appellee with having used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections.

To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations. As indicated by the reports of the Congressional Committees that investigated campaign expenditures, it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe "expenditures." It is open to the Government to prove under this indictment activity by appellee that, except for an irrelevant difference in the medium of communication employed, is virtually indistinguishable from the Brotherhood of Railway Trainmen's purchase of radio time to sponsor candidates or the Ohio C. I. O.'s general distribution of pamphlets to oppose Senator Taft. Because such conduct was claimed to be merely "an expenditure [by the union] of its own funds to state its position to the world," the Senate and House Committees recommended and Congress enacted, as we have seen, the prohibition of "expenditures" as well as "contributions" to "plug the existing loophole."

Although not entitled to the same weight as these carefully considered committee reports, the Senate debate preceding the passage of the Taft-Hartley Act confirms

what these reports demonstrate. A colloquy between Senator Taft and Senator Pepper dealt with the problem confronting us:

> "Mr. PEPPER. Does what the Senator has said in the past also apply to a radio speech? If a national labor union, for example, should believe that it was in the public interest to elect the Democratic Party instead of the Republican Party, or vice versa, would it be forbidden by this proposed act to pay for any radio time, for anybody to make a speech that would express to the people the point of view of that organization?
>
> "Mr. TAFT. If it contributed its own funds to get somebody to make the speech, I would say they would violate the law.
>
> "Mr. PEPPER. If they paid for the radio time?
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> "Mr. TAFT. If they are simply giving the time, I would say not; I would say that is in the course of their regular business.
>
> "Mr. PEPPER. What I mean is this: I was not assuming that the radio station was owned by the labor organization. Suppose that in the 1948 campaign, Mr. William Green, as president of the American Federation of Labor, should believe it to be in the interest of his membership to go on the radio and support one party or the other in the national election, and should use American Federation of Labor funds to pay for the radio time. Would that be an expenditure which is forbidden to a labor organization under the statute?
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> "Mr. TAFT. Yes." 93 Cong. Rec. 6439.

The discussion that followed, while suggesting that difficult questions might arise as to whether or not a particular broadcast fell within the statute, buttresses the conclusion that § 304 was understood to proscribe

the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party.[1]

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[1] "Mr. BARKLEY. Suppose a certain corporation, for instance, the corporation that makes Bayer aspirin, or Jergens lotion, or any other well-advertised product, employs a commentator to talk about various things, winding up with an advertisement of the product, and suppose that the radio commentator from day to day takes advantage of his employment or his sponsorship to make comments which are calculated to influence the opinions of men or women as to political candidates. Would the corporation sponsoring the particular commentator be violating the law?

"Mr. TAFT. I should have to know the exact facts. If, for instance, apart from commentators and the radio, and taking the case of a paid advertisement, suppose a corporation advertises its products, and that every day for 2 weeks before the election it advertises a candidate. I should say that would be a violation of the law. I would say the same thing probably would be true of a radio broadcast of that kind, under certain circumstances, but I think I should like to know the exact facts before expressing an opinion.

"Mr. BARKLEY. In the case of a commentator who is paid to advertise a certain product, and who in the course of his 15 minutes on the radio may also seek to influence votes, the sponsor may say, either before or after the broadcast, that he is not responsible for what the commentary says; yet he is paying the commentator for his broadcast. Would that still be a violation of law, although the sponsor might excuse himself or attempt to excuse himself by saying he was not responsible for the opinions expressed by the commentator?

"Mr. TAFT. I think there are all degrees. It would be for a court to decide. I think as a matter of fact, if that had happened under the old law, there would have been the same question.

"I want to make the point that we are not raising any new questions here. Those same questions could have been raised with respect to corporations during the past 25 years. It is a question of fact: Was the corporation using its money to influence a political election?

. . . . . .

"Mr. MAGNUSON. Let us consider the teamsters. Suppose they have a weekly radio program, as, indeed, they have had for a long time back. Or let us say the AFL has such a radio program.

United States v. *C. I. O.*, 335 U. S. 106, presented a different situation. The decision in that case rested on the Court's reading of an indictment that charged defend-

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Let us assume I am running for office and they ask me to be a guest on their program. Suppose I talk on the subject of labor and do not advocate my own candidacy. Nevertheless I am on that program. My name is being advertised and I am being heard by many thousands of people. Would that be an unlawful contribution to my candidacy?

"Mr. TAFT. If a labor organization is using the funds provided by its members through payment of union dues to put speakers on the radio for Mr. X against Mr. Y, that should be a violation of the law.

"Mr. MAGNUSON. They are not paying me anything. They have asked me to be a guest.

"Mr. TAFT. I understand, but they are paying for the time on the air. Of course, in each case there is a question of fact to be decided. I cannot answer various hypotheses without knowing all the circumstances. But in each case the question is whether or not a union or a corporation is making a contribution or expenditure of funds to elect A as against B. Labor unions are supposed to keep out of politics in the same way that corporations are supposed to keep out of politics." 93 Cong. Rec. 6439–6440.

"Mr. TAYLOR. . . . Take the matter of a radio program sponsored by either a union or a corporation. I think the AFL or the CIO, one or the other, has a news commentator who comments on the news. Could he comment on political candidates favorably or unfavorably?

"Mr. TAFT. If the General Motors Corp. had a man speaking on the radio every week to advocate the election of a Republican or a Democratic Presidential candidate, the corporation ought to be punished, and it would be punished under the law. Labor organizations should be subject to the same rule.

"Mr. TAYLOR. That is altogether different. It is a more subtle thing. When a commentator is broadcasting the news every day he can do a lot more good or harm to a man by coloring his broadcast and presenting it in the guise of a news commentary than he could openly.

"Mr. TAFT. The Senator is right. It is a question of fact which would have to be raised in every case. Is it a contribution to a candidate or is it not? Possibly a knock is a boost sometimes. That argument might well be made by a person who was taking part in an election." 93 Cong. Rec. 6447.

ants with having distributed only to union members or purchasers an issue, Vol. 10, No. 28, of "The CIO News," a weekly newspaper owned and published by the C. I. O. That issue contained a statement by the C. I. O. president urging all members of the C. I. O. to vote for a certain candidate. Thus, unlike the union-sponsored political broadcast alleged in this case, the communication for which the defendants were indicted in *C. I. O.* was neither directed nor delivered to the public at large. The organization merely distributed its house organ to its own people. The evil at which Congress has struck in § 313 is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party.

Our holding that the District Court committed error when it dismissed the indictment for having failed to state an offense under the statute implies no disrespect for "the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred." *Knights Templars' Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205. The case before us does not call for its application. Here only one interpretation may be fairly derived from the relevant materials. The rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands.

Appellee urges that if, as we hold, 18 U. S. C. § 610 embraces the activity alleged in the indictment, it offends several rights guaranteed by the Constitution.[2] The Gov-

[2] ". . . if such an expenditure is prohibited by 18 U. S. C. 610, the statute violates the provisions of the Constitution of the United States in that the statute (i) abridges freedom of speech and of the press and the right peaceably to assemble and to petition; (ii) abridges the right to choose senators and representatives guaranteed by Article I, § 2 and the Seventeenth Amendment; (iii) creates an arbitrary and unlawful classification and discriminates against labor

ernment replies that the actual restraint upon union political activity imposed by the statute is so narrowly limited that Congress did not exceed its powers to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government. Once more we are confronted with the duty of being mindful of the conditions under which we may enter upon the delicate process of constitutional adjudication.

The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress "unless absolutely necessary to a decision of the case." *Burton* v. *United States,* 196 U. S. 283, 295.[3] Observance of this principle makes for the minimum tension within our democratic political system where "Scarcely any question arises . . . which does not become, sooner or later, a subject of judicial debate." 1 De Tocqueville, Democracy in America (4th Am. ed. 1843), 306.

The wisdom of refraining from avoidable constitutional pronouncements has been most vividly demonstrated on the rare occasions when the Court, forgetting "the fallibility of the human judgment," [4] has departed from its own practice. The Court's failure in *Dred Scott*

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organizations in violation of the Fifth Amendment, and (iv) is vague and indefinite and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments." Brief for appellee, pp. 2–3.

[3] Cases are collected in the opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 345 *et seq.*

[4] "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Cooley, Constitutional Limitations (8th ed.), 332.

v. *Sandford,* 19 How. 393, "to take the smooth handle for the sake of repose" by disposing of the case solely upon "the outside issue" and the effects of its attempt "to settle the agitation" are familiar history.[5] *Dred Scott* does not stand alone. These exceptions have rightly been characterized as among the Court's notable "self-inflicted wounds." Charles Evans Hughes, The Supreme Court of the United States, 50.

Clearly in this case it is not "absolutely necessary to a decision," *Burton* v. *United States, supra,* to canvass the constitutional issues. The case came here under the Criminal Appeals Act because the District Court blocked the prosecution on the ground that the indictment failed to state an offense within § 313 of the Corrupt Practices Act. Our reversal of the district judge's erroneous construction clears the way for the prosecution to proceed.

Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case. First of all, these questions come to us unillumined by the consideration of a single judge—we are asked to decide them in the first instance. Again, only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision. Finally, by remanding the case

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[5] A letter written by Mr. Justice Catron to President Buchanan shortly before the decision was handed down reveals an attitude happily exceptional:

"Will you drop [Mr. Justice] Grier a line, saying how necessary it is—& how good the opportunity is, to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other. He ought not to occupy so doubtful a ground as the outside issue—that admitting the constitutionality of the Mo. Comp. line of 1820, still, as no domicile was acquired by the negro at Ft. Snelling, & he returned to Missouri, he was not free. He has no doubt about the question on the main contest, but has been persuaded to take the smooth handle for the sake of repose." 10 Works of James Buchanan 106.

for trial it may well be that the Court will not be called upon to pass on the questions now raised. Compare *United States* v. *Petrillo,* 332 U. S. 1, 9 *et seq.*, with the subsequent adjudication on the merits in *United States* v. *Petrillo,* 75 F. Supp. 176.

Counsel are prone to shape litigation, so far as it is within their control, in order to secure comprehensive rulings. This is true both of counsel for defendants and for the Government. Such desire on their part is not difficult to appreciate. But the Court has its responsibility. Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear. Allegations of the indictment hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of proof. For example, was the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election? As Senator Taft repeatedly recognized in the debate on § 304, prosecutions under the Act may present difficult questions of fact. See *supra,* pp. 585–587, n. 1. We suggest the possibility of such questions, not to imply answers to problems of statutory construction, but merely to indicate the covert issues that may be involved in this case.

Enough has been said to justify withholding determination of the more or less abstract issues of constitutional law. Because the District Court's erroneous interpretation of the statute led it to stop the prosecution pre-

maturely, its judgment must be reversed and the case must be remanded to it for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

We deal here with a problem that is fundamental to the electoral process and to the operation of our democratic society. It is whether a union can express its views on the issues of an election and on the merits of the candidates, unrestrained and unfettered by the Congress. The principle at stake is not peculiar to unions. It is applicable as well to associations of manufacturers, retail and wholesale trade groups, consumers' leagues, farmers' unions, religious groups and every other association representing a segment of American life and taking an active part in our political campaigns and discussions. It is as important an issue as has come before the Court, for it reaches the very vitals of our system of government.

Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.

In *United States* v. *C. I. O.*, 335 U. S. 106, 144, Mr. Justice Rutledge spoke of the importance of the First Amendment rights—freedom of expression and freedom of assembly—to the integrity of our elections. "The most complete exercise of those rights," he said, "is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the

electorate is deprived of information, knowledge and opinion vital to its function."

What the Court does today greatly impairs those rights. It sustains an indictment charging no more than the use of union funds for broadcasting television programs that urge and endorse the selection of certain candidates for the Congress of the United States. The opinion of the Court places that advocacy in the setting of corrupt practices. The opinion generates an environment of evil-doing and points to the oppressions and misdeeds that have haunted elections in this country.

Making a speech endorsing a candidate for office does not, however, deserve to be identified with antisocial conduct. Until today political speech has never been considered a crime. The making of a political speech up to now has always been one of the preferred rights protected by the First Amendment. It usually costs money to communicate an idea to a large audience. But no one would seriously contend that the expenditure of money to print a newspaper deprives the publisher of freedom of the press. Nor can the fact that it costs money to make a speech—whether it be hiring a hall or purchasing time on the air—make the speech any the less an exercise of First Amendment rights. Yet this statute, as construed and applied in this indictment, makes criminal any "expenditure" by a union for the purpose of expressing its views on the issues of an election and the candidates. It would make no difference under this construction of the Act whether the union spokesman made his address from the platform of a hall, used a sound truck in the streets, or bought time on radio or television. In each case the mere "expenditure" of money to make the speech is an indictable offense. The principle applied today would make equally criminal the use by a union of its funds to print pamphlets for general distribution or to distribute political literature at large.

Can an Act so construed be constitutional in view of the command of the First Amendment that Congress shall make no law that abridges free speech or freedom of assembly?

The Court says that the answer on the constitutional issue must await the development of the facts at the trial. It asks, "Did the broadcast reach the public at large or only those affiliated with appellee?" But the size of the audience has heretofore been deemed wholly irrelevant to First Amendment issues. One has a right to freedom of speech whether he talks to one person or to one thousand. One has a right to freedom of speech not only when he talks to his friends but also when he talks to the public. It is startling to learn that a union spokesman or the spokesman for a corporate interest has fewer constitutional rights when he talks to the public than when he talks to members of his group.

The Court asks whether the broadcast constituted "active electioneering" or simply stated "the record of particular candidates on economic issues." What possible difference can it make under the First Amendment whether it was one or the other? The First Amendment covers the entire spectrum. It protects the impassioned plea of the orator as much as the quiet publication of the tabulations of the statistician or economist. If there is an innuendo that "active electioneering" by union spokesmen is not covered by the First Amendment, the opinion makes a sharp break with our political and constitutional heritage.

The Court asks, "Did the union sponsor the broadcast with the intent to affect the results of the election?" The purpose of speech is not only to inform but to incite to action. As Mr. Justice Holmes said in his dissent in *Gitlow* v. *New York,* 268 U. S. 652, 673, "Every idea is an incitement. It offers itself for belief and if believed it

is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth." To draw a constitutional line between informing the people and inciting or persuading them and to suggest that one is protected and the other not by the First Amendment is to give constitutional dignity to an irrelevance. Any political speaker worth his salt intends to sway voters. His purpose to do so cannot possibly rob him of his First Amendment rights, unless we are to reduce that great guarantee of freedom to the protection of meaningless mouthings of ineffective speakers.

Finally, the Court asks whether the broadcast was "paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis." Behind this question is the idea that there may be a minority of union members who are of a different political school than their leaders and who object to the use of their union dues to espouse one political view. This is a question that concerns the internal management of union affairs. To date, unions have operated under a rule of the majority. Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig. All union expenditures for political discourse are banned because a minority might object.

When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be "narrowly drawn" to meet the evil that the government can control. *Cantwell* v. *Connecticut,* 310 U. S. 296, 311. Or as the Court said in *De Jonge* v. *Oregon,* 299 U. S. 353, 364–365, when speaking of First Amendment rights, ". . . the legislative intervention can find constitutional justification only by dealing

with the abuse. The rights themselves must not be curtailed."

If minorities need protection against the use of union funds for political speech-making, there are ways of reaching that end without denying the majority their First Amendment rights.[1]

First Amendment rights are not merely curtailed by the construction of the Act which the Court adopts. Today's ruling abolishes First Amendment rights on a wholesale basis. Protection of minority groups, if any, can be no excuse. The Act is not "narrowly drawn" to meet that abuse.

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. Cf. *United States* v. *Rumely,* 345 U. S. 41. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.

These constitutional questions are so grave that the least we should do is to construe this Act, as we have in comparable situations (*United States* v. *C. I. O., supra;*

[1] There are alternative measures appropriate to cure this evil which Congress has seen in the expenditure of union funds for political purposes. The protection of union members from the use of their funds in supporting a cause with which they do not sympathize may be cured by permitting the minority to withdraw their funds from that activity. The English have long required labor unions to permit a dissenting union member to refuse to contribute funds for political purposes. Trade Union Act, 1913, 2 & 3 Geo. V, c. 30; Trade Disputes and Trade Unions Act, 1927, 17 & 18 Geo. V, c. 22; Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. VI, c. 52.

United States v. *Rumely,* 345 U. S. 41; *United States* v. *Harriss,* 347 U. S. 612), to limit the word "expenditure" to activity that does not involve First Amendment rights.[2]

The Act, as construed and applied, is a broadside assault on the freedom of political expression guaranteed by the First Amendment. It cannot possibly be saved by any of the facts conjured up by the Court. The answers to the questions reserved are quite irrelevant to the constitutional questions tendered under the First Amendment.

I would affirm the judgment dismissing the indictment.

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[2] If Congress is of the opinion that large contributions by labor unions to candidates for office and to political parties have had an undue influence upon the conduct of elections, it can prohibit such contributions. And, in expressing their views on the issues and candidates, labor unions can be required to acknowledge their authorship and support of those expressions. Undue influence, however, cannot constitutionally form the basis for making it unlawful for any segment of our society to express its views on the issues of a political campaign.

Syllabus.

CEBALLOS (Y ARBOLEDA) *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 71. Argued January 16–17, 1957.—Decided March 11, 1957.

1. In a suit by an alien in a federal district court against a District Director of Immigration for (1) a declaratory judgment that he is eligible for suspension of deportation under § 19 (c) of the Immigration Act of 1917, as amended, and (2) to restrain the District Director from taking him into custody for deportation, neither the Attorney General nor the Commissioner of Immigration is a necessary party. *Shaughnessy* v. *Pedreiro,* 349 U. S. 48. Pp. 603–604.
2. An alien was admitted to the United States during World War II for permanent residence. While his country was still a neutral, he applied to a local Selective Service Board for exemption from military service as a neutral alien. The Board took no action on that application. After his country had become a cobelligerent with the United States, the local board classified the alien as available for military service; he reported for a physical examination; but he failed to pass and was reclassified as physically defective. *Held:* By his application for exemption as a neutral alien, he was debarred from citizenship under § 3 (a) of the Selective Training and Service Act of 1940; and, therefore, he is not now eligible for a suspension of deportation under § 19 (c) of the Immigration Act of 1917, as amended. Pp. 600–606.

   (a) The alien's voluntary act of executing, filing, and allowing to remain on file, a legally sufficient application for exemption from military service as a neutral alien, effected his debarment from citizenship under § 3 (a) of the Selective Training and Service Act of 1940—even though the local board never took any action on his application. Pp. 604–605.

   (b) Section 315 of the Immigration and Nationality Act of 1952, which makes an alien permanently ineligible for citizenship only when he has both applied for *and received* exemption from military service or training, is not applicable to this case, because this alien's application for suspension of deportation was filed before enactment of that Act. Pp. 605–606.

229 F. 2d 592, affirmed.

Sidney Kansas argued the cause and filed a brief for petitioner.

Oscar H. Davis argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This declaratory judgment action was brought by petitioner, in March 1955 in the District Court for the Southern District of New York, to obtain a judgment against the District Director of Immigration declaring that petitioner was eligible for suspension of deportation and restraining the Director from taking him into custody for deportation.[1] The District Court dismissed the complaint, without reaching the merits, upon the procedural ground "that the Attorney General [of the United States] and/or the Commissioner [of Immigration] are indispensable parties to the instant action." [2] The Court of Appeals for the Second Circuit affirmed, not only for the reason given by the District Court, but also upon the ground that, because the petitioner is "an alien who 'has made application' to be relieved from military service," he is debarred from citizenship as a matter of law and "hence is not eligible for an order suspending deportation." [3] This Court granted certiorari.[4]

Deportation proceedings had been instituted because petitioner had entered the United States on April 2, 1951, on a temporary visa and remained beyond the period for

[1] The action was instituted pursuant to § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, and the general jurisdictional provision of the Immigration and Nationality Act of 1952, 66 Stat. 230, 8 U. S. C. § 1329.

[2] 130 F. Supp. 30, 31.

[3] 229 F. 2d 592, 593.

[4] 351 U. S. 981.

which he was admitted. Petitioner was found deportable but was given permission to depart voluntarily, in lieu of deportation. Petitioner's timely application for suspension of deportation under § 19 (c) of the Immigration Act of 1917, as amended,[5] was denied by the Immigration and Naturalization Service because it found that petitioner did not satisfy a prerequisite for the application of that section—eligibility for naturalization. His ineligibility was based on a finding that in August 1943 petitioner, as a citizen and subject of Colombia, then a World War II neutral, applied under § 3 (a) of the Selective Training and Service Act of 1940, as amended, for relief from service with the United States armed forces. Section 3 (a) provided that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." [6]

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[5] Section 19 (c) of the Immigration Act of 1917, as amended, provided in pertinent part:

"In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization . . . if he finds (a) that such deportation would result in serious economic detriment to a citizen . . . who is the spouse . . . or minor child of such deportable alien . . . ." 39 Stat. 889, as amended, 54 Stat. 671, 62 Stat. 1206, 8 U. S. C. (1946 ed., Supp. V) § 155.

[6] Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provided in pertinent part:

"Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five . . . shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed

The petitioner was admitted to the United States for permanent residence in February 1942, during World War II. On June 16, 1943, he executed Selective Service System Form DSS 304, "Alien's Personal History and Statement," which gave the alien a choice of inserting "do" or "do not" in the statement: "I ..... object to service in the land or naval forces of the United States." The petitioner inserted the word "do." The form contained this notice:

> ". . . If you are a citizen or subject of a neutral country, and you do not wish to serve in the land or naval forces of the United States, you may apply to your local board for Application by Alien for Relief from Military Service (Form 301) which, when executed by you and filed with the local board, will relieve you from the obligation to serve in the land or naval forces of the United States, but will also debar you from thereafter becoming a citizen of the United States." [7]

On August 26, 1943, the petitioner executed Form DSS 301, "Application by Alien for Relief from Military Service." The form contained the following paragraph:

> "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability

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by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States . . . ." 54 Stat. 885, as amended, 55 Stat. 845, 56 Stat. 1019, 50 U. S. C. App. (1940 ed., Supp. II) § 303 (a).

[7] This form was authorized by Selective Service System Order No. 75, 7 Fed. Reg. 3424.

will debar me from becoming a citizen of the United States. . . ." [8]

Selective Service Regulations required the local board to follow prescribed formalities to place a neutral applying for relief from service in Class IV–C and to notify the alien of the classification.[9] The board did not comply with these regulations in petitioner's case. Its first formal action was taken after the Selective Service System notified the board, on December 20, 1943, that Colombia, on November 26, 1943, had changed its neutral status to that of a cobelligerent with the United States. On January 27, 1944, five months after the petitioner filed the Form DSS 301, the board notified the petitioner that he was classified I–A, available for military service, and ordered him to report for preinduction physical examination. He reported as ordered, but failed to pass the physical examination and, on March 2, 1944, was reclassified IV–F, physically defective.

The petitioner argues that neither the Attorney General nor the Commissioner of Immigration is a necessary party to this action. The respondent offers no argument in opposition. We hold that neither the Attorney General nor the Commissioner is a necessary party. This Court in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, held that determination of the question of indispensability of parties is dependent, not on the nature of the decision attacked, but on the ability and authority of the defendant before the court to effectuate the relief which the alien seeks. In this case the petitioner asks to have the order of deportation suspended and to restrain the District Director from deporting him. Because the District

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[8] This form was authorized by Selective Service System Order No. 54, 7 Fed. Reg. 1104.

[9] 32 CFR, 1943 Cum. Supp., § 622.43 (b); 32 CFR, 1943 Cum. Supp., § 623.1; 32 CFR, 1943 Cum. Supp., § 623.61.

Director is the official who would execute the deportation, he is a sufficient party. It is not a basis for distinction of *Pedreiro* that suspension of deportation, rather than deportation itself, is involved in this action.[10]

The petitioner's argument on the merits challenges the holding of the Court of Appeals that the execution and filing of Form DSS 301 had the effect as a matter of law of debarring him from becoming a citizen of the United States. He contends that debarment could result only if the local board affirmatively granted the relief applied for by classifying him IV–C on its records and giving him notice of its action. We hold that the petitioner's voluntary act of executing and filing, and allowing to remain on file, the legally sufficient application Form DSS 301 effected his debarment from citizenship under § 3 (a).[11] The explicit terms of the section debar the neutral alien "who makes such application" for immunity from military service.

Legislative history shows this to be the effect contemplated by Congress.[12] This same construction has been adopted in the few court decisions which refer to the sec-

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[10] The Court of Appeals made that distinction and held that not *Pedreiro* but its decision in *De Pinho Vaz* v. *Shaughnessy*, 208 F. 2d 70, controlled. 229 F. 2d, at 593.

[11] The petitioner's claim that he executed the application in the belief that he was required to do so to obtain assignment to a Latin American contingent of the United States Army was rejected, after hearing, by the Immigration and Naturalization Service. In fact, the Board of Immigration Appeals found that petitioner "fully understood the legal consequences of his action and that he was not duly influenced by other considerations." Cf. *Moser* v. *United States*, 341 U. S. 41.

[12] This appears in both the House and Senate Reports. The House Report states:

". . . In the case of citizens or subjects of any neutral country, special provision is made to enable them, upon application, to be relieved from the liability for service, but *the making of such appli-*

tion,[13] and administrative construction has consistently given the section this meaning.[14] The neutral alien in this country during the war was at liberty to refuse to bear arms to help us win the struggle, but the price he paid for his unwillingness was permanent debarment from United States citizenship.

The petitioner argues that in any event § 315 of the Immigration and Nationality Act of 1952,[15] and not

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cation will debar them from becoming citizens of the United States. . . ." (Emphasis added.) H. R. Rep. No. 1508, 77th Cong., 1st Sess. 4.

The Senate Report states:

". . . Under the bill reported by the committee, aliens would be liable whether or not they had declared their intention to become citizens. However, aliens who are citizens or subjects of a neutral country would be relieved of liability upon making application in the manner prescribed by the President, but *the making of such application* will debar them from ever becoming citizens of the United States. . . ." (Emphasis added.) S. Rep. No. 915, 77th Cong., 1st Sess. 2.

[13] *Mannerfrid* v. *United States,* 200 F. 2d 730; *Navarro* v. *Landon,* 108 F. Supp. 922; see *Machado* v. *McGrath,* 90 U. S. App. D. C. 70, 74, 193 F. 2d 706, 710. See *McGrath* v. *Kristensen,* 340 U. S. 162, 172: "By the terms of the statute, that bar only comes into existence when an alien resident liable for service *asks* to be relieved." (Emphasis added.) See *Moser* v. *United States,* 341 U. S. 41, 45: Section 3 (a) "imposed the condition that neutral aliens residing here who *claimed* such immunity would be debarred from citizenship." (Emphasis added.)

[14] See quotations from Forms DSS 304 and DSS 301 in text. And see, Selective Service Regulations, § 622.43, effective March 16, 1942, 7 Fed. Reg. 2087. Section 622.43, as revised, effective October 1, 1943, 8 Fed. Reg. 13672, read: ". . . (a) In Class IV–C shall be placed any registrant: . . . (2) Who is an alien and who is a citizen or subject of a neutral country . . . and who . . . files with his local board an Application by Alien for Relief from Military Service (Form 301) . . . ."

[15] The Immigration and Nationality Act of 1952, § 315, provides:

"(a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training

§ 3 (a) of the Selective Training and Service Act of 1940, governs this case. Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one "who applies or has applied for exemption," and also one who "is or was relieved or discharged from such training or service on such ground." That section has no application here. The 1952 law had not been enacted when the petitioner applied for relief from deportation in 1951 [16] and by its terms is expressly made inapplicable to proceedings for suspension of deportation under § 19 of the Immigration Act of 1917 pending, as here, on the effective date of the 1952 law.[17]

Affirmed.

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or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

"(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien." 66 Stat. 242, 8 U. S. C. § 1426.

[16] The 1952 law became effective in December 1952.

[17] The Immigration and Nationality Act of 1952, § 405 (a), provides:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect . . . proceedings . . . brought, . . . or existing, at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended . . . which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. § 1101, note.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 606 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM END OF OCTOBER TERM, 1955, THROUGH MARCH 11, 1957.

Cases Dismissed in Vacation.

No. 139. Peck, Tax Commissioner of Ohio, *v.* Broadview Savings & Loan Co. et al. On petition for writ of certiorari to the Supreme Court of Ohio. June 29, 1956. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *C. William O'Neill,* Attorney General of Ohio, was on the stipulation for petitioner. With him on the petition was *William E. Herron,* Assistant Attorney General. *Florence G. Denton* for the Broadview Savings & Loan Co., *Francis J. Wright* for the Fremont Savings Bank Co., and *John P. McMahon* for the First National Bank of Akron, Ohio, et al., respondents, were on the stipulation. Reported below: 165 Ohio St. 82, 133 N. E. 2d 366.

No. 70. In re Idaho Natural Gas Co. On petition for writ of certiorari to the Supreme Court of Idaho. July 7, 1956. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Albert E. Hallett* for petitioner. *Graydon W. Smith,* Attorney General of Idaho, was on the stipulation for the Idaho Public Utilities Commission. Reported below: 77 Idaho 188, 289 P. 2d 933.

No. 218. Warner et al. *v.* Doerr et al. On petition for writ of certiorari to the Supreme Court of Minnesota. September 4, 1956. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *R. H. Fryberger* for petitioners. *Karl H. Covell* for respondents. Reported below: 247 Minn. 98, 76 N. W. 2d 505.

No. 229. Anchor Rome Mills, Inc., *v.* National Labor Relations Board. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. September 26, 1956. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Frank A. Constangy, Thomas E. Shroyer* and *Milton C. Denbo* were on the stipulation for petitioner. With them on the petition was *John W. Maddox*. *Solicitor General Rankin* and *Theophil C. Kammholz* were on the stipulation for respondent. With *Mr. Kammholz* on a brief in opposition to the petition were *Oscar H. Davis,* then Acting Solicitor General, and *Dominick L. Manoli*. Reported below: 228 F. 2d 775.

No. 65. Higa, Administrator, *v.* Transocean Airlines. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. September 27, 1956. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Roger E. Brooks* for petitioner. *Jesse H. Steinhart* was on the stipulation for respondent. Reported below: 230 F. 2d 780.

No. 158. American Automobile Insurance Co. of St. Louis, Missouri, *v.* Collins, Committee. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. September 27, 1956. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. *John F. X. Finn* was on the motion for petitioner. With him on the petition was *Richard E. Joyce*. Reported below: 230 F. 2d 416.

No. 176. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25, A. F. L., *v.* W. L. Mead, Inc. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. September

28, 1956. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Stephen J. D'Arcy, Jr.* was on the stipulation for petitioner. With him on the petition were *John D. O'Reilly, Jr.* and *Richard S. Sullivan.* Reported below: 230 F. 2d 576.

OCTOBER 1, 1956.

Discharge of Advisory Committee.

IT IS ORDERED by this Court that the Advisory Committee to advise the Court with respect to proposed amendments or additions to the Rules of Civil Procedure for the District Courts of the United States, as appointed pursuant to an order of this Court dated June 3, 1935 [295 U. S. 774], is hereby discharged with thanks, and further that the order of this Court dated January 5, 1942 [314 U. S. 720], making said Rules Committee a continuing body is hereby revoked.

OCTOBER 4, 1956.

Dismissal Under Rule 60.

No. 146. LESLIE ET AL. *v.* HOUSTON NATURAL GAS CORP. On petition for writ of certiorari to the Supreme Court of Texas. B. H. Gillman, George D. Gibson, C. L. Lambert, L. E. Dykes, D. C. Landwehr, L. B. Wolfe, Harry Pepper, Standard Rendering Co., John G. Taylor, A. M. Lewis and A. N. Lewis as partners, and S. J. Cutaia and Frank Cutaia as partners, J. E. Burleson and George L. Barr are dismissed as parties petitioner herein per stipulation pursuant to Rule 60 of the Rules of this Court. *Fred W. Moore* was on the stipulation for petitioners. With him on the petition was *Dan Moody. Leon Jaworski* was on the stipulation for respondent. With him on a brief in opposition to the petition were *John C. White* and *Milton K. Eckert.*

OCTOBER 5, 1956.

Case Dismissed Under Rule 60.

No. 23, Misc. EDWARDS *v.* NEW YORK. On petition for writ of certiorari to the Court of Appeals of New York. Dismissed on motion of petitioner under Rule 60 of the Rules of this Court. *Curtis F. McClane* was on the motion to dismiss. With him on the petition was *John F. Finerty.*

OCTOBER 8, 1956.

Decisions Per Curiam.

No. 66. VAN HUFFEL TUBE CORP. ET AL. *v.* BOWERS, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Robert G. Day* for appellants. *C. William O'Neill,* Attorney General of Ohio, and *W. E. Herron,* Assistant Attorney General, for appellee. Reported below: 164 Ohio St. 209, 129 N. E. 2d 467.

No. 81. OTTAWA HUNTING ASSOCIATION, INC., *v.* KANSAS ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *James C. Wilson* for appellant. *John Anderson, Jr.,* Attorney General of Kansas, *Paul E. Wilson,* Assistant Attorney General, and *Noel Mullendore,* Special Assistant Attorney General, for appellees. Reported below: 178 Kan. 460, 289 P. 2d 754.

No. 165. DULUTH, MISSABE & IRON RANGE RAILWAY CO. *v.* MINNESOTA ET AL. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Donald D. Harries, Franklin B. Stevens* and *Vermont Hatch* for appellant. *Miles Lord,*

Attorney General, and *Victor J. Michaelson,* Assistant Attorney General, for the State of Minnesota, and *Gordon Rosenmeier* for the Order of Railway Conductors et al., appellees. Reported below: 247 Minn. 383, 75 N. W. 2d 398.

No. 170. GOODWIN *v.* STATE TAX COMMISSION. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles Goodwin, Jr., pro se. Jacob K. Javits,* Attorney General of New York, *James O. Moore, Jr.,* Solicitor General, and *Robert W. Bush* and *John R. Davison,* Assistant Attorneys General, for appellee. Reported below: 1 N. Y. 2d 680, 133 N. E. 2d 711.

No. 88. TAYLOR *v.* OKLAHOMA EX REL. RUTHERFORD, COUNTY ATTORNEY. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Charles Orlando Pratt* for appellant. Reported below: 291 P. 2d 1033.

No. 188. MALOTTE *v.* CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Leslie C. Gillen* and *John R. Golden* for appellant. Reported below: 46 Cal. 2d 59, 292 P. 2d 517.

No. 99. PACIFIC WESTERN OIL CORP., SUCCESSOR IN INTEREST TO GEORGE F. GETTY, INC., *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from the District Court of Appeal of California, Third Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Joseph D. Peeler, John P. Pollock, David W. Richmond* and *Robert N. Miller* for appellant. *Edmund G. Brown,* Attorney General of California, *James E.*

Sabine, Irving H. Perluss, Assistant Attorneys General, and *Ernest P. Goodman,* Deputy Attorney General, for appellee. Reported below: 136 Cal. App. 2d 794, 289 P. 2d 287.

No. 115. GARLINGTON ET AL. *v.* WASSON ET AL. Appeal from the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. *Per Curiam:* The appeal is dismissed for want of jurisdiction.* *Elmer McClain* for appellants. Reported below: 279 S. W. 2d 668.

No. 190. ELLIS *v.* OHIO TURNPIKE COMMISSION ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *John F. Hunter* and *Edward N. Barnard* for appellant. *Frank A. Harrington* for the Ohio Turnpike Commission et al., appellees. Reported below: 164 Ohio St. 377, 403, 131 N. E. 2d 397, 132 N. E. 2d 100.

No. 214. FIELD ENTERPRISES, INC., *v.* WASHINGTON. Appeal from the Supreme Court of Washington. *Per Curiam:* The judgment is affirmed. *Norton Company* v. *Department of Revenue of Illinois,* 340 U. S. 534. MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted. *Simon H. Rifkind* for appellant. Reported below: 47 Wash. 2d 852, 289 P. 2d 1010.

No. 95. FEDERAL TRADE COMMISSION *v.* AMERICAN CRAYON CO. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. The case is remanded with directions as follows: (1) to affirm and enforce paragraphs

*[This order amended, *post,* p. 979.]

numbered 4 and 5 and the unnumbered paragraph following paragraph numbered 5 of the Federal Trade Commission's order issued pursuant to § 2 (d) of the Clayton Act; and (2) to consider and pass upon the Federal Trade Commission's petition for affirmance and enforcement of the provisions of paragraphs numbered 1, 2 and 3 of the Federal Trade Commission's order issued under § 2 (a) of that Act. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Barnes, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for petitioner. *Thomas F. Butler, Jr.* for respondent.

No. 92, Misc. HATCHETT *v.* MICHIGAN. Appeal from the Supreme Court of Michigan. *Per Curiam:* The appeal is dismissed.

No. 108, Misc. ELLENBERGER *v.* CITY OF OAKLAND ET AL. Appeal from the Superior Court of California, Alameda County. *Per Curiam:* The appeal is dismissed. THE CHIEF JUSTICE took no part in the consideration or decision of this case.

No. 102, Misc. WETZEL *v.* WIGGINS, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Albert Sidney Johnston, Jr.* for appellant. Reported below: —— Miss. ——, 85 So. 2d 469.

No. 226. WILLIAMS-MCWILLIAMS INDUSTRIES, INC., *v.* MCKEIGNEY, CHAIRMAN, STATE TAX COMMISSION. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for appellant. *John E. Stone* for appellee. Reported below: —— Miss. ——, 86 So. 2d 672.

Miscellaneous Orders.

No. 20. MESAROSH, ALIAS NELSON, ET AL. *v.* UNITED STATES. Certiorari, 350 U. S. 922, to the United States Court of Appeals for the Third Circuit. [On a motion of the United States to remand the case to the District Court for a hearing on the credibility of a government witness.] Further consideration of the motion to remand is postponed to the hearing on the merits. Counsel are directed at the outset to address themselves to this motion and 30 additional minutes are allotted to each side for that purpose. MR. JUSTICE FRANKFURTER has filed a memorandum in this case. *Solicitor General Rankin* and *Assistant Attorney General Tompkins* for the United States. *Frank J. Donner, Arthur Kinoy, Marshall Perlin* and *Hubert T. Delany,* for petitioners, filed a memorandum opposing the Government's motion to remand and moving that the case be remanded to the District Court for a new trial.

MR. JUSTICE FRANKFURTER.

Less than six months ago, in *Communist Party* v. *Control Board,* 351 U. S. 115, a case that raised important constitutional issues, this Court refused to pass on those issues when newly discovered evidence was alleged to demonstrate that the record out of which those issues arose was tainted. It did so in the following language:

> "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 pro-

> ceeding is inevitably discredited and the Board's determination must duly take this fact into account. We cannot pass upon a record containing such challenged testimony. . . ." 351 U. S., at 124–125.

The Court in that case, over the protest of the Government, remanded the proceedings to the Subversive Activities Control Board so that it might consider the allegations against the witnesses and, if necessary, reassess the evidence purged of taint.

In this case, the Government itself has presented a motion to remand the case, alleging that one of its witnesses, Joseph Mazzei, since he testified in this case, "has given certain sworn testimony (before other tribunals) which the Government, on the basis of the information in its possession, now has serious reason to doubt." Some of the occurrences on which the motion is based go back to 1953. (It should be noted that the petition for certiorari was filed in this Court on October 6, 1955.) Thus the action by the Government at this time may appear belated. This is irrelevant to the disposition of this motion. The fact is that the history of Mazzei's post-trial testimony did not come to the Solicitor General's notice until less than ten days before the presentation of this motion.* It would, I believe, have been a disregard of the responsibility of the law officer of the Government especially charged with representing the Government before this Court not to bring these disturbing facts to the Court's attention once they came to his attention. And so, it would be unbecoming to speak of the candor of the Solicitor General in sub-

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*The motion for remand states: "The complete details of Mazzei's testimony in Florida, as set forth in this motion, did not come to the attention of the Department of Justice until September 1956, and the history of Mazzei's post-trial testimony did not come to the Solicitor General's attention until less than ten days ago."

mitting these facts to the Court by way of a formal motion for remand. It ought to be assumed that a Solicitor General would do this as a matter of course.

The Government in its motion sets forth the facts which lead it to urge remand. The Government lists five incidents of testimony by Mazzei between 1953 and 1956 about the activities of alleged Communists and about his own activities in behalf of the Federal Bureau of Investigation which it now "has serious reason to doubt." The Government also notes that in the trial of this case Mazzei "gave testimony which directly involved two of the petitioners, Careathers and Dolsen." Although the Government maintains "that the testimony given by Mazzei at the trial was entirely truthful and credible," it deems the incidents it sets forth so significant that it asks that the issue of Mazzei's truthfulness be determined by the District Court after a hearing such as was held in a similar situation in *United States* v. *Flynn,* 130 F. Supp. 412.

How to dispose of the Government's motion raises a question of appropriate judicial procedure. The Court has concluded not to pass on the Solicitor General's motion at this time. It retains the motion to be heard at the outset of the argument of the case as heretofore set down. I deem it a more appropriate procedure that the motion be granted forthwith, with directions to the District Court to hear the issues raised by this motion. I feel it incumbent to state the reasons for this conviction. Argument can hardly disclose further information on which to base a decision on the motion. Furthermore, there may be controversy over the facts, and the judicial methods for sifting controverted facts are not available here. The basic principle of the *Communist Party* case that allegations of tainted testimony must be resolved before this Court will pass on a case is decisive. Indeed, the situation

here is an even stronger one for application of that principle, for we have before us a statement by the Government that it "now has serious reason to doubt" testimony given in other proceedings by Mazzei, one of its specialists on Communist activities, and a further statement by the Government that Mazzei's testimony in this case "directly involved two of the petitioners."

This Court should not even hypothetically assume the trustworthiness of the evidence in order to pass on other issues. There is more at stake here even than affording guidance for the District Court in this particular case. This Court should not pass on a record containing unresolved allegations of tainted testimony. The integrity of the judicial process is at stake. The stark issue of rudimentary morality in criminal prosecutions should not be lost in the melange of more than a dozen other issues presented by petitioners. And the importance of thus vindicating the scrupulous administration of justice as a continuing process far outweighs the disadvantage of possible delay in the ultimate disposition of this case. The case should be remanded now for a hearing before the trial judge.

No. 32. LIGHTFOOT *v.* UNITED STATES. Certiorari, 350 U. S. 992, to the United States Court of Appeals for the Seventh Circuit. The motion of Bruce McM. Wright et al. for leave to file brief, as *amici curiae,* is denied.

No. 34. ROWOLDT *v.* PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 350 U. S. 993, to the United States Court of Appeals for the Eighth Circuit. The motions of International Longshoremen's & Warehousemen's Union and National Lawyers Guild for leave to file briefs, as *amici curiae,* are denied.

No. 61. ALBERTS *v.* CALIFORNIA. Appeal from the Superior Court of California, Appellate Department, County of Los Angeles. The motion of American Civil Liberties Union, Southern California Branch, for leave to file brief, as *amicus curiae,* is denied. Reported below: 138 Cal. App. 2d 909, 292 P. 2d 90.

No. 68. THEARD *v.* UNITED STATES. Certiorari, 351 U. S. 961, to the United States Court of Appeals for the Fifth Circuit. The motion of the Solicitor General to permit the Louisiana State Bar Association to present oral argument is denied. Leave to submit a brief is granted. *Delvaille H. Theard, pro se. Oscar H. Davis,* then Acting Solicitor General, was on the motion, and *Solicitor General Rankin* was on a supplemental memorandum in support of the motion, for the United States.

No. 11, Original. UNITED STATES *v.* LOUISIANA. The motion to dismiss on jurisdictional grounds is denied. The motion for entry of default and for leave to proceed *ex parte* is denied. The State of Louisiana is directed to file an answer on the merits within 30 days. THE CHIEF JUSTICE took no part in the consideration or decision of these motions or order of the Court. *Jack P. F. Gremillion,* Attorney General, *W. Scott Wilkinson, Edward M. Carmouche* and *John L. Madden,* Special Assistant Attorneys General, and *Bailey Walsh* for the State of Louisiana. *Attorney General Brownell, Solicitor General Rankin, Oscar H. Davis, John F. Davis* and *George S. Swarth* for the United States.

No. 175. SWEEZY *v.* NEW HAMPSHIRE BY WYMAN, ATTORNEY GENERAL. Appeal from the Supreme Court of New Hampshire. Further consideration of the question of jurisdiction is postponed to the hearing of the case

on the merits. *Thomas I. Emerson* for appellant. *Louis C. Wyman*, Attorney General of New Hampshire, for appellee. Reported below: 100 N. H. 103, 121 A. 2d 783.

No. 929, October Term, 1955. GINSBURG *v.* GREGG, GUARDIAN AD LITEM, ET AL., 351 U. S. 979. Motion for leave to file appendix to petition granted. Motion of the respondent Gregg to strike the petition for rehearing denied. Petition for rehearing denied.

No. 16, Misc. JONES *v.* SCANLON, CLERK OF QUARTER SESSIONS, PHILADELPHIA, PENNSYLVANIA. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *James N. Lafferty* for respondent.

No. 701, October Term, 1955. REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL, *v.* COVERT, 351 U. S. 487; and

No. 713, October Term, 1955. KINSELLA, WARDEN, *v.* KRUEGER, 351 U. S. 470. The Solicitor General is requested to file a response to the petition for rehearing in these cases within 15 days.

No. 131, Misc. KRUPOWICZ *v.* NEW YORK. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Motion for leave to file petition for writ of mandamus denied.

No. 147, Misc. SMOTHERMAN *v.* MICHIGAN. Petition for writ of certiorari to the Supreme Court of Michigan denied. Motion for leave to file petition for writ of habeas corpus denied.

No. 35, Misc. SHOTKIN *v.* CITY OF MIAMI BEACH, FLORIDA. Petition for an appeal denied.

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No. 46, Misc. SPRIGGS *v.* UNITED STATES;
No. 56, Misc. IN RE HOWARD;
No. 66, Misc. FARNUM *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL;
No. 88, Misc. GREENE *v.* HERITAGE, WARDEN;
No. 106, Misc. WESSELMAN *v.* WISCONSIN;
No. 137, Misc. EX PARTE LIPSCOMB;
No. 138, Misc. SCASSERRA *v.* CAVELL, WARDEN;
No. 142, Misc. RIOLA *v.* NEW JERSEY ET AL.;
No. 156, Misc. DONNELL *v.* BIBB, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL.;
No. 166, Misc. LOPEZ *v.* UNITED STATES;
No. 178, Misc. BLACKBURN *v.* CLEMMER;
No. 181, Misc. SCASSERRA *v.* COURT OF QUARTER SESSIONS OF ALLEGHENY COUNTY, PENNSYLVANIA; and
No. 187, Misc. SCASSERRA *v.* COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 118, Misc. CHAPMAN *v.* UNITED STATES; and
No. 132, Misc. IN RE NELSON. Applications denied.

No. 3, Misc. REEVES *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, for respondent.

No. 71, Misc. SMITH *v.* RAGEN, WARDEN;
No. 121, Misc. HAINES *v.* RAGEN, WARDEN;
No. 163, Misc. SCASSERRA *v.* QUARTER SESSIONS COURT OF BUTLER COUNTY, PENNSYLVANIA;
No. 164, Misc. SCASSERRA *v.* CAVELL, WARDEN, ET AL.;
No. 182, Misc. SCASSERRA *v.* COURT OF QUARTER SESSIONS OF ALLEGHENY COUNTY, PENNSYLVANIA; and
No. 183, Misc. SCASSERRA *v.* COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA. Motions for leave to file petitions for writs of certiorari denied.

No. 57, Misc. LANG *v.* HALBERT, U. S. DISTRICT JUDGE;

No. 103, Misc. DOBBS *v.* KRAUSE, RECORDER'S COURT JUDGE, ET AL.;

No. 120, Misc. IN RE FLETCHER;

No. 124, Misc. IN RE WALLACE; and

No. 146, Misc. JANOWICZ *v.* FOX, CIRCUIT COURT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 36, Misc. RICHARDS *v.* CWIKLINSKI, MUNICIPAL COURT JUDGE. Motion for leave to file petition for writ of mandamus denied without prejudice to proceeding in an appropriate state court.

No. 195. CLINTON *v.* STEWART, DIRECTOR OF EMPLOYMENT, OF CALIFORNIA. Motion to strike certain portions of the record, etc., denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Petitioner *pro se. Edmund G. Brown,* Attorney General of California, *Irving H. Perluss,* Assistant Attorney General, and *William L. Shaw,* Deputy Attorney General, for respondent.

No. 28, Misc. STONE *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied;

No. 37, Misc. STONE *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied; and

No. 38, Misc. STONE *v.* WYOMING SUPREME COURT. Petition for writ of certiorari to the Supreme Court of Wyoming denied. Motions for leave to file petitions for writs of mandamus denied. Reported below: No. 38, Misc., 74 Wyo. 389, 288 P. 2d 767.

Probable Jurisdiction Noted.

No. 101. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 110. RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL. *v.* UNITED STATES ET AL. Appeals from the United States District Court for the District of Columbia. Probable jurisdiction noted. Counsel in No. 110 are invited to discuss the issue of standing to sue. *Peter T. Beardsley* for the American Trucking Associations, Inc., *Roland Rice* and *Albert B. Rosenbaum* for the Regular Common Carrier Conference of A. T. A., and *Stephen Robinson* and *Rex H. Fowler* for the Iowa-Nebraska Transportation Co. et al., appellants in No. 101. *Clarence Mulholland* and *Edward J. Hickey, Jr.* for appellants in No. 110. *Robert W. Ginnane* for the Interstate Commerce Commission, and *Arthur L. Winn, Jr.* and *Alden B. Howland* for the Rock Island Motor Transit Co., appellees. Reported below: 144 F. Supp. 365.

No. 82. BAKER, WEEKS & CO. ET AL. *v.* BRESWICK & CO. ET AL.; and

No. 114. INTERSTATE COMMERCE COMMISSION *v.* BRESWICK & CO. ET AL. Appeals from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Eward M. Garlock* for appellants in No. 82. *Robert W. Ginnane* and *Leo H. Pou* for appellant in No. 114. Reported below: 138 F. Supp. 123.

No. 289. UNITED STATES *v.* TURLEY. Appeal from the United States District Court for the District of Maryland. Probable jurisdiction noted. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 141 F. Supp. 527.

No. 125. Arkansas & Louisiana Missouri Railway Co. et al. *v.* Amarillo-Borger Express, Inc., et al.; and

No. 224. United States et al. *v.* Amarillo-Borger Express, Inc., et al. Appeals from the United States District Court for the Northern District of Texas. Probable jurisdiction noted. *J. T. Suggs* for the Arkansas & Louisiana Missouri Railway Co. et al., appellants in No. 125. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Barnes, Robert W. Ginnane* and *H. Neil Garson* for the United States and the Interstate Commerce Commission, appellants in No. 224. Reported below: 138 F. Supp. 411.

No. 280. Guss, doing business as Photo Sound Products Manufacturing Co., *v.* Utah Labor Relations Board. Appeal from the Supreme Court of Utah. Probable jurisdiction noted. *Harold P. Fabian* for appellant. Reported below: 5 Utah 2d 68, 296 P. 2d 733.

No. 295. United States *v.* Witkovich. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Oscar H. Davis*, then Acting Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 140 F. Supp. 815.

Certiorari Granted. (*See also No. 95, ante, p. 806.*)

No. 79. International Brotherhood of Teamsters, Local 695, A. F. L., et al. *v.* Vogt, Inc. Supreme Court of Wisconsin. Certiorari granted. *David Previant* for petitioners. *Leon B. Lamfrom* and *Jacob L. Bernheim* for respondent. Reported below: 270 Wis. 321a, 74 N. W. 2d 749.

No. 89. Automobile Club of Michigan *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Cer-

tiorari granted. *E. C. Alvord* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Rice, Hilbert P. Zarky* and *I. Henry Kutz* for respondent. Reported below: 230 F. 2d 585.

No. 94. RADOVICH *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 9th Cir. Certiorari granted. *Maxwell Keith* for petitioner. *Marshall E. Leahy* and *John F. O'Dea* for the National Football League et al., respondents. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Barnes* and *Charles H. Weston* filed a memorandum for the United States, as *amicus curiae*, in support of the petition. Reported below: 231 F. 2d 620.

No. 97. UNITED STATES *v.* UNION PACIFIC RAILROAD CO. C. A. 10th Cir. Certiorari granted. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the United States. *Louis W. Myers, William W. Clary, Warren M. Christopher, John U. Loomis, W. R. Rouse* and *J. H. Anderson* for respondent. Reported below: 230 F. 2d 690.

No. 103. NATIONAL LABOR RELATIONS BOARD *v.* TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L. C. A. 2d Cir. Certiorari granted. *Simon E. Sobeloff*, then Solicitor General, *Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for petitioner. *Thomas P. McMahon* for respondent. *Kenneth C. Royall* and *Frank C. Fisher* filed a brief for the Linen and Credit Exchange et al., as *amici curiae*, in support of the petition. Reported below: 231 F. 2d 110.

No. 109. CONLEY ET AL. *v.* GIBSON ET AL. C. A. 5th Cir. Certiorari granted. *Roberson L. King* for petition-

ers. *Clarence Mulholland* and *Edward J. Hickey, Jr.* for respondents. Reported below: 229 F. 2d 436.

No. 122. MITCHELL, SECRETARY OF LABOR, *v.* BEKINS VAN & STORAGE CO. C. A. 9th Cir. Certiorari granted. *Simon E. Sobeloff*, then Solicitor General, *Solicitor General Rankin, Stuart Rothman* and *Bessie Margolin* for petitioner. *Homer D. Crotty* and *Lucien Shaw* for respondent. Reported below: 231 F. 2d 25.

No. 137. GOLD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Harold I. Cammer, Joseph Forer* and *David Rein* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Tompkins* and *Philip R. Monahan* for the United States. Reported below: 99 U. S. App. D. C. 136, 237 F. 2d 764.

No. 153. OLIN MATHIESON CHEMICAL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari granted. *Wm. A. Stuart* and *H. W. Stull* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Theophil C. Kammholz* and *Dominick L. Manoli* for respondent. Reported below: 232 F. 2d 158.

No. 162. KREMEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Norman Leonard* for petitioners. *Simon E. Sobeloff*, then Solicitor General, and *Assistant Attorney General Tompkins* for the United States. Reported below: 231 F. 2d 155.

No. 205. UNITED STATES EX REL. HINTOPOULOS ET UX. *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Edward L. P. O'Connor* for petitioners. *Oscar H. Davis*, then Acting Solicitor General, *Assistant Attorney General Olney, Robert S. Erdahl* and *Isabelle Cappello* for respondent. Reported below: 233 F. 2d 705.

No. 260. CURCIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Samuel Mezansky* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 234 F. 2d 470.

No. 302. VANDERBILT *v.* VANDERBILT ET AL. Court of Appeals of New York and Supreme Court of New York, County of New York. Certiorari granted. *Sol A. Rosenblatt* for petitioner. *Monroe J. Winsten* for Vanderbilt, respondent. Reported below: 1 N. Y. 2d 342, 135 N. E. 2d 553.

No. 310. FOURCO GLASS CO. *v.* TRANSMIRRA PRODUCTS CORP. ET AL. C. A. 2d Cir. Certiorari granted. *Edward S. Irons* for petitioner. *Morrie Slifkin* for respondents. Reported below: 233 F. 2d 885.

No. 199. DEEN *v.* GULF, COLORADO & SANTA FE RAILWAY CO. Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. Certiorari granted. *Robert Lee Guthrie* for petitioner. *Preston Shirley* for respondent. Reported below: 275 S. W. 2d 529.

No. 257. HAYNES ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *J. Walter LeCraw* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, for the United States. Reported below: 233 F. 2d 413.

No. 240. ARNOLD *v.* PANHANDLE & SANTA FE RAILWAY CO. Supreme Court of Texas and Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Certiorari granted. *Henry D. Akin, Jr.* for petitioner. *Preston Shirley* for respondent. Reported below: 283 S. W. 2d 303.

No. 266. HOME UTILITIES CO., INC., *v.* EASTMAN KODAK CO. C. A. 4th Cir. Certiorari granted. *Melvin J. Sykes* for petitioner. *David R. Owen* for respondent. Reported below: 234 F. 2d 766.

No. 92. SCHWARE *v.* BOARD OF BAR EXAMINERS OF NEW MEXICO. Supreme Court of New Mexico. Certiorari granted. *Herbert Monte Levy* for petitioner. *Richard H. Robinson,* Attorney General of New Mexico, *Fred M. Standley,* Assistant Attorney General, and *Pearce C. Rodey* for respondent. Reported below: 60 N. M. 304, 291 P. 2d 607.

No. 247. BRITISH TRANSPORT COMMISSION *v.* UNITED STATES ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. . . . The first question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision."

Dean Acheson and *Edwin Longcope* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Doub, Samuel D. Slade* and *William W. Ross* for the United States, and *John W. Oast, Jr., Wilbur E. Dow, Jr., Barron F. Black, R. Arthur Jett* and *C. Lydon Harrell* for Haslam et al., respondents. Reported below: 230 F. 2d 139.

No. 211. TEXTILE WORKERS UNION OF AMERICA *v.* LINCOLN MILLS OF ALABAMA. C. A. 5th Cir. Certiorari granted. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Benjamin Wyle, Arthur J. Goldberg* and *David E. Feller* for petitioner. Reported below: 230 F. 2d 81.

No. 276. General Electric Co. *v.* Local 205, United Electrical, Radio and Machine Workers of America (U. E.). C. A. 1st Cir. Certiorari granted. Mr. Justice Black took no part in the consideration or decision of this application. *Warren F. Farr* and *Robert W. Barker* for petitioner. *Allan R. Rosenberg* for respondent. Reported below: 233 F. 2d 85.

No. 22, Misc. Peak *v.* United States. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. *John S. Wrinkle* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Doub*, *Samuel D. Slade* and *Alan S. Rosenthal* for the United States. Reported below: 229 F. 2d 503.

No. 269. Youngdahl et al. *v.* Rainfair, Inc. Supreme Court of Arkansas. Certiorari granted. *Sidney S. McMath* and *William J. Isaacson* for petitioners. *J. L. Shaver* for respondent. Reported below: 226 Ark. 80, 288 S. W. 2d 589.

No. 261. Watkins *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Mr. Justice Burton took no part in the consideration or decision of this application. *Joseph L. Rauh, Jr.*, *Harold A. Cranefield*, *Norma Zarky*, *Daniel H. Pollitt*, *Sidney S. Sachs* and *John Silard* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Tompkins* for the United States. *Telford Taylor* filed a brief for Metcalf, as *amicus curiae*, supporting petitioner. Reported below: 98 U. S. App. D. C. 190, 233 F. 2d 681.

No. 262. Goodall-Sanford, Inc., *v.* United Textile Workers of America, A. F. L. Local 1802, et al. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to questions

1, 2, 3, 4, and 7 as set out in the petition for writ of certiorari and to the question raised by the respondent, namely, the appealability of an order granting specific performance of an arbitration covenant. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Douglas M. Orr* and *William B. Mahoney* for petitioner. *Arthur J. Goldberg, David E. Feller* and *Sidney W. Wernick* for respondents. Reported below: 233 F. 2d 104.

Certiorari Denied. (*See also Nos. 99, 190, 195 and Misc. Nos. 3, 16, 28, 37, 38, 71, 102, 121, 131, 147, 163, 164, 182 and 183, supra.*)

No. 55. DEBURGH, EXECUTRIX, *v.* KINDEL FURNITURE CO. ET AL. C. A. 6th Cir. Certiorari denied. *Roberts B. Larson* for petitioner. *Peter P. Price* and *Oscar Giese* for respondents. Reported below: 229 F. 2d 740.

No. 67. CALIFORNIA OREGON POWER CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR SISKIYOU COUNTY ET AL. Supreme Court of California. Certiorari denied. *Gregory A. Harrison, Moses Lasky* and *Malcolm T. Dungan* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Ralph W. Scott,* Deputy Attorney General, for respondents. Reported below: 45 Cal. 2d 858, 291 P. 2d 455.

No. 73. MORRISON *v.* PENNSYLVANIA. Superior Court of Pennsylvania and Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 180 Pa. Super. 121, 118 A. 2d 258.

No. 74. MORRISON *v.* PENNSYLVANIA. Superior Court of Pennsylvania and Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 180 Pa. Super. 133, 118 A. 2d 263.

October 8, 1956. 352 U. S.

No. 80. MAMMOTH COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Bernard G. Segal* and *Edward W. Mullinix* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Rice, Hilbert P. Zarky* and *Marvin W. Weinstein* for respondent. Reported below: 229 F. 2d 535, 539.

No. 85. BOBERTZ *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. *Gregory S. Dolgorukov* for petitioner. *George L. DeMott* for respondent. Reported below: 228 F. 2d 94.

No. 87. HINES *v.* FRED JONES CO. C. A. 10th Cir. Certiorari denied. *Neal E. McNeill* for petitioner. *Truman B. Rucker* for respondent. Reported below: 229 F. 2d 213.

No. 90. MCCLANAHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph W. Cash* and *David Bland* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 230 F. 2d 919.

No. 93. LIDDON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *John J. Hooker* and *K. Harlan Dodson, Jr.* for petitioners. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 230 F. 2d 304.

No. 96. DART EXPORT CORP. ET AL. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *Henry P. Dart, III* for petitioners. *Simon E. Sobeloff*, then Solicitor General, *Assistant At-*

torney General Doub, John R. Benney and *Melvin Richter* for the United States. Reported below: 43 C. C. P. A. (Cust.) 64.

No. 100. SCOTT ET AL. *v.* WILSON. Supreme Court of Ohio. Certiorari denied. *Charles G. White, Forrest E. Ely, Harold A. Kertz* and *Lucien H. Mercier* for petitioners. *Lyman Brownfield* for respondent.

No. 102. NOVAK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Walter Stein* and *Mervyn R. Turk* for petitioner. *Raymond R. Start* for respondent. Reported below: 384 Pa. 237, 120 A. 2d 543.

No. 105. SCOTT ET AL. *v.* FAYETTE COUNTY AGRICULTURAL SOCIETY. Supreme Court of Ohio. Certiorari denied. *Charles G. White, Forrest E. Ely, Harold A. Kertz* and *Lucien H. Mercier* for petitioners. *Lyman Brownfield* for respondent. Reported below: 164 Ohio St. 528, 132 N. E. 2d 212.

No. 106. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 420, AFL, ET AL. *v.* SCHAUFFLER, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Charles A. Rothman, Martin F. O'Donoghue* and *Thomas X. Dunn* for petitioners. *Simon E. Sobeloff*, then Solicitor General, *Theophil C. Kammholz* and *Dominick L. Manoli* for respondent. Reported below: 230 F. 2d 572.

No. 111. CHOCTAW NATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Wesley E. Disney* and *W. F. Semple* for petitioner. *Simon E. Sobeloff*, then

Solicitor General, *Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 133 Ct. Cl. 207, 135 F. Supp. 536.

No. 112. Rosenblum et al., Trustees, *v.* Neisner Bros., Inc. C. A. 7th Cir. Certiorari denied. *Samuel Morgan* for petitioners. *Frank G. Marshall* for respondent. Reported below: 231 F. 2d 322.

No. 116. Eggleton *v.* United States. C. A. 6th Cir. Certiorari denied. *Fred J. Karem* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice* and *Dickinson Thatcher* for the United States. Reported below: 227 F. 2d 493.

No. 117. Tomlinson *v.* Ford Motor Co. C. A. 6th Cir. Certiorari denied. *Theodore T. Sindell* for petitioner. *James A. Butler* for respondent. Reported below: 229 F. 2d 873.

No. 118. Hartford Accident & Indemnity Co. *v.* Pacific Employers Insurance Co. C. A. 9th Cir. Certiorari denied. *Walter O. Schell* for petitioner. *Frank W. Woodhead* for respondent. Reported below: 228 F. 2d 365.

No. 119. Seitz et al. *v.* Toolan et al. C. A. 3d Cir. Certiorari denied. *Archibald Palmer* for petitioners. *Max M. Albach* for Toolan et al., and *Theodore D. Parsons* for Hayes et al., respondents. Reported below: 231 F. 2d 224.

No. 121. Camp Wolters Enterprises, Inc., *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *R. B. Cannon* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 230 F. 2d 555.

No. 123. Az Din *v.* United States. C. A. 9th Cir. Certiorari denied. *Robert W. Kenny* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 232 F. 2d 283.

No. 126. Waylyn Corporation et al. *v.* United States. C. A. 1st Cir. Certiorari denied. *William G. Grant* and *Benicio Sanchez Castano* for petitioners. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 231 F. 2d 544.

No. 127. Koziol *v.* The Fylgia et al. C. A. 2d Cir. Certiorari denied. *Silas B. Axtell* and *Charles A. Ellis* for petitioner. *James M. Estabrook* and *David P. H. Watson* for Stockholms Rederi A. B. Svea, respondent. Reported below: 230 F. 2d 651.

No. 128. Vevelstad et al. *v.* Flynn. C. A. 9th Cir. Certiorari denied. *R. E. Robertson* for petitioners. *John H. Dimond* for respondent. Reported below: 230 F. 2d 695.

No. 129. State Farm Mutual Automobile Insurance Co. *v.* Harris. C. A. 6th Cir. Certiorari denied. *William M. Hall* for petitioner. *Chas. W. Miles, III* and *W. Morris Miles* for respondent. Reported below: 232 F. 2d 532.

No. 130. Ball et al. *v.* United States. Court of Claims. Certiorari denied. *Samuel I. Sherwood* for petitioners. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 133 Ct. Cl. 841, 137 F. Supp. 740.

No. 134. SIMPSON ET AL. *v.* SOUTHWESTERN RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. *Charles J. Bloch* for petitioners. *Walter A. Harris* and *John B. Miller* for respondents. Reported below: 231 F. 2d 59.

No. 136. MUNGIOLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 233 F. 2d 204.

No. 140. PAPANIKOLAOU *v.* ATLANTIC FREIGHTERS, LTD., ET AL.; and

No. 141. THOMPSON, ADMINISTRATOR, *v.* ENDARA ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Jacob L. Morewitz* for petitioners. *Harry E. McCoy* for respondents in No. 140. *Raymond T. Greene, Guilford D. Ware* and *Hugh S. Meredith* for respondents in No. 141.

No. 143. CORY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Watson Washburn* for petitioners. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice, Lee A. Jackson* and *Morton K. Rothschild* for respondent. Reported below: 230 F. 2d 941.

No. 144. TUCK ET AL. *v.* CITY OF EL PASO ET AL. Court of Civil Appeals of Texas, Eighth Supreme Judicial District. Certiorari denied. *Dan Moody* and *J. F. Hulse* for petitioners. Reported below: 282 S. W. 2d 764.

No. 145. JOHN DANZ CHARITABLE TRUST *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *F. A. LeSourd* for petitioner. *Simon E. Sobeloff,*

then Solicitor General, *Assistant Attorney General Rice, Hilbert P. Zarky* and *Melva M. Graney* for respondent. Reported below: 231 F. 2d 673.

No. 146. LESLIE ET AL. *v.* HOUSTON NATURAL GAS CORP. Supreme Court of Texas. Certiorari denied. *Dan Moody* and *Fred W. Moore* for petitioners. *Leon Jaworski, John C. White* and *Milton K. Eckert* for respondent.

No. 147. NICHOLS ET AL. *v.* ALKER ET AL. C. A. 2d Cir. Certiorari denied. *Harold G. Aron* for petitioners. *Charles C. Lockwood* for Vanneck, *Percival E. Jackson, pro se,* and *David K. Kadane* for Barrett et al., respondents. With them on a brief in opposition to the petition was *Peter H. Kaminer.* Reported below: 231 F. 2d 68.

No. 98. PANHANDLE EASTERN PIPE LINE CO. *v.* CITY OF DETROIT ET AL.; and

No. 113. FEDERAL POWER COMMISSION *v.* CITY OF DETROIT ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Miller* and *Harry S. Littman* for petitioner in No. 98. *Willard W. Gatchell* and *C. Louis Knight* for petitioner in No. 113. *Charles S. Rhyne* and *Eugene F. Mullin, Jr.* for the City of Detroit, and *Harry A. Bowen* for Wayne County, respondents. Reported below: 97 U. S. App. D. C. 260, 230 F. 2d 810.

No. 108. SALTER ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY. Supreme Court of Colorado. Certiorari denied. *Wesley E. McDonald* for petitioners. Reported below: 133 Colo. 138, 292 P. 2d 345.

No. 135. S. C. JOHNSON & SON, INC., *v.* GOLD SEAL CO. ET AL. United States Court of Appeals for the Dis-

trict of Columbia Circuit. Certiorari denied. *Francis C. Browne, William E. Schuyler, Jr.* and *Andrew B. Beveridge* for petitioner. *Floyd E. Thompson, Edward B. Beale* and *Maurice M. Moore* for the Gold Seal Co., respondent. Reported below: 97 U. S. App. D. C. 282, 230 F. 2d 832.

No. 148. ELLITHORPE *v.* BRADLEY ET AL. Supreme Court of Illinois and the Appellate Court of Illinois, First District. Certiorari denied. *Weightstill Woods* for petitioner. *J. F. Dammann* for respondents. *Sarsfield Collins,* Guardian Ad Litem, respondent *pro se.* Reported below: 7 Ill. App. 2d 440, 129 N. E. 2d 578.

No. 151. BRAVERMAN *v.* BAR ASSOCIATION OF BALTIMORE CITY. Court of Appeals of Maryland. Certiorari denied. *Harold Buchman* and *Joseph Forer* for petitioner. *G. C. A. Anderson* for respondent. Reported below: 209 Md. 328, 121 A. 2d 473.

No. 154. KEATING ET AL. *v.* BUCKEYE PIPE LINE CO. ET AL. C. A. 7th Cir. Certiorari denied. *Owen W. Crumpacker* for petitioners. *Charles M. Wells* for the Buckeye Pipe Line Co., respondent. Reported below: 229 F. 2d 795.

No. 155. KLEINMAN *v.* KOBLER, DOING BUSINESS AS KOBLER SHAVING CO. C. A. 2d Cir. Certiorari denied. Reported below: 230 F. 2d 913.

No. 156. FAROLL, EXECUTRIX, *v.* JARECKI, COLLECTOR OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Claude A. Roth* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice* and *Hilbert P. Zarky* for respondent. Reported below: 231 F. 2d 281.

No. 159. MURPHEY ET AL. *v.* REED ET AL., DOING BUSINESS AS M. T. REED CONSTRUCTION CO. C. A. 5th Cir. Certiorari denied. *R. W. Thompson, Jr.* for petitioners. *Charles S. Corben* for respondents. Reported below: 232 F. 2d 668.

No. 160. HOME GAS CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward S. Pinney, E. Fontaine Broun* and *John P. Randolph* for petitioners. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell* and *William L. Ellis* for the Federal Power Commission, *Morrell S. Lockhart* and *Theodore J. Carlson* for the Central Hudson Gas & Electric Corporation, and *Justin R. Wolf* for the Rockland Light & Power Co., respondents. Reported below: 97 U. S. App. D. C. 300, 231 F. 2d 253.

No. 161. CITY OF FORT LAUDERDALE *v.* FREEMAN, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Carl A. Hiaasen* for petitioner. *R. Bruce Jones* for respondent. Reported below: 230 F. 2d 948.

No. 163. CROSBY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Alston Cockrell* for petitioners. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 231 F. 2d 679.

No. 164. GRAHAM-PAIGE MOTORS CORP. *v.* STELLA. C. A. 2d Cir. Certiorari denied. *Ambrose V. McCall* for petitioner. *Lewis M. Dabney, Jr.* and *Murray C. Bernays* for respondent. Reported below: 232 F. 2d 299.

No. 166. GULF, MOBILE & OHIO RAILROAD CO. *v.* PEOPLE EX REL. CALLAHAN, COUNTY COLLECTOR, MADISON COUNTY. Supreme Court of Illinois. Certiorari denied. *J. N. Ogden* for petitioner. *Fred P. Schuman* for respondent. Reported below: 8 Ill. 2d 66, 132 N. E. 2d 544.

No. 167. MASTELLER ET AL. *v.* GRAFTON. C. A. 3d Cir. Certiorari denied. *Walter Biddle Saul* for petitioners. Reported below: 232 F. 2d 773.

No. 168. MIGHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Carl V. Rice, Claude L. Rice* and *Thurman Hill* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice* and *Dickinson Thatcher* for the United States. Reported below: 233 F. 2d 731.

No. 171. WOOLSEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James O. Moore, Jr.* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice, Hilbert P. Zarky* and *Morton K. Rothschild* for the United States. Reported below: 230 F. 2d 948.

No. 172. WALTER W. JOHNSON CO. *v.* RECONSTRUCTION FINANCE CORP. C. A. 9th Cir. Certiorari denied. *Edwin S. Pillsbury* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 230 F. 2d 479.

No. 173. GULF REFINING CO. *v.* BLACK WARRIOR TOWING CO. C. A. 5th Cir. Certiorari denied. *Harry McCall, Ernest A. Carrere, Jr.* and *Archie D. Gray* for petitioner. *Selim B. Lemle* for respondent. Reported below: 230 F. 2d 346.

No. 177. SCHWIMMER *v.* UNITED STATES; and

No. 178. SCHWIMMER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. *Harvey B. Cox, Morris A. Shenker* and *Bernard J. Mellman* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: 232 F. 2d 855, 866.

No. 179. KANSAS CITY SOUTHERN RAILWAY CO. *v.* JUSTIS. C. A. 5th Cir. Certiorari denied. *John M. Madison* for petitioner. *Leonard L. Lockard* for respondent. Reported below: 232 F. 2d 267.

No. 180. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Douglas W. McGregor* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 233 F. 2d 56.

No. 182. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* ALLENDORF, SPECIAL ADMINISTRATRIX. Supreme Court of Illinois. Certiorari denied. *Harlan L. Hackbert* for petitioner. *William H. DeParcq* for respondent. Reported below: 8 Ill. 2d 164, 133 N. E. 2d 288.

No. 185. CROVETTO ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *G. Wray Gill* for petitioners. Reported below: 229 La. 793, 86 So. 2d 907.

No. 189. MACNEIL *v.* GARGILL, TRUSTEE. C. A. 1st Cir. Certiorari denied. *Angus M. MacNeil* for petitioner. Reported below: 231 F. 2d 33.

No. 191. DIE & TOOLMAKERS LODGE 113, INTERNATIONAL ASSOCIATION OF MACHINISTS (AFL-CIO), *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Cer-

tiorari denied. *Plato E. Papps* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Theophil C. Kammholz, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 231 F. 2d 298.

No. 193. West et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Frank E. Flynn* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 232 F. 2d 694.

No. 196. Vernaci *v.* Louisiana;

No. 197. Habeney *v.* Louisiana; and

No. 198. Callia et al. *v.* Louisiana. Supreme Court of Louisiana. Certiorari denied. *Felicien Y. Lozes* for petitioners in Nos. 196 and 197. *Bentley G. Byrnes* and *George J. Gulotta* for petitioners in No. 198. Reported below: 229 La. 758, 796, 86 So. 2d 895, 909.

No. 200. A. L. Coupe Construction Co., Inc., et al. *v.* United States. Court of Claims. Certiorari denied. *Robert Sheriffs Moss, Ralph E. Becker* and *Bailey Walsh* for petitioners. *Oscar H. Davis,* then Acting Solicitor *General, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 134 Ct. Cl. 392, 139 F. Supp. 61.

No. 202. Jockey Club *v.* United States. Court of Claims. Certiorari denied. *John W. Burke, Jr.* and *H. C. McCollom* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice, A. F. Prescott* and *Melva M. Graney* for the United States. Reported below: 133 Ct. Cl. 787, 137 F. Supp. 419.

No. 203. Pezznola *v.* United States. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* and *Reuben Goodman* for petitioner. *Oscar H. Davis,* then Acting Solicitor

General, *Assistant Attorney General Rice* and *Dickinson Thatcher* for the United States. Reported below: 232 F. 2d 907.

No. 206. LEONARD *v.* BOWERS, TAX COMMISSIONER OF OHIO. Supreme Court of Ohio. Certiorari denied. *John H. Leonard, pro se. C. William O'Neill,* Attorney General of Ohio, and *William E. Herron,* Assistant Attorney General, for respondent. Reported below: 164 Ohio St. 578, 132 N. E. 2d 107.

No. 207. KLEIN, TRUSTEE IN BANKRUPTCY, *v.* BRANDT & BRANDT PRINTERS, INC. C. A. 2d Cir. Certiorari denied. *Joseph Calderon* for petitioner. *Chauncey H. Levy* and *Sydney Basil Levy* for respondent. Reported below: 232 F. 2d 151.

No. 209. CHICAGO GREAT WESTERN RAILWAY CO. *v.* SCOVEL. C. A. 8th Cir. Certiorari denied. *David L. Grannis* and *Bryce L. Hamilton* for petitioner. *A. Harold Peterson* for respondent. Reported below: 232 F. 2d 952.

No. 210. STONEKING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Daniel J. Leary* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Olney, Robert S. Erdahl* and *Joseph A. Barry* for the United States. Reported below: 232 F. 2d 385.

No. 212. KAUFMANN & BAER CO. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harry J. Rudick* and *Mason G. Kassel* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *Robert N. Anderson* for the United States. Reported below: 133 Ct. Cl. 510, 137 F. Supp. 725.

No. 213. MARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Olney, Robert S. Erdahl* and *Carl H. Imlay* for the United States. Reported below: 234 F. 2d 118.

No. 219. KIMBLE GLASS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *James M. Guiher* and *Fred E. Fuller* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Theophil C. Kammholz* and *Dominick L. Manoli* for respondent. Reported below: 230 F. 2d 484.

No. 221. KANSAS CITY LIFE INSURANCE CO. *v.* MOULDEN, FORMERLY SMITH. C. A. 10th Cir. Certiorari denied. *Lawrence A. Long* for petitioner. *Benjamin F. Stapleton, Jr.* for respondent. Reported below: 232 F. 2d 706.

No. 222. FISHER STUDIO, INC., ET AL. *v.* LOEW'S INCORPORATED ET AL. C. A. 2d Cir. Certiorari denied. *Arnold Malkan* for petitioners. *Bruce Bromley, Louis Phillips* and *John Logan O'Donnell* for respondents. Reported below: 232 F. 2d 199.

No. 223. PEBBLE SPRINGS DISTILLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Claude A. Roth* and *Benjamin M. Brodsky* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 231 F. 2d 288.

No. 225. COMMONWEALTH EX REL. HERNANDEZ *v.* PRICE, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Samuel J. Goldstein* for petitioner. Reported below: 385 Pa. 44, 122 A. 2d 206.

No. 227. Great Northern Railway Co. *v.* Lumber & Sawmill Workers, Local Union No. 2409, et al. C. A. 9th Cir. Certiorari denied. *Taylor B. Weir* and *Edwin C. Matthias* for petitioner. *James R. Browning* for respondents. Reported below: 232 F. 2d 358.

No. 228. Doby et al. *v.* Brown et al., Trustees, et al. C. A. 4th Cir. Certiorari denied. *Frank Thomas Miller, Jr.* for petitioners. *Staton P. Williams* for respondents. Reported below: 232 F. 2d 504.

No. 230. Omaha Public Power District et al. *v.* O'Malley, Collector of Internal Revenue. C. A. 8th Cir. Certiorari denied. *Reece A. Gardner* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *Robert N. Anderson* for respondent. Reported below: 232 F. 2d 805.

No. 232. Funkhouser et ux. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. Petitioners *pro se. Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice, A. F. Prescott* and *Walter Akerman, Jr.* for respondent. Reported below: 226 F. 2d 910, 231 F. 2d 657.

No. 234. Cooper *v.* United States. C. A. 8th Cir. Certiorari denied. *George C. Dyer* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *Dickinson Thatcher* for the United States. Reported below: 233 F. 2d 821.

No. 235. Blau et al. *v.* California et al. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Murray M. Chotiner* and *Russell E. Parsons* for petitioners. Reported below: 140 Cal. App. 2d 193, 294 P. 2d 1047.

No. 238. Department of Conservation and Development, Division of Parks, of Virginia, et al. *v.* Tate et al. C. A. 4th Cir. Certiorari denied. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Henry T. Wickham* for petitioners. *Victor J. Ashe, Oliver W. Hill, Thurgood Marshall* and *Spottswood W. Robinson, III* for respondents. Reported below: 231 F. 2d 615.

No. 241. Boudoin *v.* Lykes Bros. Steamship Co., Inc. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* and *Samuel C. Gainsburgh* for petitioner. *Andrew R. Martinez* and *William E. Wright* for respondent. Reported below: 231 F. 2d 446.

No. 244. Paley et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Loyd Wright* and *Dudley K. Wright* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 232 F. 2d 915.

No. 245. Lowe *v.* United States. C. A. 3d Cir. Certiorari denied. *Anthony A. Calandra* and *Max Mehler* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Olney* and *Robert S. Erdahl* for the United States. Reported below: 234 F. 2d 919.

No. 249. Goodman et al. *v.* United States. C. A. 4th Cir. Certiorari denied. *John W. Oast, Jr., Wilbur E. Dow, Jr., Barron F. Black, R. Arthur Jett* and *C. Lydon Harrell* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Doub, Samuel D. Slade* and *William W. Ross* for the United States. Reported below: 230 F. 2d 139.

No. 250. GOLDSTEIN BROTHERS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Sol Goodman* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 232 F. 2d 566.

No. 251. GENERAL PROTECTIVE COMMITTEE FOR HOLDERS OF OPTION WARRANTS OF UNITED CORPORATION ET AL. *v.* UNITED CORPORATION ET AL. C. A. 3d Cir. Certiorari denied. *Henry S. Drinker, Thomas Reath, John Mulford* and *M. Quinn Shaughnessy* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Thomas G. Meeker, Alexander Cohen* and *Ellwood L. Englander* for the Securities and Exchange Commission, and *Richard Joyce Smith, William S. Potter* and *William R. Sherwood* for the United Corporation, respondents. Reported below: 232 F. 2d 601.

No. 252. CARPENTERS' LOCAL UNION NO. 1028, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Charles H. Tuttle* and *Francis X. Ward* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Theophil C. Kammholz, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 232 F. 2d 454.

No. 253. WOLCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harold Leventhal* and *Leo R. Friedman* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice, Marvin E. Frankel* and *Joseph M. Howard* for the United States. Reported below: 233 F. 2d 748.

October 8, 1956. 352 U. S.

No. 254. LYKENS HOSIERY MILLS, INC., *v.* DWIGHT S. WILLIAMS CO., INC. C. A. 4th Cir. Certiorari denied. *Francis H. Fairley* and *Harold L. Lipton* for petitioner. *Paul B. Eaton* for respondent. Reported below: 233 F. 2d 398.

No. 255. BERNSTEIN ET AL. *v.* HERREN, COMMANDING GENERAL. C. A. 2d Cir. Certiorari denied. *Stanley Faulkner* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 234 F. 2d 434.

No. 258. AMERICAN WELL & PROSPECTING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *George G. Tyler* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 232 F. 2d 934.

No. 259. DWOSKIN, ALIAS DEE, *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *E. D. O'Sullivan, Sr.* for petitioner. Reported below: 161 Neb. 793, 74 N. W. 2d 847.

No. 264. HOOVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, and *Assistant Attorney General Rice* for the United States. Reported below: 233 F. 2d 870.

No. 270. GENTZEL ET AL. *v.* MANNING, MAXWELL & MOORE, INC. C. A. 2d Cir. Certiorari denied. *A. D. Caesar* for petitioners. *Stephen H. Philbin* and *Louis D. Fletcher* for respondent. Reported below: 230 F. 2d 341.

No. 271. CARLISLE, TRADING AS CARLISLE DRUGS, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Edward S. Hemphill* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 234 F. 2d 196.

No. 272. JOHNSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *David R. Shelton* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Meyer Rothwacks* for respondent. Reported below: 233 F. 2d 752.

No. 273. CHICAGO GREAT WESTERN RAILWAY CO. *v.* RAMSEY. Supreme Court of Minnesota. Certiorari denied. *David L. Grannis* and *Bryce L. Hamilton* for petitioner. *Carl L. Yaeger* for respondent. Reported below: 247 Minn. 217, 77 N. W. 2d 176.

No. 274. CHITTO ET AL. *v.* UNITED STATES ET AL. Court of Claims. Certiorari denied. *Horace S. Whitman* and *Robert C. Handwerk* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States, and *W. F. Semple* for the Choctaw Nation, respondents. Reported below: 133 Ct. Cl. 643, 138 F. Supp. 253.

No. 282. MAYER, ADMINISTRATRIX, *v.* CHASE NATIONAL BANK OF NEW YORK, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. *Edward F. Unger* for petitioner. *Jacob K. Javits,* Attorney General, *James O. Moore, Jr.,* Solicitor General, and *Ruth Kessler Toch* and *Daniel M. Cohen,* Assistant Attorneys General, for the State of New York, respondent. Reported below: 233 F. 2d 468.

No. 287. WERNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 233 F. 2d 52.

No. 288. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *J. H. Doughty* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 235 F. 2d 27.

No. 290. GRABLE ET UX., TRUSTEES, ET AL. *v.* BURNS ET AL. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 138 Cal. App. 2d 280, 291 P. 2d 969.

No. 291. CANNON *v.* NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION. Supreme Court of North Carolina. Certiorari denied. *W. P. Burkhimer* and *H. Edmund Rodgers* for petitioner. *R. Brookes Peters* for respondent.

No. 293. FITZGERALD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Milton H. Friedman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States. Reported below: 235 F. 2d 453.

No. 296. TILLMAN ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Donald C. Walker* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 232 F. 2d 511.

No. 298. ISBRANDTSEN CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur O.*

Louis for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Leavenworth Colby* and *Herman Marcuse* for the United States. Reported below: 233 F. 2d 184.

No. 299. STRATTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Warren G. Moore* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *B. Jenkins Middleton* for the United States. Reported below: 232 F. 2d 880.

No. 301. KING ET AL. *v.* CRON ET AL. Court of Civil Appeals of Texas, Fourth Supreme Judicial District. Certiorari denied. *Thomas H. Dent* for petitioners. *Charles I. Francis* for respondents. Reported below: 285 S. W. 2d 833.

No. 142. OWEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Charles Dana Snewind* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 231 F. 2d 831.

No. 194. MONTANA POWER CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *E. Roy Gilpin* and *Harry A. Poth, Jr.* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice, Lee A. Jackson* and *Walter Akerman, Jr.* for the United States. Reported below: 232 F. 2d 541.

No. 150. COLGATE-PALMOLIVE CO. ET AL. *v.* CARTER PRODUCTS, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should

be granted. *John T. Cahill* for petitioners. *George B. Finnegan, Jr., William L. Hanaway, William D. Denson* and *Morris Kirschstein* for respondents. Reported below: 230 F. 2d 855.

No. 208. HERZOG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Frederick Bernays Wiener* and *Spurgeon Avakian* for petitioner. *Solicitor General Rankin, Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Rice* and *Philip Elman* for the United States. Reported below: 226 F. 2d 561, 235 F. 2d 664.

No. 174. JOHNSON ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK would grant certiorari in this case to consider whether executive officers can impose penalties of the nature here without denying the constitutional guaranties of "due process of law and trial by jury" upheld by this Court in *Lipke* v. *Lederer,* 259 U. S. 557, 562. *Thurman Arnold* and *Milton V. Freeman* for petitioners. *Simon E. Sobeloff,* then Solicitor General, *Thomas G. Meeker, Arden L. Andresen* and *Ellwood L. Englander* for respondent. Reported below: 97 U. S. App. D. C. 364, 231 F. 2d 523.

No. 187. KAPLOW, EXECUTOR, *v.* REINFELD ET AL., DOING BUSINESS AS BRONFMAN INTERESTS AND BROWNE-VINTNERS CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Maurice Edelbaum* for petitioner. *Theodore Kiendl* and *William R. Meagher* for Reinfeld et al., and *Lowell Wadmond* and *Thomas Kiernan* for Bronfman et al., respondents. Reported below: 229 F. 2d 248.

No. 279. SOUTHLAND BROADCASTING CO. ET AL. *v.* TODD. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied without prejudice to petitioners' right to present their defenses in the District Court. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Pat Coon* for petitioners. *C. E. Bryson* for respondent. Reported below: 231 F. 2d 225.

No. 138. CARR ET AL. *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *H. G. B. King* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *James M. Glasgow,* Assistant Attorney General, for respondent.

No. 91. NEWS PRINTING CO., INC., *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles A. Horsky* and *Jerome Ackerman* for petitioner. *Simon E. Sobeloff,* then Solicitor General, *Theophil C. Kammholz, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 98 U. S. App. D. C. 14, 231 F. 2d 767.

No. 120. LIAKAS *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *L. E. Gwinn* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *James M. Glasgow,* Assistant Attorney General, for respondent. Reported below: 199 Tenn. 298, 549, 286 S. W. 2d 856, 288 S. W. 2d 430.

No. 152. DISTRICT OF COLUMBIA *v.* RADIO CORPORATION OF AMERICA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray, George C. Updegraff*

and *Henry E. Wixon* for petitioner. *Robert G. Zeller* and *John A. Gilmore* for respondent. Reported below: 98 U. S. App. D. C. 119, 232 F. 2d 376.

No. 157. MONDAKOTA GAS CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James R. Browning* and *Ellis Lyons* for petitioners. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell* and *Joseph B. Hobbs* for the Federal Power Commission, and *James A. Murray* and *Philip F. Herrick* for the Montana-Dakota Utilities Co., respondents. Reported below: 98 U. S. App. D. C. 101, 232 F. 2d 358.

No. 169. BLUE *v.* MCKAY, SECRETARY OF THE INTERIOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Welburn Mayock* and *Morris Lavine* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for respondent. Reported below: 98 U. S. App. D. C. 131, 232 F. 2d 688.

No. 181. GALLOWAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Rankin, Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 98 U. S. App. D. C. 288, 235 F. 2d 515.

No. 192. WINFIELD *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Reuben M. Ginsberg* for petitioner. Reported below: —— Tex. Cr. R. ——, 293 S. W. 2d 765.

No. 217. CARPENTERO, ALIAS LLANOS, *v.* HOGAN, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Hyman M. Greenstein* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent.

No. 220. MICHIGAN NATIONAL BANK *v.* GIDNEY, COMPTROLLER OF THE CURRENCY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John Lord O'Brian, James B. Alley* and *Daniel M. Gribbon* for petitioner. *Oscar H. Davis*, then Acting Solicitor General, *Assistant Attorney General Doub* and *Paul A. Sweeney* for respondent. Reported below: 99 U. S. App. D. C. 134, 237 F. 2d 762.

No. 277. DISTRICT OF COLUMBIA *v.* FADELEY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for petitioner. *Charles T. Akre* for respondents. Reported below: 98 U. S. App. D. C. 176, 233 F. 2d 667.

No. 278. AMOS *v.* PULLMAN COMPANY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William F. McDonnell* for petitioner. *John E. Powell, Arthur P. Drury* and *John M. Lynham* for respondent. Reported below: 98 U. S. App. D. C. 371, 236 F. 2d 666.

No. 283. FURMAN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Emanuel Harris* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 135 Ct. Cl. ——, 140 F. Supp. 781.

No. 104. UNITED STATES ET AL. *v.* CALIFORNIA EASTERN LINE, INC. 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. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Doub* and *Melvin Richter* for petitioners. *Robert E. Kline, Jr.* and *Louis J. Gusmano* for respondent. Reported below: 98 U. S. App. D. C. 1, 231 F. 2d 754.

No. 286. KREBIOZEN RESEARCH FOUNDATION ET AL. *v.* BEACON PRESS, INC. Supreme Judicial Court of Massachusetts. Certiorari denied. *Reginald Heber Smith* for petitioners. *Frank B. Frederick* for respondent. Reported below: 334 Mass. 86, 134 N. E. 2d 1.

No. 297. HYMAN-MICHAELS CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Max Siskind* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 135 Ct. Cl. 47, 140 F. Supp. 784.

No. 309. 2600 STATE DRUGS, INC., ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Bernard H. Sokol* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 235 F. 2d 913.

No. 83. CENTRAL OF GEORGIA RAILWAY CO. *v.* JONES ET AL.; and

No. 231. JONES ET AL. *v.* CENTRAL OF GEORGIA RAILWAY CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *John B. Miller* and *W. H. Sadler, Jr.* for the Central of Georgia Railway Co. *Joseph*

L. Rauh, Jr. and *John Silard* for Jones et al. *Al G. Rives* and *J. K. Jackson* for the Brotherhood of Railroad Trainmen, respondent in No. 231. Reported below: 229 F. 2d 648.

No. 2, Misc. FUHS *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle,* Attorney General of Illinois, for respondent.

No. 7, Misc. SHEARD *v.* MISSOURI. 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. 14, Misc. DAVIS *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. *Don Eastvold,* Attorney General of Washington, and *E. P. Donnelly, Michael R. Alfieri* and *Duane S. Radliff,* Assistant Attorneys General, for respondent.

No. 17, Misc. INSCO *v.* NASH, 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. 24, Misc. THOMPSON *v.* GRAHAM, WARDEN. Supreme Court of Utah. Certiorari denied. Petitioner *pro se.* *E. R. Callister,* Attorney General of Utah, and *Walter L. Budge,* Assistant Attorney General, for respondent.

No. 25, Misc. WHITE, REAL NAME BEING LUCAS, *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* for respondent. Reported below: 309 N. Y. 636, 132 N. E. 2d 880.

No. 27, Misc. GREGORY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 97 U. S. App. D. C. 305, 231 F. 2d 258.

No. 30, Misc. DYKE, ADMINISTRATRIX, *v.* DYKE ET AL. C. A. 6th Cir. Certiorari denied. *Jas. P. Brown* and *Hobart F. Atkins* for petitioner. *J. H. Doughty* for respondents. Reported below: 227 F. 2d 461.

No. 31, Misc. MAHURIN *v.* TOMLINSON, JUDGE. Supreme Court of Missouri. Certiorari denied.

No. 32, Misc. FARMER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 34, Misc. MARRON *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 39, Misc. WILLIAMS *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 40, Misc. KRYDER *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Walter B. Fincher* for petitioner. Reported below: 212 Ga. 272, 91 S. E. 2d 612.

No. 41, Misc. OREGON EX REL. SHERWOOD *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 42, Misc. IN RE KAUFFMAN. Supreme Court of Wisconsin. Certiorari denied. *Jack J. Schumacher* for petitioner. *Vernon W. Thomson*, Attorney General of Wisconsin, and *William A. Platz*, Assistant Attorney General, filed a brief in opposition to the petition.

No. 43, Misc. SPROUSE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 286 S. W. 2d 761.

No. 44, Misc. PREECE *v.* COINER, ACTING WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 47, Misc. JACKSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 49, Misc. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 233 F. 2d 317.

No. 50, Misc. STANLEY *v.* KANSAS ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 179 Kan. 613, 296 P. 2d 1088.

No. 51, Misc. FRENCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Charles L. Mayer* for petitioner. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 232 F. 2d 736.

No. 52, Misc. INGRAM *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 53, Misc. SHERMAN *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 54, Misc. JOHNSON *v.* ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 55, Misc. BAYLESS *v.* MISSOURI ET AL. Supreme Court of Missouri. Certiorari denied.

No. 58, Misc. POE *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 59, Misc. PENNSYLVANIA EX REL. DUGAN *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 62, Misc. IN RE KAQUATOSH. Supreme Court of Wisconsin. Certiorari denied. *Jack J. Schumacher* for petitioner. *Vernon W. Thomson,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, filed a brief in opposition to the petition.

No. 63, Misc. DAVIS *v.* GRAHAM, WARDEN. Supreme Court of Utah. Certiorari denied.

No. 64, Misc. MCCARTHY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 67, Misc. STRICKLAND *v.* W. HORACE WILLIAMS CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 230 F. 2d 793.

No. 70, Misc. JACKSON *v.* CLINE & CHAMBERS COAL CO. ET AL. Court of Appeals of Kentucky. Certiorari denied.

No. 72, Misc. MURPHY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department, and County Court of Kings County, New York. Certiorari denied.

No. 73, Misc. STRONG *v.* BLAKE ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Oscar H. Davis*, then Acting Solicitor General, *Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 231 F. 2d 447.

No. 74, Misc. CLARK *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 75, Misc. JONES *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 76, Misc. EGAN *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 77, Misc. EISELE *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 78, Misc. LANZETTA *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 79, Misc. SLAUGHTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 83, Misc. BRIMAGE *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 84, Misc. UNITED STATES EX REL. BAERCHUS *v.* MYERS, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 232 F. 2d 627.

No. 89, Misc. RICHARDSON *v.* RANDOLPH, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 90, Misc. RHYCE *v.* CUMMINGS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 233 F. 2d 190.

No. 95, Misc. MCDONALD *v.* MICHIGAN. Supreme Court of Michigan and Circuit Court of Newaygo County, Michigan. Certiorari denied.

No. 96, Misc. HANSON *v.* RAGEN, WARDEN. Circuit Court of Macon County, Illinois. Certiorari denied.

No. 98, Misc. MCDONALD, INFORMED AGAINST AS MAYFIELD, *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 99, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Robert C. Barnard* for respondent.

No. 104, Misc. STOCKWELL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 107, Misc. KRAMMER *v.* UNITED STATES. Court of Claims. Certiorari denied.

No. 109, Misc. MANFREDI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 1 N. Y. 2d 743, 135 N. E. 2d 46.

No. 110, Misc. STONE *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 111, Misc. WATKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 113, Misc. RHEIM *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 114, Misc. STAPLETON *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 116, Misc. DUNNE *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 122, Misc. RICHARDS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 126, Misc. SPEARS *v.* SHELL OIL CO. ET AL. C. A. 9th Cir. Certiorari denied.

No. 127, Misc. BRAHM *v.* BURNES ET AL. Supreme Court of Errors of Connecticut. Certiorari denied. Petitioner *pro se*. *Lorin W. Willis* for respondents.

No. 128, Misc. HICKS *v.* HOLLAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 235 F. 2d 183.

No. 129, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* ELLIOTT ET AL. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Oscar H. Davis*, Acting Solicitor General, and *A. F. Prescott* for the United States, *Charles C. Trabue, Jr.* for Dunn, Trustee, and *F. A. Berry* for the First American National Bank of Nashville, respondents. Reported below: 231 F. 2d 526.

No. 130, Misc. EVERETT *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 135, Misc. JOHNSON *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 139, Misc. KENNEY *v.* KILLIAN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Charles W. Gore* for respondent. Reported below: 232 F. 2d 288.

No. 140, Misc. KENNEY *v.* HATFIELD ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Charles W. Gore* for respondents. Reported below: 232 F. 2d 288.

No. 144, Misc. TISCIO *v.* MARTIN, WARDEN, ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 151, Misc. NIEMOTH *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 155, Misc. FLETCHER *v.* LAWS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Oscar H. Davis,* then Acting Solicitor General, for respondent.

No. 159, Misc. RADOWITZ *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied. Reported below: 21 N. J. 428, 122 A. 2d 512.

No. 160, Misc. SCHUMAN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 168, Misc. GUERIN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 169, Misc. HOLLAND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 170, Misc. BRANNON ET AL. *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 171, Misc. HULLOM *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 175, Misc. MULLEN *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 176, Misc. LEVY *v.* EVANS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Oscar H. Davis*, then Acting Solicitor General, for respondents.

No. 177, Misc. LARSEN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 179, Misc. BAUMGART *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 180, Misc. PISCITELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 231 F. 2d 443.

No. 19, Misc. GREEN *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Elizabeth Cassidy* for petitioner.

No. 68, Misc. CHAPIN *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *Samuel P. Sears* for petitioner. *George Fingold*, Attorney General of Massachusetts, for respondent. Reported below: 333 Mass. 610, 132 N. E. 2d 404.

No. 33, Misc. BOISVERT *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *John A. McNiff* for petitioner. Reported below: 333 Mass. 640, 133 N. E. 2d 226.

No. 26, Misc. JACKSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 287 S. W. 2d 663.

No. 82, Misc. MEDLEY *v.* WARDEN, MARYLAND HOUSE OF CORRECTION, ET AL. Court of Appeals of Maryland. Certiorari denied. Reported below: 210 Md. 649, 123 A. 2d 595.

No. 97, Misc. BINGHAM *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 290 S. W. 2d 915.

No. 100, Misc. FARLEY *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Jennings P. Felix* for petitioner. Reported below: 48 Wash. 2d 11, 290 P. 2d 987.

No. 115, Misc. MADDOX *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 46 Cal. 2d 301, 294 P. 2d 6.

No. 141, Misc. FORREST *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 210 Md. 660, 124 A. 2d 275.

No. 136, Misc. WASHINGTON ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 230 La. 181, 88 So. 2d 19.

No. 143, Misc. SNEED ET AL. *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 235 Ind. 198, 130 N. E. 2d 32.

No. 152, Misc. MILLS *v.* LEVINE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Emmett Leo Sheehan* and *Landon Gerald*

Dowdey for petitioner. *Samuel Z. Goldman* and *Joseph D. Bulman* for respondent. Reported below: 98 U. S. App. D. C. 137, 233 F. 2d 16.

No. 165, Misc. MOYLE *v.* TEETS, WARDEN. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 141 Cal. App. 2d 350, 296 P. 2d 907.

No. 133, Misc. LITTLE *v.* UTAH. Supreme Court of Utah. Certiorari denied. Reported below: 5 Utah 2d 42, 296 P. 2d 289.

No. 149, Misc. DOWNIE *v.* JACKSON, WARDEN. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 286 App. Div. 1131, 146 N. Y. S. 2d 456.

Rehearing Denied. (*See also No. 929, October Term, 1955, ante, p. 813.*)

No. 92, October Term, 1955. BLACK ET AL. *v.* CUTTER LABORATORIES, 351 U. S. 292;

No. 320, October Term, 1955. PARR *v.* UNITED STATES, 351 U. S. 513;

No. 373, October Term, 1955. COMMISSIONER OF INTERNAL REVENUE *v.* LOBUE, 351 U. S. 243;

No. 451, October Term, 1955. RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, ET AL. *v.* HANSON ET AL., 351 U. S. 225;

No. 489, October Term, 1955. DURLEY *v.* MAYO, CUSTODIAN, FLORIDA STATE PRISON, 351 U. S. 277;

No. 529, October Term, 1955. DE SYLVA *v.* BALLENTINE, GUARDIAN, 351 U. S. 570; and

No. 573, October Term, 1955. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* DEPARTMENT OF REVENUE OF ILLINOIS, 351 U. S. 950. Petitions for rehearing denied.

No. 643, October Term, 1955. JOHNSTON ET AL. *v.* UNITED STATES, 351 U. S. 215;

No. 704, October Term, 1955. UNITED STATES *v.* PATTESON, 351 U. S. 215;

No. 722, October Term, 1955. COFFMAN *v.* OHIO, 351 U. S. 923;

No. 773, October Term, 1955. JOLLY *v.* UNITED STATES, 351 U. S. 963;

No. 809, October Term, 1955. SAWYER *v.* BARCZAK, SHERIFF, 351 U. S. 966;

No. 820, October Term, 1955. ROBINSON, ADMINISTRATRIX, *v.* NORTHEASTERN STEAMSHIP CORP., 351 U. S. 937;

No. 851, October Term, 1955. HADZIMA *v.* UNITED STATES, 351 U. S. 953;

No. 854, October Term, 1955. LOTT *v.* UNITED STATES, 351 U. S. 953;

No. 860, October Term, 1955. IN RE MILLER, 351 U. S. 951;

No. 901, October Term, 1955. SCHER *v.* WEEKS, SECRETARY OF COMMERCE, 351 U. S. 973; and

No. 928, October Term, 1955. OFFUTT *v.* UNITED STATES, 351 U. S. 988. Petitions for rehearing denied.

No. 386, October Term, 1955. INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF AMERICA, AFL, LOCAL UNION NO. 294, *v.* WESTERN FOUNDRY CO., 350 U. S. 886. Motion for leave to file petition for rehearing denied.

No. 795, October Term, 1955. PURSSELLEY *v.* UNITED STATES, 351 U. S. 953. Rehearing denied.

No. 549, Misc., October Term, 1955. WILLIAMS *v.* UNITED STATES ET AL., 351 U. S. 986; and

No. 207, Misc., October Term, 1955. CHICK *v.* TEXAS, 351 U. S. 935. Petitions for rehearing denied.

No. 594, Misc., October Term, 1955. IN RE FLASPHALER, 351 U. S. 973;

No. 621, Misc., October Term, 1955. HOLLAND *v.* CAPITAL TRANSIT CO., 351 U. S. 955;

No. 696, Misc., October Term, 1955. BROWN ET AL. *v.* UNITED STATES, 351 U. S. 986;

No. 703, Misc., October Term, 1955. MCKINNEY *v.* CALIFORNIA, 351 U. S. 968;

No. 716, Misc., October Term, 1955. CARROLL *v.* NEW YORK, 351 U. S. 969;

No. 726, Misc., October Term, 1955. BINDER *v.* UNITED STATES, 351 U. S. 969;

No. 733, Misc., October Term, 1955. MAUPIN *v.* UNITED STATES, 351 U. S. 975;

No. 773, Misc., October Term, 1955. BYRD *v.* ILLINOIS, 351 U. S. 971;

No. 783, Misc., October Term, 1955. DINWIDDIE ET AL. *v.* BROWN ET AL., 351 U. S. 971;

No. 787, Misc., October Term, 1955. SORBER *v.* WIGGINS, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., 351 U. S. 975; and

No. 791, Misc., October Term, 1955. HOUSTON *v.* TEXAS, 351 U. S. 975. Petitions for rehearing denied.

No. 547, Misc., October Term, 1955. MAS ET AL. *v.* OWENS-ILLINOIS GLASS CO., 350 U. S. 1016; and

No. 564, Misc., October Term, 1955. BURNS *v.* UNITED STATES, 351 U. S. 910. Motions for leave to file second petitions for rehearing denied.

No. 745, Misc., October Term, 1955. MORNEAU *v.* UNITED STATES BOARD OF PAROLE, 351 U. S. 972; and

No. 755, Misc., October Term, 1955. HOCKADAY *v.* UNITED STATES, 351 U. S. 947. Motions for leave to file petitions for rehearing denied.

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OCTOBER 10, 1956.

Decision Per Curiam.

No. 20. MESAROSH, ALIAS NELSON, ET AL. *v.* UNITED STATES. Certiorari, 350 U. S. 922, to the United States Court of Appeals for the Third Circuit. [On a motion of the United States to remand the case to the District Court for a hearing on the credibility of a government witness.] Argued and decided October 10, 1956.*

Per Curiam: The motion of the Government to remand the case to the District Court is denied.

The judgment is vacated and the case is remanded to the District Court with instructions to grant the defendants a new trial.

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN dissent, believing the Government's motion to remand should be granted, and reserve the right to file an opinion.

Solicitor General Rankin argued in support of the Government's motion to remand. *Assistant Attorney General Tompkins* was with him on the motion. *Frank J. Donner* argued in opposition to the Government's motion and in support of petitioners' motion that the case be remanded to the District Court for a new trial. *Arthur Kinoy, Marshall Perlin* and *Hubert T. Delany* were with him on petitioners' motion and a supporting memorandum. Reported below: 223 F. 2d 449.

OCTOBER 15, 1956.

Decisions Per Curiam.

No. 1. THOMPSON *v.* COASTAL OIL CO. Certiorari, 350 U. S. 817, to the United States Court of Appeals for the Third Circuit. Argued January 24, 1956. Affirmed by an equally divided Court, January 30, 1956. 350 U. S. 956. Petition for rehearing granted and case restored to

*[For opinions in this case, see *ante*, p. 1 *et seq.*]

the docket for reargument, March 12, 1956. 350 U. S. 985. Reargued October 8, 1956. Decided October 15, 1956.

Per Curiam: The judgment of the United States Court of Appeals for the Third Circuit is reversed and the judgment of the United States District Court for the District of New Jersey is reinstated. MR. JUSTICE HARLAN concurs in the result, but would have preferred to remand the case to the Court of Appeals for determination as to whether the District Court properly found the vessel unseaworthy. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE MINTON dissent.

Charles A. Ellis argued the cause for petitioner on the original argument. With him on the brief was *Silas Blake Axtell*. *Silas Blake Axtell* reargued the cause for petitioner. With him on the brief was *Charles A. Ellis*. *Michael E. Hanrahan* argued and reargued the cause and filed briefs for respondent. Reported below: 221 F. 2d 559.

No. 311. A A A DENTAL LABORATORIES, INC., ET AL. *v.* ILLINOIS EX REL. CHICAGO DENTAL SOCIETY ET AL. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Werner W. Schroeder* for appellants. *Owen Rall* for appellees. Reported below: 8 Ill. 2d 330, 134 N. E. 2d 285.

No. 285. BAUMANN ET AL. *v.* SMRHA, CHIEF ENGINEER, DIVISION OF WATER RESOURCES, KANSAS STATE BOARD OF AGRICULTURE, ET AL. Appeal from the United States District Court for the District of Kansas. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE REED and MR. JUSTICE DOUGLAS would note probable jurisdiction. *Kenneth G. Speir* and

Herbert H. Sizemore for appellants. *John Anderson, Jr.*, Attorney General of Kansas, *Paul E. Wilson,* Assistant Attorney General, and *Warden L. Noe,* Special Assistant Attorney General, for Smrha, and *Robt. B. Morton* and *Paul J. Donaldson* for the City of Wichita, appellees. Reported below: 146 F. Supp. 617.

Miscellaneous Order.

No. 35. National Labor Relations Board *v.* Textile Workers Union of America, CIO, et al. The order entered April 2, 1956, 350 U. S. 1004, granting petition for writ of certiorari is vacated and the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is denied. *Solicitor General Rankin, Theophil C. Kammholz* and *Dominick L. Manoli* for petitioner. *Arthur J. Goldberg, David E. Feller* and *Benjamin Wyle* for the Textile Workers Union of America et al., respondents. Reported below: 97 U. S. App. D. C. 35, 227 F. 2d 409.

Probable Jurisdiction Noted.

No. 265. United States *v.* American Freightways Co. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Simon E. Sobeloff,* then Solicitor General, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Martin Werner* for appellee.

Certiorari Granted.

No. 304. United States *v.* Calamaro. C. A. 3d Cir. Certiorari granted. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Olney, Robert S. Erdahl* and *J. F. Bishop* for the United States. *Thomas D. McBride* for respondent. Reported below: 236 F. 2d 182.

No. 313. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* CHICAGO RIVER & INDIANA RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari granted. *William C. Wines* for petitioners. *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* for respondents. Reported below: See 229 F. 2d 926.

No. 316. SMITH, SPECIAL ADMINISTRATOR, *v.* SPERLING ET AL. C. A. 9th Cir. Certiorari granted. *Morris J. Pollack* for petitioner. *Eugene D. Williams* for Warner et al., and *Norman Altman* for United States Pictures, Inc., et al., respondents. Reported below: 237 F. 2d 317.

No. 84. CENTRAL OF GEORGIA RAILWAY CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN, LOCAL LODGE NO. 721, ET AL. C. A. 5th Cir. Certiorari granted. *John B. Miller* for petitioner. *Wayland K. Sullivan* for respondents. Reported below: 229 F. 2d 901.

No. 131. LAWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Milton Pollack* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 232 F. 2d 589.

No. 133. GIGLIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Moses Polakoff* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 232 F. 2d 589.

No. 149. SWANSON ET AL. *v.* TRAER ET AL. C. A. 7th Cir. Certiorari granted. *Avern B. Scolnik* and *Philip F. La Follette* for petitioners. *Kenneth F. Burgess, Thomas L. Marshall* and *Charles F. Short, Jr.* for Traer et al., and *Marland Gale* for Fitzgerald et al., respondents. Reported below: 230 F. 2d 228.

No. 183. GRUNEWALD *v.* UNITED STATES;

No. 184. HALPERIN *v.* UNITED STATES; and

No. 186. BOLICH *v.* UNITED STATES. The petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit are granted limiting the questions to those enumerated below:

(a) No. 183:

"1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

"2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the knowledge or the participation of the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

"3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

"4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be pre-

sumed to know that their activities would always be open to investigation—whether a subordinate conspiracy to conceal may be implied from the original crime.

"5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

"6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-incrimination on a long line of questions. The constitutional privilege thus infringed is that part of the Fifth Amendment which reads: '. . . nor shall be compelled in any criminal case to be a witness against himself . . . .' "

No. 184:

"1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

"2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he could not cross-examine or be represented

by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

"3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness on his own behalf?

"4. Does the rationale of *Raffel* v. *United States,* 271 U. S. 244, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

"5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education,* decided by this Court April 9, 1956 [350 U. S. 551], compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

"6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, 'An innocent man may honestly claim his answers may tend to incriminate him'?

"8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States,* 336 U. S. 440, and *Lutwak* v. *United States,* 344 U. S. 604?

"9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's decision in *Kotteakos* v. *United States,* 328 U. S. 750?"

No. 186:

"1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

"2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

"6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility."

A total of two hours will be allowed for argument on these questions.

(b) No. 184:

"7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

"11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?"

A total of one hour will be allowed for argument on these questions.

Edward J. Bennett and *Harold H. Corbin* for petitioner in No. 183. *Henry G. Singer* and *Harry Silver* for petitioner in No. 184. *Rudolph Stand* and *Frank Aranow* for petitioner in No. 186. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. Reported below: 233 F. 2d 556.

Certiorari Denied. (*See also No. 35, ante, p. 864.*)

No. 242. SEXTON *v.* BARRY ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Thomas O. Nevison* for Barry, respondent. Reported below: 233 F. 2d 220.

No. 248. HOOD ET AL. *v.* BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, SUMTER COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. *Augustus S. Merrimon* for petitioners. Reported below: 232 F. 2d 626.

No. 256. HENRY HANGER & DISPLAY FIXTURE CORP. ET AL. *v.* SEL-O-RAK CORPORATION. C. A. 5th Cir. Certiorari denied. *Milton M. Mokotoff* and *Murray A. Gordon* for petitioners. *Leonard Michaelson* and *Karl W. Flocks* for respondent. Reported below: 232 F. 2d 176.

No. 284. MARKUN ET AL. *v.* DULING ET AL., EXECUTORS; and

No. 336. DULING ET AL., EXECUTORS, *v.* MARKUN ET AL. C. A. 7th Cir. Certiorari denied. *Gustav H. Dongus* for Markun et al. *James M. Guiher* for Duling et al. Reported below: 231 F. 2d 833.

No. 263. WATWOOD *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl L. Shipley* for petitioner. *Vernon E. West, Chester H. Gray* and *Hubert B. Pair* for respondent.

No. 268. PACIFIC FAR EAST LINES, INC., *v.* WILLIAMS. C. A. 9th Cir. Certiorari denied. *John Hays* for petitioner. *Melvin M. Belli* for respondent. Reported below: 234 F. 2d 378.

No. 275. VANITY FAIR MILLS, INC., *v.* T. EATON CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied. *Harry A. Toulmin, Jr.* for petitioner. *Cornelius W. Wickersham* for respondents. Reported below: 234 F. 2d 633.

No. 281. NEWELL *v.* NEWELL ET AL. Supreme Court of Idaho. Certiorari denied. *Don J. McClenahan* for petitioner. *W. D. Eberle* for respondents. Reported below: 77 Idaho 355, 293 P. 2d 663.

No. 303. GRENGS *v.* TWENTIETH CENTURY FOX FILM CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Abram F. Myers* for petitioner. *J. Gilbert Hardgrove* for Twentieth Century Fox Film Corporation et al., *Maxwell H. Herriott* for Fox Wisconsin Theatres, Inc., et al., and *George L. Ruder* for Wausau Theatres Co., respondents. Reported below: 232 F. 2d 325.

No. 314. PRESTON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. *John W. Preston* and *Oliver O. Clark* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 232 F. 2d 77.

No. 312. MURRAY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *John Stanley Cooper* for petitioner. *Solicitor General Rankin, I. Henry Kutz* and *Meyer Rothwacks* for respondent. Reported below: 232 F. 2d 742.

No. 308. WALTON *v.* ARABIAN AMERICAN OIL CO. C. A. 2d Cir. Certiorari denied. *Thomas J. O'Neill* and *John V. Higgins* for petitioner. *J. Courtney McGroarty* for respondent. Reported below: 233 F. 2d 541.

No. 233. UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) ET AL. *v.* GOODMAN MANUFACTURING CO. ET AL. C. A. 7th Cir. Motion to use the certified record in case No. 775, October Term, 1955, as a part of the record in this case granted. Certiorari denied. *Basil R. Pollitt* for petitioners. *Oscar H. Davis,* then Acting Solicitor General, *Theophil C. Kammholz, Dominick L. Manoli* and *Samuel M. Singer* for the National Labor Relations Board, and *Charles Aaron* for the Goodman Manufacturing Co., respondents. Reported below: 234 F. 2d 775.

No. 267. UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA ET AL. *v.* GENERAL ELECTRIC CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Basil R. Pollitt, Frank Donner, Arthur Kinoy* and *Marshall Perlin* for petitioners. *Gerhard A. Gesell* and *Burke Marshall* for respondent. Reported below: 97 U. S. App. D. C. 306, 231 F. 2d 259.

No. 237. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James F. Reilly* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney,*

Beatrice Rosenberg and *Isabelle Cappello* for the United States. Reported below: 98 U. S. App. D. C. 228, 234 F. 2d 49.

No. 246. MONROE ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Myron G. Ehrlich* for Monroe et al., *John H. Burnett* and *George E. C. Hayes* for Simkins, *Joseph Sitnick* for Taylor, and *Curtis P. Mitchell* and *DeLong Harris* for Anderson et al., petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 98 U. S. App. D. C. 228, 234 F. 2d 49.

No. 322. SHIBLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin, Sam Rosenwein* and *Daniel G. Marshall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 236 F. 2d 238.

No. 243. SHIBLEY *v.* UNITED STATES. C. A. 9th Cir. The motion for leave to file brief of William B. Enright et al., as *amici curiae,* is denied. Certiorari denied. *Morris Lavine, Daniel G. Marshall, A. L. Wirin* and *Sam Rosenwein* for petitioner. *Oscar H. Davis,* then Acting Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 237 F. 2d 327.

No. 315. THOMAS *v.* THOMAS. Kansas City Court of Appeals, State of Missouri. Certiorari denied. *Hayden C. Covington* for petitioner. Reported below: 288 S. W. 2d 689.

OCTOBER 22, 1956.

Decisions Per Curiam.

No. 339. GIBSON *v.* PHILLIPS PETROLEUM CO. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the judgment of the District Court is reinstated. MR. JUSTICE REED and MR. JUSTICE BURTON would deny certiorari. MR. JUSTICE FRANKFURTER has filed a dissent in which MR. JUSTICE HARLAN joins. *Henry D. Akin, Jr.* for petitioner. *Rayburn L. Foster, Harry D. Turner* and *William L. Kerr* for respondent. Reported below: 232 F. 2d 13.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, dissenting.

This is an ordinary suit for damages for injuries claimed to have been caused by defendant's fault. Doubtless hundreds upon hundreds of such suits are constantly brought in the state courts of Texas. This suit is brought in a federal court because the plaintiff is a citizen of Texas and the defendant corporation is, in the eyes of the law, a citizen of Delaware. The federal court in a case like this is deemed to be a state court of Texas,* and the law by which the plaintiff's rights are to be determined is exclusively Texas law. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. No federal law, statute or decisional, is remotely involved. These diversity litigations place, it is becoming increasingly recognized, an undue burden upon the federal courts in their ability to dispose expeditiously of other litigation which can be properly brought only in

* ". . . a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . . ." *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108.

the federal courts. Very often litigants in the position of the plaintiff bring a suit involving merely local law in a federal court because for one reason or another they expect a more favorable outcome than if the suit were tried in the local courts. See *Lumbermen's Mutual Casualty Co.* v. *Elbert,* 348 U. S. 48, 53 (concurring opinion).

This case was tried before a jury, which found for the plaintiff. Defendant appealed to the Court of Appeals for the Fifth Circuit. While the particular judges who heard the case are not from Texas, they are, however, constantly charged in such cases as this with the task of being conversant with, and applying, Texas law. The Court of Appeals held that, as a matter of Texas law, the District Court committed error in not directing a verdict for the defendant. It reversed the judgment of the District Court and rendered judgment for the defendant. Plaintiff then sought a writ of certiorari to review the judgment of the Court of Appeals.

This Court cannot determine whether the Court of Appeals was right or wrong in its judgment without determining whether on this record the case should or should not have been left to the jury. That can only be decided on the basis of an investigation of Texas law. This Court is not a court to determine the local law of the forty-eight States. Error on the part of a Court of Appeals in applying the local law of any one of the forty-eight States involves injustice to a particular litigant, whether it is a personal injury case or any other case. If the claim of injustice in a particular case arising solely out of diversity jurisdiction justifies review by this Court, it justifies it in every case in which on a surface view of the record this Court feels a Court of Appeals may have been wrong in its ascertainment of local law.

In taking one of these cases, encouragement doubtless is given to seek this Court's review in other like cases.

But Congress sought to relieve this Court of the burden of such cases when it established the Courts of Appeals in 1891. This Court has respected the purpose of that enactment by stating again and again that it does not sit to correct errors, even a plain error, in a particular case, especially one involving a local controversy of this sort. The Supreme Court of the United States is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise inevitably and in increasing measure in a federal system like ours. These questions are more than sufficient in volume and difficulty to engage all the energy and thought possessed by the Court; it should not be diverted by the correction of errors in local controversies turning on particular circumstances.

The Court's consideration of a case like this and the encouragement given for similar demands upon the Court are, in my deep conviction, so inimical to the effective discharge of the true functions of this Court that I cannot abstain from expressing my dissent from the Court's entertainment of the petition for certiorari.

No. 273, Misc. WILLIAMS *v.* UNITED STATES. Appeal from the United States District Court for the District of Alaska. *Per Curiam:* The appeal is dismissed.

Miscellaneous Orders.

No. 40. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Certiorari, 351 U. S. 905, to the United States Court of Appeals for the Sixth Circuit. The motion of the Solicitor General to postpone argument is denied. *Solicitor General Rankin* and *Theophil C. Kammholz* for the National Labor Relations Board, movant. *Harold I. Cammer* for petitioner.

No. 56. PENNSYLVANIA RAILROAD CO. ET AL. *v.* RYCHLIK. Certiorari, 351 U. S. 930, to the United States Court of Appeals for the Second Circuit. The motions for leave to file briefs of the Brotherhood of Locomotive Engineers and Railway Labor Executives' Association, as *amici curiae,* are granted. *Clarence E. Weisell* and *Harold N. McLaughlin* for the Brotherhood of Locomotive Engineers, and *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *Richard R. Lyman* for the Railway Labor Executives' Association.

No. ——. ROLLINS *v.* MICHIGAN. The motion to stay execution of sentence and for bail is denied.

Certiorari Granted. (*See also No. 339, ante, p. 874.*)

No. 321. THOMSON *v.* TEXAS & PACIFIC RAILWAY CO. C. A. 5th Cir. Certiorari granted. *Dallas Scarborough* and *Davis Scarborough* for petitioner. *John B. Pope* for respondent. Reported below: 232 F. 2d 313.

No. 359. BLACK, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX DIVISION, INTERNAL REVENUE SERVICE, *v.* MAGNOLIA LIQUOR CO., INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for petitioner. *Moise S. Steeg, Jr.* for respondent. Reported below: 231 F. 2d 941.

No. 173, Misc. MALLORY *v.* UNITED STATES. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit are granted. *Joseph C. Waddy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 98 U. S. App. D. C. 406, 236 F. 2d 701.

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Certiorari Denied.

No. 292. RIPPY, PRESIDENT, BOARD OF TRUSTEES, DALLAS INDEPENDENT SCHOOL DISTRICT, DALLAS COUNTY, TEXAS, ET AL. *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. *John D. McCall* for petitioners. Reported below: 233 F. 2d 796.

No. 318. ESTATE OF SWEET, TRACY-COLLINS TRUST CO., ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Maurice J. Hindin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 234 F. 2d 401.

No. 319. ESTATE OF DUPONT, WILMINGTON TRUST CO., EXECUTOR, *v.* COMMISSIONNER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *George S. Leisure* and *Carberry O'Shea* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky* and *Grant W. Wiprud* for respondent. Reported below: 233 F. 2d 210.

No. 323. HAMMER ET AL. *v.* SANDERS ET AL., DOING BUSINESS AS SANDERS-FYE DRILLING CO. Supreme Court of Illinois. Certiorari denied. *Leon M. Despres* for petitioners. *Charles F. Short, Jr.* for respondents. Reported below: 8 Ill. 2d 414, 134 N. E. 2d 509.

No. 325. BOND ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Ellsworth T. Simpson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *L. W. Post* for respondent. Reported below: 232 F. 2d 822.

No. 328. MEIER & POHLMANN FURNITURE CO. *v.* GIBBONS ET AL. C. A. 8th Cir. Certiorari denied. *Walter R. Mayne* for petitioner. *Harry Craig* for Gibbons et al., *Gregory M. Rebman* for Anderson Motor Service, Inc., et al., and *William R. Gentry* for Railway Express Agency, Inc., respondents. Reported below: 233 F. 2d 296.

No. 329. DISTRICT COURT OF CREEK COUNTY ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Supreme Court of Oklahoma. Certiorari denied. *William H. De Parcq* and *Pat Malloy* for petitioners. *R. M. Rainey* for respondent. Reported below: 298 P. 2d 427.

No. 330. CHURCH ET AL. *v.* INGERSOLL ET UX. C. A. 10th Cir. Certiorari denied. *Gerald B. Klein* for petitioners. *Truman B. Rucker* for respondents. Reported below: 234 F. 2d 176.

No. 333. SALES AFFILIATES, INC., *v.* HELENE CURTIS INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *George B. Finnegan, Jr.* and *William D. Denson* for petitioner. *Theodore S. Kenyon* for Helene Curtis Industries, Inc., et al., *Henry R. Ashton* for the Gillette Company, and *Clarence Fried* for Skillern & Sons, Inc., et al., respondents. Reported below: 233 F. 2d 148.

No. 335. WHETSTONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin* for the United States.

No. 338. BARRIENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John Peace* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 235 F. 2d 116.

No. 341. HIRSCH LUMBER CO. *v.* WEYERHAEUSER STEAMSHIP CO. C. A. 2d Cir. Certiorari denied. *Isidor Enselman* for petitioner. *William G. Symmers* and *Frederick Fish* for respondent. Reported below: 233 F. 2d 791.

No. 344. COMPANIA DE VAPORES INSCO, S. A., ET AL. *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. *Walter Carroll* for petitioners. *Murray F. Cleveland* and *Kalford K. Miazza* for respondents. Reported below: 232 F. 2d 657.

No. 345. SILVER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irving Spieler, Samuel Mezansky* and *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 235 F. 2d 375.

No. 349. HANF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *J. M. George* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 235 F. 2d 710.

No. 6, Misc. MCGRATH ET UX. *v.* DELEAR, TRUSTEE. C. A. 3d Cir. Certiorari denied. Petitioners *pro se*. *Daniel F. DeLear, pro se*. Reported below: 226 F. 2d 959.

No. 112, Misc. GRANDSINGER *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Eugene D. O'Sullivan, Sr., James A. Lake, Sr., Arthur Lazarus, Jr.* and *Richard Schifter* for petitioner. *Clarence S. Beck*, Attorney General of Nebraska, and *Robert A. Nelson*, Assistant Attorney General, for respondent. Reported below: 161 Neb. 419, 73 N. W. 2d 632.

No. 65, Misc. WILLIAMS *v.* B. & I. COURT REPORTERS ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States, respondent.

No. 94, Misc. WILLIAMS *v.* PETERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 233 F. 2d 618.

No. 15, Misc. SNELL *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *Jos. P. Manners,* Special Assistant Attorney General, for respondent.

No. 134, Misc. WILLIAMS *v.* STAFFORD ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States, respondent.

No. 148, Misc. DAY *v.* DAVIS, COMMANDANT. C. A. 10th Cir. Certiorari denied. *Thomas Homer Davis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 235 F. 2d 379.

No. 189, Misc. DEBERRY *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *Jo M. Ferguson,* Attorney General of Kentucky, and *Zeb A. Stewart,* Assistant Attorney General, for respondent. Reported below: 289 S. W. 2d 495.

No. 190, Misc. SHECKLES *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *Jo M. Ferguson,* Attorney General of Kentucky, and *William F. Simpson,* Assistant Attorney General, for respondent. Reported below: 289 S. W. 2d 515.

No. 269, Misc. BOWMAN *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *Jo M. Ferguson,* Attorney General of Kentucky, and *Zeb A. Stewart,* Assistant Attorney General, for respondent. Reported below: 290 S. W. 2d 814.

No. 320. LUFF ET UX. *v.* LUFF ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard L. Merrick* for petitioners. *R. Sidney Johnson* and *J. Richard Earle* for respondents. Reported below: 98 U. S. App. D. C. 211, 233 F. 2d 702.

No. 327. STICKEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Morris M. Schnitzer, Robert Roy Dann* and *R. Lewis Townsend* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 235 F. 2d 279.

No. 337. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 236 F. 2d 13.

No. 348. GRIMES *v.* MARYLAND STATE FAIR, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ford E. Young, Jr.* for petitioner. *Charles E. Pledger, Jr., Randolph C. Richardson* and *Max Sokol* for respondent. Reported below: 97 U. S. App. D. C. 275, 230 F. 2d 825.

No. 360. CAPITAL TRANSIT CO., INC., *v.* SIMPSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George D. Horning, Jr.* for petitioner. *David G. Bress* and *Alvin L. Newmyer, Jr.* for respondents. Reported below: 98 U. S. App. D. C. 298, 235 F. 2d 525.

No. 317. CUTTING ET AL. *v.* HIGLEY, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL. The motion for leave to file brief of Queens County American Legion, Department of New York, as *amicus curiae,* is denied. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Claude L. Dawson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *Lester S. Jayson* for respondents. Reported below: 98 U. S. App. D. C. 288, 235 F. 2d 515.

OCTOBER 23, 1956.

Case Dismissed Under Rule 60.

No. 332. DICTOGRAPH PRODUCTS CO., INC., *v.* SONOTONE CORPORATION ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Louis P. Haffer* for petitioner. *John E. Fetzer* was on the stipulation for Greibach, respondent. With him on a brief in opposition to the petition was *Charles H. Tuttle* for the Sonotone Corporation, respondent. Reported below: 230 F. 2d 131, 231 F. 2d 867.

NOVEMBER 5, 1956.

Decisions Per Curiam.

No. 326. NUNN *v.* CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Morris Lavine* for appellant. Reported below: 46 Cal. 2d 460, 296 P. 2d 813.

No. 340. OHIO EX REL. CHURCH ET AL. *v.* BROWN, SECRETARY OF STATE OF OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Lewis W. Combest* and *Harry W. Day* for appellants. *C. William O'Neill,* Attorney General of Ohio, and *Ralph Klapp* and *Neva H. Wertz,* Assistant Attorneys General, for appellee. Reported below: 165 Ohio St. 31, 135 N. E. 2d 333.

No. 365. INTERSTATE COMMERCE COMMISSION *v.* HOME TRANSFER & STORAGE CO., INC. Appeal from the United States District Court for the Western District of Washington. *Per Curiam:* The judgment is affirmed. *Robert W. Ginnane* and *Leo H. Pou* for appellant. Briefs of *amici curiae* in support of appellant were filed by *Charles P. Reynolds* and *Carl Helmetag, Jr.* for the Akron, Canton & Youngstown Railroad Co. et al., and *Peter T. Beardsley* for the American Trucking Associations, Inc., et al. Reported below: 141 F. Supp. 599.

No. 372. POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. *v.* C. H. ELLE CONSTRUCTION CO. ET AL. Appeal from the Supreme Court of Idaho. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted. The judgment of the Supreme Court of Idaho is reversed. *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468. *J. Albert Woll, Thomas E. Harris* and *Clarence M. Beck* for appellants. *L. E. Haight* for appellees. Reported below: 77 Idaho 514, 297 P. 2d 519.

No. 300. COZART ET AL. *v.* WILSON, SECRETARY OF DEFENSE, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Colum-

bia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause is moot. *United States* v. *Munsingwear, Inc.,* 340 U. S. 36. *Emanuel Redfield* and *Murray Sprung* for petitioners. *Solicitor General Rankin* for respondents. Reported below: 98 U. S. App. D. C. 437, 236 F. 2d 732.

No. 221, Misc. THOMPSON *v.* MICHIGAN CORRECTIONS COMMISSION ET AL. Appeal from the Supreme Court OF MICHIGAN. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

No. 222, Misc. PUGH *v.* CALIFORNIA. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Morris Lavine* for appellant. Reported below: 137 Cal. App. 2d 226, 289 P. 2d 826.

Miscellaneous Orders.

No. 11, Original. UNITED STATES *v.* LOUISIANA. The motion by the Solicitor General to dismiss as moot the motion by Anderson-Prichard Oil Corporation for extraordinary relief and for amendment or interpretation of the decree of this Court is granted. The motion by Anderson-Prichard Oil Corporation for extraordinary relief and for amendment or interpretation of the decree of this Court is dismissed. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Solicitor General Rankin* for the United States. *Joseph V. Ferguson, II* for the Anderson-Prichard Oil Corporation, movant. (For decree, see 351 U. S. 978.)

No. 13, Original. MISSOURI ET AL. *v.* DAVEY ET AL. The motion for leave to file bill of complaint is denied. *Illinois* v. *Wisconsin,* 333 U. S. 879; *Louisiana* v. *Cummins,* 314 U. S. 580; and *Massachusetts* v. *Missouri,* 308 U. S. 1, 18–20. *John M. Dalton,* Attorney General of Missouri, and *Robert L. Hyder* for plaintiffs. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for Streeper, and *Schaefer O'Neill* for Struif et al., defendants.

No. 345, October Term, 1955. STERLING *v.* LOCAL 438, LIBERTY ASSOCIATION OF STEAM & POWER PIPE FITTERS & HELPERS ASSOCIATION, ET AL. The motion for leave to file petition for writ of mandamus is denied. *Louis R. Milio* for petitioner.

No. 132. PRINCE *v.* UNITED STATES. Certiorari, 351 U. S. 962, to the United States Court of Appeals for the Fifth Circuit. The motion of petitioner to enlarge the record is granted.

No. 751, Misc., October Term, 1955. MCNALLY *v.* TEETS, WARDEN. The motion for leave to file petition for rehearing is granted. The order of June 4, 1956, denying certiorari, 351 U. S. 972, is vacated. Treating the papers filed as a petition for certiorari to the Supreme Court of California in its case No. 5884, decided April 18, 1956, as well as in its case No. 5783, decided February 28, 1956, certiorari is denied in both cases. [No. 5783 reported below, 46 Cal. 2d 307, 293 P. 2d 777. No. 5884 unreported.]

No. 305. BRENNAN CONSTRUCTION CO., INC., *v.* COLORADO SPRINGS CO. ET AL. Motion to defer consideration of petition for writ of certiorari denied. Petition for writ of certiorari to the Supreme Court of Colorado de-

nied. *John H. Gately* for petitioner. *David W. Richmond* and *Robert N. Miller* for respondents. *James Quine* for Abrahamson et al., respondents. Reported below: 133 Colo. 301, 295 P. 2d 686.

No. 199, Misc. COPLEY *v.* SWEET ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. Motion for leave to file petition for writ of mandamus also denied. Petitioner *pro se*. *Richard H. Paulson* for respondents. Reported below: 234 F. 2d 660.

No. 188, Misc. MCNELIS *v.* PENNSYLVANIA BOARD OF PAROLE ET AL.;

No. 196, Misc. MORTON *v.* BROWNELL, ATTORNEY GENERAL;

No. 203, Misc. HICKOX *v.* RAGEN, WARDEN, ET AL.;

No. 226, Misc. PRINCE *v.* VIRGINIA;

No. 227, Misc. FREY *v.* MAILLER, CHAIRMAN, NEW YORK STATE PAROLE BOARD, ET AL.;

No. 236, Misc. CURTIS *v.* BUCHKOE, WARDEN;

No. 237, Misc. NEWSTEAD *v.* NASH, WARDEN; and

No. 239, Misc. MEDLIN *v.* CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 192, Misc. WHITE *v.* HAFFRON, SUPERINTENDENT, ELGIN STATE HOSPITAL, ELGIN, ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

No. 205, Misc. FARRIS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION; and

No. 210, Misc. MCNELIS *v.* PENNSYLVANIA BOARD OF PAROLE ET AL. Motions for leave to file petitions for writs of certiorari denied.

Probable Jurisdiction Noted.

No. 362. PUBLIC SERVICE COMMISSION OF UTAH ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Utah. Probable jurisdiction noted. *Calvin L. Rampton* for appellants. *E. R. Callister,* Attorney General of Utah, and *Raymond W. Gee,* Assistant Attorney General, for the Public Service Commission of Utah, appellant. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, *Elmer B. Collins, Bryan P. Leverich, Ernest P. Porter* and *Wood R. Worsley* for the Denver & Rio Grande Western Railroad Co. et al., appellees. Reported below: 146 F. Supp. 803.

Certiorari Granted. (*See also Nos. 300 and 372, supra.*)

No. 346. BLACK ET AL. *v.* AMEN ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. A question presented is whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervener or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship."

MR. JUSTICE REED took no part in the consideration or decision of this application.

Dean Acheson, Stanley L. Temko, Scott W. Lucas and *Malcolm Miller* for petitioners. *Douglas F. Smith* for Amen et al., *Oliver H. Hughes* for Sherrard et al., and *D. Arthur Walker* for Walker et al., respondents. Reported below: 234 F. 2d 12.

No. 370. Baltimore & Ohio Railway Co. *v.* Jackson. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Stephen Ailes* for petitioner. *Milford J. Meyer* for respondent. *Robert W. Ginnane* and *C. H. Johns* filed a brief for the Interstate Commerce Commission, as *amicus curiae,* in support of the petition for writ of certiorari. Reported below: 98 U. S. App. D. C. 169, 233 F. 2d 660.

No. 204. Benz et al. *v.* Compania Naviera Hidalgo, S. A.. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to file a brief, as *amicus curiae,* expressing the views of the National Labor Relations Board. *Kneland C. Tanner* for petitioners. *Lofton L. Tatum* for respondent. Reported below: 233 F. 2d 62.

No. 371. Lasky et vir *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari granted. *Robert Ash* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *I. Henry Kutz* for respondent. Reported below: 235 F. 2d 97.

No. 373. Lester *v.* United States et al. C. A. 2d Cir. Certiorari granted. *Edward J. Behrens* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 234 F. 2d 625.

No. 534. Allen *v.* Merrell, County Clerk, Duchesne County, Utah. The Attorney General of the State of Utah having consented to and urged the granting of the petition for certiorari, the petition for writ of certiorari to the Supreme Court of Utah is granted. *Robert W. Barker, John S. Boyden* and *John W. Cragun* for petitioner. *E. R. Callister,* Attorney General of Utah, for respondent. *Solicitor General Rankin* filed a

memorandum for the United States, as *amicus curiae,* urging that the petition for a writ of certiorari be granted.

Certiorari Denied. (See also Nos. 305 and 326, Misc. Nos. 199, 205, 210 and 221, and Misc. No. 751, October Term, 1955, supra.)

No. 334. Compania Naviera Hidalgo, S. A., *v.* Benz et al. C. A. 9th Cir. Certiorari denied. *Lofton L. Tatum* for petitioner. Reported below: 233 F. 2d 62.

No. 350. Cain *v.* United States. Court of Claims. Certiorari denied. *Albert B. Arbaugh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *L. W. Post* for the United States. Reported below: 133 Ct. Cl. 188, 135 F. Supp. 516.

No. 354. Michigan Corporation and Securities Commission et al. *v.* Panhandle Eastern Pipe Line Co. Supreme Court of Michigan. Certiorari denied. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for petitioners. *Paul F. Mickey, H. I. Armstrong, Jr.* and *Russell Voertman* for respondent. Reported below: 346 Mich. 50, 77 N. W. 2d 249.

No. 355. Melrose Realty Co., Inc., *v.* Loew's Incorporated et al. C. A. 3d Cir. Certiorari denied. *Lewis M. Stevens* for petitioner. *Wm. A. Schnader* and *Bernard G. Segal* for Loew's Incorporated et al., *Louis J. Goffman* for Warner Bros. Pictures Distributing Corporation et al., and *Albert M. Cohen* for Glenside Theatre Corporation, respondents. Reported below: 234 F. 2d 518.

No. 358. Cold Metal Process Co. et al. *v.* Republic Steel Corp. C. A. 6th Cir. Certiorari denied. *William H. Webb, Howard F. Burns* and *Clarence B. Zewadski* for petitioners. *Drury W. Cooper* for respondent. Reported below: 233 F. 2d 828.

No. 361. Lupo *v.* Norfolk & Western Railway Co. Court of Appeals for Franklin County, Ohio. Certiorari denied. *C. Richard Grieser* for petitioner. *John D. Holschuh* and *Robert L. Barton* for respondent.

No. 367. Hineline *v.* United States. Court of Claims. Certiorari denied. *John Price Wetherill* and *Henry B. Kellog* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 134 Ct. Cl. 370, 138 F. Supp. 866.

No. 368. Farley *v.* United States. Court of Claims. Certiorari denied. *Edwin J. McDermott* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *Joseph Langbart* for the United States. Reported below: 134 Ct. Cl. 672, 139 F. Supp. 757.

No. 369. Panhandle Eastern Pipe Line Co. *v.* Federal Power Commission et al. C. A. 3d Cir. Certiorari denied. *G. R. Redding* and *William E. Miller* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Bernard Cedarbaum, William W. Gatchell* and *Robert L. Russell* for the Federal Power Commission, and *Charles V. Shannon, Arthur R. Seder, Jr., Donald R. Richberg* and *Oscar L. Chapman* for the Michigan Consolidated Gas Co., respondents. Reported below: 232 F. 2d 467.

No. 375. STONE *v.* STONE. Court of Appeals of New York. Certiorari denied. *Edward H. Kavinoky* for petitioner. *William L. Marcy* for respondent. Reported below: 1 N. Y. 2d 785, 135 N. E. 2d 590.

No. 376. KINSEY ET AL. *v.* KNAPP ET AL., VOTING TRUSTEES. C. A. 6th Cir. Certiorari denied. *George E. Brand* for petitioners. *Richard Ford* for Knapp et al., Voting Trustees, respondents. Reported below: 232 F. 2d 458, 235 F. 2d 129.

No. 379. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Francis J. O'Hara, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *William W. Ross* for the United States. Reported below: 234 F. 2d 861.

No. 383. PREPO CORPORATION *v.* PRESSURE CAN CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Elwin A. Andrus* for petitioner. *John T. Love* for the Pressure Can Corporation et al., and *Will Freeman* for the Knapp-Monarch Company, respondents. Reported below: 234 F. 2d 700.

No. 384. OHIO EX REL. FOCKE ET AL. *v.* PRICE, CHIEF, DAYTON POLICE DEPARTMENT. Supreme Court of Ohio. Certiorari denied. *Joseph W. Sharts* for petitioners. Respondent *pro se*. Reported below: 165 Ohio St. 340, 135 N. E. 2d 407.

No. 374. WISCONSIN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Vernon W. Thomson,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *Gordon Samuelsen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 134 Ct. Cl. 478, 139 F. Supp. 938.

No. 380. KENNY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Murdaugh Stuart Madden* and *C. William Tayler* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 134 Ct. Cl. 442.

No. 386. DOYLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 234 F. 2d 788.

No. 390. FRAZIER ET AL., RECEIVERS, *v.* ASH. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* for petitioners. *Miller Walton* for respondent. Reported below: 234 F. 2d 320.

No. 391. LEISER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Paul E. Troy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 234 F. 2d 648.

No. 294. TALIAFERRO *v.* COAKLEY, SUPERIOR COURT JUDGE PRO TEM., ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Petitioner *pro se*. *Francis W. Collins* for Coakley, Superior Court Judge Pro Tem., respondent.

No. 364. FALSTAFF BREWING CORP. ET AL. *v.* LINES. Motions for leave to file briefs of National Association of Credit Men, Rocky Mountain Association of Credit Men, Credit Managers Association of Southern Califor-

nia, and the National Paint, Varnish and Lacquer Association, Inc., as *amici curiae,* denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Arthur P. Shapro* for petitioners. *Max H. Margolis* for respondent. Reported below: 233 F. 2d 927.

No. 395. GRUBBS *v.* FARNSLEY ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Marshall P. Eldred, Blakey Helm* and *J. Dudley Inman* for Farnsley et al., and *Wilson W. Wyatt* for Bingham et al., respondents. Reported below: 234 F. 2d 666.

No. 388. BATTLE *v.* ESTATE OF GALLAGHER ET AL. Court of Appeals of Maryland. Certiorari denied. *H. Richard Smalkin* and *Max R. Israelson* for petitioner. *Paul F. Due* for respondents. Reported below: 209 Md. 592, 122 A. 2d 93.

No. 394. KENNY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Isadore Glauberman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 236 F. 2d 128.

No. 381. BAKER ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Francis M. Shea* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 134 Ct. Cl. 200.

No. 324. TAYLOR *v.* CITY OF PINE BLUFF. Supreme Court of Arkansas. Certiorari denied. *Kenneth Coffelt* for petitioner. *Jay W. Dickey* for respondent. Reported below: 226 Ark. 309, 289 S. W. 2d 679.

No. 351. INTERNATIONAL BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William J. Dempsey* and *William C. Koplovitz* for petitioner. *Solicitor General Rankin* for the Federal Communications Commission, respondent. Reported below: 99 U. S. App. D. C. 51, 237 F. 2d 205.

No. 353. SMITH-JOHNSON STEAMSHIP CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Arthur M. Becker* and *Melvin Spaeth* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Leavenworth Colby* and *Herman Marcuse* for the United States. Reported below: 135 Ct. Cl. 866, 142 F. Supp. 367.

No. 356. BAY STATE CAFE, INC., ET AL. *v.* COHEN. Supreme Judicial Court, and Superior Court, of Massachusetts. Certiorari denied. *Angus M. MacNeil* for petitioners. Respondent *pro se*. Reported below: 334 Mass. 705, 134 N. E. 2d 914.

No. 377. ROBESON *v.* DULLES, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *B. Jenkins Middleton* for respondent. Reported below: 98 U. S. App. D. C. 313, 235 F. 2d 810.

No. 382. CAHILL *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Clifford D. O'Brien* for petitioner. *Lester W. Humphreys* for respondent. Reported below: 208 Ore. 538, 609, 293 P. 2d 169, 298 P. 2d 214.

No. 387. BANTEL ET AL. *v.* BROWNELL, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George Eric Rosden* for petitioners. *Solicitor General Rankin, Assistant Attorney General Townsend, James D. Hill, George B. Searls* and *Irwin A. Seibel* for respondents. Reported below: 98 U. S. App. D. C. 257, 234 F. 2d 692.

No. 389. MORGANTOWN GLASSWARE GUILD, INC., *v.* HUMPHREY, SECRETARY OF THE TREASURY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Roy St. Lewis* and *Carl L. Shipley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for respondent. Reported below: 98 U. S. App. D. C. 375, 236 F. 2d 670.

No. 21, Misc. KOZICKY ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank A. Gulotta* for respondent.

No. 45, Misc. WALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 233 F. 2d 804.

No. 69, Misc. CAWLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Paul Y. Cunningham* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 231 F. 2d 650.

No. 85, Misc. YATES *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 87, Misc. McCall *v.* North Carolina. Superior Court of North Carolina, Edgecombe County. Certiorari denied.

No. 91, Misc. McConnell *v.* Nash, Warden. Supreme Court of Missouri. Certiorari denied.

No. 117, Misc. James *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 234 F. 2d 662.

No. 154, Misc. Sylvester *v.* United States. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 161, Misc. Lewis *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 235 F. 2d 580.

No. 186, Misc. Chernachowicz *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. Mr. Justice Brennan took no part in the consideration or decision of this application. Reported below: 22 N. J. 83, 123 A. 2d 526.

No. 193, Misc. In re Carpenter. Supreme Court of California. Certiorari denied.

No. 194, Misc. Clark *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 195, Misc. RODGERS *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 197, Misc. DELEVAY ET AL. *v.* LEE, BANKRUPT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 198, Misc. BISHOP *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 233 F. 2d 208.

No. 200, Misc. WILLIAMS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 201, Misc. IN RE SPEER. Supreme Court of California. Certiorari denied.

No. 202, Misc. NEW YORK EX REL. LOWERY *v.* MURPHY, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 209, Misc. CANNON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 386 Pa. 62, 123 A. 2d 675.

No. 211, Misc. GILLILAND *v.* MICHIGAN. Circuit Court for Lapeer County, Michigan, Fortieth Judicial Circuit. Certiorari denied. *Leo W. Hoffman* for petitioner. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 212, Misc. FEBRE *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 215, Misc. MULLEN *v.* FOLSOM, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, William W. Ross* and *Joseph Langbart* for respondent. Reported below: 230 F. 2d 611.

No. 217, Misc. BERMAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 218, Misc. HOLLAND *v.* COINER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 219, Misc. DUNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 220, Misc. PICKENS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 223, Misc. COMERFORD *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 233 F. 2d 294.

No. 225, Misc. LANDERS *v.* NEW YORK. County Court of Richmond County, New York. Certiorari denied.

No. 228, Misc. GUNTER *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 231, Misc. LAFLAMME *v.* ROBBINS, WARDEN, ET AL. Supreme Judicial Court of Maine. Certiorari denied.

No. 232, Misc. ROLIE *v.* RANDOLPH, WARDEN, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 233, Misc. BRABSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 235, Misc. MOORE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 238, Misc. SYKES *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 240, Misc. DARCY *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 242, Misc. NICKERSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Dan J. Kelly* for respondent. Reported below: 1 N. Y. 2d 815, 135 N. E. 2d 604.

No. 243, Misc. HORNE *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied.

No. 246, Misc. ROCKOWER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *David Du Vivier* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 235 F. 2d 49.

No. 214, Misc. RUPP *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. J. Zirpoli* for petitioner. Reported below: 235 F. 2d 674.

No. 191, Misc. CARTER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 210 Md. 657, 124 A. 2d 574.

No. 93, Misc. GOODSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 157, Misc. BAKER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 98 U. S. App. D. C. 250, 234 F. 2d 685.

Rehearing Granted. (*See also No. 751 Misc., October Term, 1955, ante, p. 886.*)

No. 701, October Term, 1955. REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL, *v.* COVERT, 351 U. S. 487; and

No. 713, October Term, 1955. KINSELLA, WARDEN, *v.* KRUEGER, 351 U. S. 470. On petition for rehearing.

The petition for rehearing is granted. On reargument counsel are invited to include among the issues to be discussed by them the following matters:

"1. The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas; the practical alternatives to the exercise of jurisdiction by court-martial.

"2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court-martial jurisdiction authorized under Art. I, § 8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the conclusion that the Art. I, § 8, cl. 14, power was thought

to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

"3. The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents.

"4. The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses."

MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE CLARK would deny the petition for rehearing. They believe that the problems presented in the above questions, with the exception of No. 4, the answer to which in their opinion is obvious, have been fully presented in the briefs and argument already had. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application and order.

Frederick Bernays Wiener for Covert and Krueger, petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* in reply.

Rehearing Denied.

No. 99, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC., *ante*, p. 854. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

NOVEMBER 7, 1956.

Certiorari Denied.

No. 433. MCGOWEN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Elmer Ware Stahl* for petitioner. Reported below: —— Tex. Cr. R. ——, 290 S. W. 2d 521.

NOVEMBER 13, 1956.

Decisions Per Curiam.

No. 2. HOLOPHANE CO., INC., *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of Ohio. (Probable jurisdiction noted, 350 U. S. 814.) Argued November 5, 1956. Decided November 13, 1956. *Per Curiam:* The Court unanimously affirms the judgment and decree of the District Court except paragraph XI, and that paragraph is affirmed by an equally divided Court. MR. JUSTICE HARLAN took no part in the consideration or decision of this case. *Richard F. Stevens* argued the cause for appellant. With him on the brief were *Howard F. Burns, Shepard Broad* and *Lewis Horwitz. Daniel M. Friedman* argued the cause for the United States. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Hansen.* Reported below: 119 F. Supp. 114.

No. 342. GAYLE ET AL., MEMBERS OF THE BOARD OF COMMISSIONERS OF MONTGOMERY, ALABAMA, ET AL. *v.* BROWDER ET AL.; and

No. 343. OWEN ET AL., MEMBERS OF THE ALABAMA PUBLIC SERVICE COMMISSION, ET AL. *v.* BROWDER ET AL. Appeals from the United States District Court for the Middle District of Alabama. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Brown* v. *Board of Education,* 347 U. S. 483; *Mayor and City Council of Baltimore* v. *Dawson,* 350 U. S. 877; *Holmes* v. *Atlanta,* 350 U. S. 879.

Walter J. Knabe for appellants in No. 342. *John Patterson,* Attorney General of Alabama, and *William N. McQueen* and *Gordon Madison,* Assistant Attorneys General, for appellants in No. 343. *Robert L. Carter* and *Thurgood Marshall* for appellees in No. 343. Reported below: 142 F. Supp. 707.

No. 402. GREAT NORTHERN RAILWAY CO. *v.* BOARD OF RAILROAD COMMISSIONERS OF MONTANA ET AL. Appeal from the Supreme Court of Montana. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Edwin C. Matthias, Anthony Kane, T. B. Weir* and *Edwin S. Booth* for appellant. Reported below: —— Mont. ——, 298 P. 2d 1093.

No. 119, Misc. JORDAN *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court for consideration on the merits. *Charles A. Horsky* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 98 U. S. App. D. C. 160, 233 F. 2d 362.

No. 204, Misc. MCGANN *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 order of the Court of Appeals is vacated and the cause is remanded to that court for consideration on the merits. *United States* v. *Hayman,* 342 U. S. 205, 209, n. 4. Petitioner *pro se. Solicitor General Rankin* for the United States.

Miscellaneous Orders.

No. 12, Original. LEE, GOVERNOR OF UTAH, *v.* HUMPHREY, SECRETARY OF THE TREASURY. The motion for leave to file bill of complaint is denied. *C. M. Gilmour* for plaintiff. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *Morton Hollander* for defendant.

No. 312, October Term, 1955. UNITED STATES *v.* OHIO POWER CO. The motion to vacate the order of June 11, 1956, 351 U. S. 980, and to dismiss the petition for rehearing is denied.

No. 319, Misc. HOUSTON *v.* TEXAS. Motion for leave to file petition for writ of error *coram nobis* denied. *Preston Pope Reynolds* for petitioner.

Probable Jurisdiction Noted.

No. 366. ANDREW G. NELSON, INC., *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Victor L. Lewis, Paul E. Blanchard* and *Edward W. Rothe* for appellant. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, appellees.

No. 423. GOVERNMENT AND CIVIC EMPLOYEES ORGANIZING COMMITTEE, CIO, ET AL. *v.* WINDSOR ET AL. Appeal from the United States District Court for the Northern District of Alabama. Probable jurisdiction noted. MR. JUSTICE BLACK took no part in the consideration or decision of this question. *Arthur J. Goldberg, David E. Feller* and *Herbert S. Thatcher* for appellants. *John Patterson,* Attorney General of Alabama, and *Gordon Madison* and *William N. McQueen,* Assistant Attorneys General, for appellees.

Certiorari Granted. (See also Misc. Nos. 119 and 204, supra.)

No. 407. SERVICE *v.* DULLES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Warner W. Gardner* for petitioner. *Solicitor General Rankin, Assistant Attorney General*

Doub, Paul A. Sweeney and *Donald B. MacGuineas* for respondents. Reported below: 98 U. S. App. D. C. 268, 235 F. 2d 215.

No. 422. Office Employes International Union, Local No. 11, AFL-CIO, *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Joseph E. Finley* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli* and *Fannie M. Boyls* for respondent. Reported below: 98 U. S. App. D. C. 335, 235 F. 2d 832.

No. 81, Misc. Carroll et al. *v.* United States. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted limited to question I presented by the petition for the writ which reads as follows:

"I. Does the United States of America have the right to appeal from an order of the United States District Court for the District of Columbia suppressing evidence in a criminal case where the motion to suppress and the order are filed and entered after the indictment and prior to trial?"

Curtis P. Mitchell and *Henry Lincoln Johnson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 98 U. S. App. D. C. 244, 234 F. 2d 679.

No. 403. Rabang *v.* Boyd, District Director, Immigration and Naturalization Service. C. A. 9th Cir. Certiorari granted. *John Caughlan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 234 F. 2d 904.

No. 415. NISHIKAWA *v.* DULLES, SECRETARY OF STATE. C. A. 9th Cir. Certiorari granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for respondent. Reported below: 235 F. 2d 135.

No. 12, Misc. BARTKUS *v.* ILLINOIS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Illinois granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent. Reported below: 7 Ill. 2d 138, 130 N. E. 2d 187.

No. 61, Misc. HOAG *v.* NEW JERSEY. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of New Jersey granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications. Reported below: 21 N. J. 496, 122 A. 2d 628.

No. 80, Misc. LADNER *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 230 F. 2d 726.

No. 29, Misc. MOORE *v.* MICHIGAN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Michigan granted. 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. Reported below: 344 Mich. 137, 73 N. W. 2d 274.

No. 125, Misc. BROWN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. *Geo. W. Crockett, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 234 F. 2d 140.

No. 318, Misc. PEREZ *v.* BROWNELL, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari granted. *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 235 F. 2d 364.

Certiorari Denied.

No. 397. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Harold A. Katz, Harold A. Cranefield* and *Kurt L. Hanslowe* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 231 F. 2d 237.

No. 405. MEKOLICHICK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Hayden C. Covington* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 234 F. 2d 71.

No. 398. DEL VECCHIO *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Murray L. Schwartz* for petitioner. *Philip Price* for respondent. Reported below: 233 F. 2d 2.

No. 410. EVANS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *A. M. Evans, pro se. Solicitor General Rankin* and *Assistant Attorney General Rice* for respondent. Reported below: 235 F. 2d 586.

No. 412. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Sidney M. Glazer* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 236 F. 2d 260.

No. 414. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS & HELPERS OF AMERICA, A. F. L., DISTRICT NO. 2, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Clif. Langsdale* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz* and *Dominick L. Manoli* for respondent. Reported below: 232 F. 2d 393.

No. 416. NASH *v.* NASH. C. A. 5th Cir. Certiorari denied. *Francis H. Hare* for petitioner. *Winston B. McCall* for respondent. Reported below: 234 F. 2d 821.

No. 417. MORAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph Leary Delaney* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 236 F. 2d 361.

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No. 352. SHEPPARD *v.* OHIO. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE FRANKFURTER has filed a memorandum in this case. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *William J. Corrigan* and *Paul M. Herbert* for petitioner. *Frank T. Cullitan* and *Saul S. Danaceau* for respondent. Reported below: 165 Ohio St. 293, 135 N. E. 2d 340.

MR. JUSTICE FRANKFURTER.

The truth that education demands reiteration bears on the understanding, and not only by the laity, of the meaning of the denial of a petition for certiorari. Despite the Court's frequent exposition, misconception recurrently manifests itself regarding the exercise of our discretion in not bringing a case here for review. Appropriate occasions may therefore be utilized to make explicit what ought to be assumed. This is one.

The divided Supreme Court of Ohio sustained the conviction in a capital case the trial of which was enveloped in circumstances thus summarized in the opinion of that court:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 293, 294, 135 N. E. 2d 340, 342.

The defendant claimed that a proceeding so infused and enveloped by the "atmosphere of a 'Roman Holiday' " precluded a fair trial and could not but deprive him of the due process of law guaranteed by the Fourteenth Amendment of the Constitution. The Supreme Court of Ohio rejected this claim and the defendant then invoked the discretionary power of this Court to review the correctness of its decision. This Court in turn now refuses the defendant the opportunity to bring the case here for review.

Such denial of his petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision. For reasons that have often been explained the Court does not give the grounds for denying the petitions for certiorari in the normally more than 1,000 cases each year in which petitions are denied. It has also been explained why not even the positions of the various Justices in such cases are matters of public record. The rare cases in which an individual position is noted leave unillumined the functioning of the certiorari system, and do not reveal the position of all the members of the Court. See *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912.

No. 418. CITIES SERVICE GAS PRODUCING CO. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari denied. *Conrad C. Mount, O. R. Stites* and *Robert R. McCracken* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Bernard Cedarbaum* and *Willard W. Gatchell* for respondent. Reported below: 233 F. 2d 726.

No. 420. Pacific National Fire Insurance Co. *v.* Mickelson, Trustee in Bankruptcy, et al. C. A. 8th Cir. Certiorari denied. *Samuel Levin* for petitioner. *Charles A. Horsky* and *Robert L. Randall* for Mickelson, respondent. Reported below: 235 F. 2d 425.

No. 421. Kokomo Paper Handlers' Union No. 34 et al. *v.* Cuneo Press, Inc. C. A. 7th Cir. Certiorari denied. *Herbert S. Thatcher* for petitioners. *John K. Ruckelshaus* and *John C. O'Connor* for respondent. Reported below: 235 F. 2d 108.

No. 425. MacNeil *v.* United States. C. A. 1st Cir. Certiorari denied. *Angus M. MacNeil, pro se. Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 236 F. 2d 149.

No. 4, Misc. Hunt *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 347. Summerfield, Postmaster General, et al. *v.* Tourlanes Publishing Co. et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Joseph Langbart* for petitioners. *Irving R. M. Panzer* for the Tourlanes Publishing Co., and *Josiah Lyman* and *Sophie B. Lyman* for Oakley et al., respondents. Reported below: 98 U. S. App. D. C. 20, 231 F. 2d 773.

No. 406. District of Columbia *v.* Washington Post Co. et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray, George C. Updegraff* and

Henry E. Wixon for petitioner. *Fontaine C. Bradley* for respondents. Reported below: 98 U. S. App. D. C. 304, 235 F. 2d 531.

No. 411. KEANE *v.* AMERICAN INSURANCE CO. OF NEWARK, NEW JERSEY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Louis M. Denit, Thomas Searing Jackson* and *Martin R. Fain* for petitioner. *John M. Aherne* for respondent. Reported below: 98 U. S. App. D. C. 152, 233 F. 2d 354.

No. 101, Misc. CURRAN ET AL. *v.* DELAWARE. Supreme Court of Delaware. Certiorari denied. *Irving Morris* for petitioners. *Joseph Donald Craven,* Attorney General of Delaware, and *Frank O'Donnell, Jr.,* Deputy Attorney General, for respondent. Reported below: 49 Del. 587, 122 A. 2d 126.

Rehearing Denied.

No. 150. COLGATE-PALMOLIVE CO. ET AL. *v.* CARTER PRODUCTS, INC., ET AL., *ante,* p. 843;

No. 275. VANITY FAIR MILLS, INC., *v.* T. EATON CO., LTD., ET AL., *ante,* p. 871;

No. 290. GRABLE ET UX., TRUSTEES, ET AL. *v.* BURNS ET AL., *ante,* p. 842;

No. 120, Misc. IN RE FLETCHER, *ante,* p. 815; and

No. 148, Misc. DAY *v.* DAVIS, COMMANDANT, *ante,* p. 881. Petitions for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications.

No. 235, October Term, 1955. FAIRMONT ALUMINUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE, 350 U. S. 838. Motion for leave to file second petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

NOVEMBER 19, 1956.

Miscellaneous Order.

No. 5. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. Certiorari, 351 U. S. 936, to the Supreme Court of California. The motions for leave to file briefs of the National Lawyers Guild and the American Civil Liberties Union, Southern California Branch, as *amici curiae,* are granted. *Osmond K. Fraenkel* for the National Lawyers Guild. *A. L. Wirin* for the American Civil Liberties Union, Southern California Branch.

Probable Jurisdiction Noted.

No. 408. PAN-ATLANTIC STEAMSHIP CORP. *v.* ATLANTIC COAST LINE RAILROAD CO. ET AL.; and

No. 424. INTERSTATE COMMERCE COMMISSION *v.* ATLANTIC COAST LINE RAILROAD CO. ET AL. Appeals from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. *David G. Macdonald, Russell S. Bernhard* and *Warren Price, Jr.* for appellant in No. 408. *Robert W. Ginnane* and *James A. Murray* for appellant in No. 424. Reported below: 144 F. Supp. 53.

No. 213, Misc. LAMBERT *v.* CALIFORNIA. Appeal from the Appellate Department of the Superior Court of California, Los Angeles County. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Appellant *pro se. Roger Arnebergh* and *Philip E. Grey* for appellee.

Certiorari Granted.

No. 445. LAKE TANKERS CORP. *v.* HENN, ADMINISTRATRIX. C. A. 2d Cir. Certiorari granted. *Eugene Underwood* for petitioner. *Frank C. Mason* for respondent. Reported below: 232 F. 2d 573, 235 F. 2d 783.

No. 72. LEHMANN, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, *v.* UNITED STATES EX REL. CARSON OR CARASANITI. C. A. 6th Cir. Certiorari granted. *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for petitioner. Reported below: 228 F. 2d 142.

No. 435. MULCAHEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* CATALANOTTE. C. A. 6th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for petitioner. Reported below: 236 F. 2d 955.

No. 427. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO) ET AL. *v.* RUSSELL. Supreme Court of Alabama. Certiorari granted. *Harold A. Cranefield* and *Kurt L. Hanslowe* for petitioners. *Horace C. Wilkinson* for respondent. Reported below: 264 Ala. 456, 88 So. 2d 175.

No. 172, Misc. GREEN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *George Blow* and *Charles E. Ford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. Reported below: 98 U. S. App. D. C. 413, 236 F. 2d 708.

Certiorari Denied.

No. 393. BERNSTEIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Claude Pepper* and *Arthur*

B. Cunningham for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 234 F. 2d 475.

No. 409. MISSISSIPPI RIVER FUEL CORP. ET AL. *v.* FONTENOT, COLLECTOR OF REVENUE OF LOUISIANA. C. A. 5th Cir. Certiorari denied. *Clyde R. Brown* and *Clarence L. Yancey* for petitioners. Reported below: 234 F. 2d 898.

No. 430. ACHILLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.* *Carl J. Batter, Frank J. Gagen, Jr.* and *Anna R. Lavin* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 234 F. 2d 797.

No. 431. CONE BROTHERS CONTRACTING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Carson M. Glass* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 235 F. 2d 37.

No. 436. BOWDEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *J. Richard Bowden* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky* and *Morton K. Rothschild* for respondent. Reported below: 234 F. 2d 937.

No. 440. ODENBACH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, S. Billingsley Hill* and *Harold S. Harrison* for the United States. Reported below: 234 F. 2d 410.

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*[This order vacated, *post*, p. 1023.]

No. 437. DRATH, TRADING AS BROADWAY GIFT CO., *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Horace J. Donnelly, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent.

No. 439. CLIETT ET VIR *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari denied. *Frank O. Barnes* for petitioners. *W. H. Betts* for respondents. Reported below: 233 F. 2d 269.

No. 441. CHOCTAW NATION ET AL. *v.* SEAY ET AL. C. A. 10th Cir. Certiorari denied. *W. F. Semple* and *Lynn Adams* for petitioners. *S. J. Montgomery* and *W. M. Cleaves* for respondents. Reported below: 235 F. 2d 30.

No. 442. TWENTIETH CENTURY FOX FILM CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph P. Loeb* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for the United States. Reported below: 235 F. 2d 719.

No. 444. TATKO BROTHERS SLATE CO., INC., *v.* VERMONT STRUCTURAL SLATE CO., INC. C. A. 2d Cir. Certiorari denied. *W. Brown Morton, Jr.* for petitioner. *Richard P. Schulze* for respondent. Reported below: 233 F. 2d 9.

No. 450. ITEM COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli* and *Frederick U. Reel* for respondent.

No. 392. UNION PROPERTIES, INC., *v.* BRENNAN, SUCCESSOR TREASURER OF CUYAHOGA COUNTY, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Thomas V. Koykka* for petitioner. *Frank T. Cullitan* and *Saul S. Danaceau* for Brennan, respondent. Reported below: 232 F. 2d 884.

No. 429. CAHAN *v.* CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 141 Cal. App. 2d 891, 297 P. 2d 715.

No. 443. SEYBOLD ET AL. *v.* WESTERN ELECTRIC CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Maurice Walk* and *Harry R. Booth* for petitioners. *Kenneth F. Burgess, Douglas F. Smith* and *Arthur R. Seder, Jr.* for the Illinois Bell Telephone Co. et al., and *Clyde E. Shorey* for the Bankers Trust Co., respondents. Reported below: 234 F. 2d 942.

No. 216, Misc. DEITZ, NATURAL TUTRIX, *v.* GREYHOUND CORPORATION. C. A. 5th Cir. Certiorari denied. *B. B. Taylor, Jr.* for petitioner. *G. T. Owen, Jr.* for respondent. Reported below: 234 F. 2d 327.

No. 428. SOUKARAS *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 135 Ct. Cl. 88, 140 F. Supp. 797.

No. 434. LIBERTY MUTUAL INSURANCE CO. ET AL. *v.* BRITTON, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, ET AL. United

States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Arthur J. Phelan* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the Deputy Commissioner, and *Eugene X. Murphy* for Hardy, respondents. Reported below: 98 U. S. App. D. C. 208, 233 F. 2d 699.

Rehearing Denied.

No. 119. SEITZ ET AL. *v.* TOOLAN ET AL., *ante*, p. 826;

No. 155. KLEINMAN *v.* KOBLER, DOING BUSINESS AS KOBLER SHAVING CO., *ante*, p. 830;

No. 243. SHIBLEY *v.* UNITED STATES, *ante*, p. 873;

No. 311. A A A DENTAL LABORATORIES, INC., ET AL. *v.* ILLINOIS EX REL. CHICAGO DENTAL SOCIETY ET AL., *ante*, p. 863;

No. 322. SHIBLEY *v.* UNITED STATES, *ante*, p. 873;

No. 35, Misc. SHOTKIN *v.* CITY OF MIAMI BEACH, FLORIDA, *ante*, p. 813;

No. 102, Misc. WETZEL *v.* WIGGINS, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., *ante*, p. 807; and

No. 176, Misc. LEVY *v.* EVANS ET AL., *ante*, p. 857. Petitions for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications.

No. 98. PANHANDLE EASTERN PIPE LINE CO. *v.* CITY OF DETROIT ET AL., *ante*, p. 829. The motions for leave to file briefs of Independent Natural Gas Association of America, Southern Natural Gas Company, H. E. Sears and A. E. Herrmann Corporation, Northern Natural Gas Company, Cities Service Gas Company and Cities Service Gas Producing Company, and Colorado Interstate Gas Company and Olin Gas Transmission Corporation, as *amici curiae*, are denied. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these motions or this application.

NOVEMBER 23, 1956.

Case Dismissed Under Rule 60.

No. 239. DE FLORIO *v.* MICHIGAN. On petition for writ of certiorari to the Recorder's Court of the City of Detroit, Michigan. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. *Fred A. Smith* for petitioner.

DECEMBER 3, 1956.

Decisions Per Curiam.

No. 400. BOBBINS *v.* NEW JERSEY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dispense with printing the statement as to jurisdiction is granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. *Filindo B. Masino* for appellant. Reported below: 21 N. J. 338, 122 A. 2d 366.

No. 250, Misc. KELLEY *v.* VIRGINIA ET AL. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The appeal is dismissed for want of a substantial federal question.

No. 469. KIDD ET AL. *v.* MCCANLESS, ATTORNEY GENERAL. Appeal from the Supreme Court of Tennessee, Middle District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Colegrove* v. *Green,* 328 U. S. 549; *Anderson* v. *Jordan,* 343 U. S. 912.

Hobart Atkins for appellants. *Jack Wilson* and *James M. Glasgow,* Assistant Attorneys General of Tennessee, for appellee. Reported below: —— Tenn. ——, 292 S. W. 2d 40.

No. 251, Misc. THOMPSON *v.* HEITHER ET AL. Appeal from the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The appeal is dismissed. Reported below: 235 F. 2d 176.

No. 473. HEISEY *v.* COUNTY OF ALAMEDA ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER dissent. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Henry C. Clausen* for appellant. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *J. F. Coakley* for Alameda County et al., and *Andrew F. Burke* for the Roman Catholic Welfare Corporation of San Francisco, appellees. Reported below: 46 Cal. 2d 644, 298 P. 2d 1.

No. 474. HORTON ET AL. *v.* HUMPHREY, SECRETARY OF THE TREASURY, ET AL. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *James R. Sharp* and *Eugene F. Bogan* for appellants. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for appellees. Reported below: 146 F. Supp. 819.

Miscellaneous Orders.

No. 11, Original. UNITED STATES *v.* LOUISIANA. The Solicitor General is allowed 10 days within which to file a reply to the answer filed by the State of Louisiana. THE CHIEF JUSTICE took no part in the consideration or decision of this question. *Solicitor General Rankin* for the United States, plaintiff. *Jack P. F. Gremillion,* Attorney General, *W. Scott Wilkinson, Edward M. Car-*

mouche and *John L. Madden,* Special Assistant Attorneys General, *Bailey Walsh, Hugh M. Wilkinson* and *Victor A. Sachse* for the State of Louisiana, defendant.

No. 16. BUTLER *v.* MICHIGAN. Appeal from the Recorder's Court of the City of Detroit, Michigan. (Probable jurisdiction noted, 350 U. S. 963.) The motion of David S. Alberts for leave to file petition to intervene, or in the alternative, for consolidation of this case with *Alberts* v. *California,* No. 61, October Term, 1956, is denied. The movant is granted leave to file a further memorandum in No. 61. *Stanley Fleishman* and *William B. Murrish* for movant.

No. 275, Misc. BOBO *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California denied and motion for leave to file petition for writ of habeas corpus denied.

No. 244, Misc. LOPEZ *v.* UNITED STATES. Application denied.

No. 158, Misc. LUNDGREN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 295, Misc. UNITED STATES EX REL. YOUNG *v.* MYERS, ACTING WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 270, Misc. RICHTER *v.* NEW JERSEY. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 252, Misc. NEWSTEAD *v.* NASH, WARDEN;
No. 278, Misc. RYAN *v.* ILLINOIS;
No. 280, Misc. HUGHES *v.* TEXAS;
No. 281, Misc. JACKSON *v.* UNITED STATES;
No. 287, Misc. BILBAO *v.* UNITED STATES;
No. 311, Misc. MCKEEHAN *v.* ALVIS, WARDEN, ET AL.;
No. 317, Misc. CURTIS *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY; and
No. 322, Misc. MURILLO *v.* WARDEN, NEW MEXICO STATE PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 289, Misc. POINDEXTER *v.* DISTRICT COURT OF NEBRASKA, LANCASTER COUNTY. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 419. SCHAFFER TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of South Dakota. Probable jurisdiction noted. *Peter T. Beardsley* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston* for the United States, *Robert W. Ginnane* and *H. Neil Garson* for the Interstate Commerce Commission, and *Amos M. Mathews* for the Akron, Canton & Youngstown Railroad Co. et al., appellees. Reported below: 139 F. Supp. 444.

No. 475. MOREY, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL. *v.* DOUD ET AL., DOING BUSINESS AS BONDIFIED SYSTEMS, ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for appellants. *John J. Yowell* for appellees. Reported below: 146 F. Supp. 887.

No. 447. Public Utilities Commission of California *v.* United States. Appeal from the United States District Court for the Northern District of California. Probable jurisdiction noted. *Everett C. McKeage* for appellant. Reported below: 141 F. Supp. 168.

No. 478. West Point Wholesale Grocery Co. *v.* City of Opelika. Appeal from the Court of Appeals of Alabama. Probable jurisdiction noted. *M. R. Schlesinger, N. D. Denson* and *Tom B. Slade* for appellant. *Lawrence K. Andrews* for appellee. Reported below: 38 Ala. App. 444, 87 So. 2d 661.

Certiorari Granted.

No. 426. Blackburn *v.* Alabama. Court of Appeals of Alabama. Certiorari granted. *Truman Hobbs* for petitioner. *John Patterson,* Attorney General of Alabama, and *Bernard F. Sykes* and *Paul T. Gish, Jr.,* Assistant Attorneys General, for respondent. Reported below: 38 Ala. App. 143, 88 So. 2d 199.

No. 466. Securities and Exchange Commission *v.* Louisiana Public Service Commission et al. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Thomas G. Meeker, David Ferber* and *Solomon Freedman* for petitioner. *Robert A. Ainsworth, Jr.* for the Louisiana Public Service Commission, *J. Blanc Monroe* and *Monte M. Lemann* for the Louisiana Power & Light Co., and *Daniel James* for the Middle South Utilities, Inc., respondents. Reported below: 235 F. 2d 167.

No. 314, Misc. McGee *v.* International Life Insurance Co. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Civil Appeals of Texas, First Supreme Judicial District,

granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Arthur J. Mandell* for petitioner. *Stanley Hornsby* for respondent. Reported below: 288 S. W. 2d 579.

Certiorari Denied. (*See also Misc. Nos. 158, 275 and 295, supra.*)

No. 446. CREIGHTON STATIONERY CO. ET AL. *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Frank J. Filippi* for petitioners. *Delger Trowbridge* for Sutton, respondent. Reported below: 46 Cal. 2d 791, 298 P. 2d 857.

No. 448. SHELL OIL CO. *v.* SULLIVAN ET AL. C. A. 9th Cir. Certiorari denied. *Clifford Burnhill* and *John S. Cooper* for petitioner. *Charles O. Bruce* for respondents. Reported below: 234 F. 2d 733.

No. 451. RAWDON, PRESIDENT, BOARD OF TRUSTEES, MANSFIELD INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* JACKSON ET AL. C. A. 5th Cir. Certiorari denied. *R. K. Hanger* and *E. A. Cantey* for petitioners. Reported below: 235 F. 2d 93.

No. 452. SACHS, DOING BUSINESS AS ATLANTIC LIQUOR WHOLESALERS, *v.* BROWN-FORMAN DISTILLERS CORP. C. A. 2d Cir. Certiorari denied. *Sydney Krause* for petitioner. *Thomas Kiernan* for respondent. Reported below: 234 F. 2d 959.

No. 454. CAPITAL NATIONAL BANK IN AUSTIN, TEXAS, ET AL. *v.* LOONEY ET AL. C. A. 5th Cir. Certiorari denied. *Coleman Gay* and *R. Dean Moorhead* for petitioners. Reported below: 235 F. 2d 436.

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No. 455. MARINE TERMINALS CORP. *v.* AMERICAN PRESIDENT LINES, LTD. C. A. 9th Cir. Certiorari denied. *Joe Crider, Jr.* for petitioner. *Joseph J. Geary* for respondent. Reported below: 234 F. 2d 753.

No. 456. PAQUET *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *O. P. Soares* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 236 F. 2d 203.

No. 458. LEHMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Edward S. Bentley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 234 F. 2d 958.

No. 460. ANDERSON ET AL., DOING BUSINESS AS H. S. ANDERSON CO., *v.* MITCHELL, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. *Homer D. Crotty* for petitioners. *Solicitor General Rankin, Stuart Rothman, Bessie Margolin* and *Sylvia S. Ellison* for respondent. Reported below: 235 F. 2d 638.

No. 461. GLENN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jerome L. Yesko* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 231 F. 2d 884.

No. 470. WALTHER DAIRY PRODUCTS ET AL. *v.* KRAFT FOODS CO. C. A. 7th Cir. Certiorari denied. *Vernon W. Thomson,* Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin, *Maxwell Barus* and *Stuart S. Ball* for Walther Dairy Products et al., and *Joseph G. Werner* for the Wisconsin Swiss &

Limburger Cheese Producers' Association et al., petitioners. *Cyril A. Soans* for respondent. Reported below: 234 F. 2d 279.

No. 477. PHOENIX INDEMNITY CO. *v.* LAVOIE. Superior Court of Massachusetts, Suffolk County. Certiorari denied. *Samuel P. Sears* for petitioner. *John L. Hall* for respondent.

No. 479. COLVILLE, EXECUTRIX, *v.* KOCH, ADMINISTRATRIX. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* for petitioner. *M. M. Newmark* for respondent. Reported below: 234 F. 2d 157.

No. 480. GULF COAST SHRIMPERS & OYSTERMANS ASSOCIATION ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Albert Sidney Johnston, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States. Reported below: 236 F. 2d 658.

No. 482. HERINGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *R. E. H. Julien* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 235 F. 2d 149.

No. 485. WARNER *v.* FIRST NATIONAL BANK OF MINNEAPOLIS. C. A. 8th Cir. Certiorari denied. *R. H. Fryberger* for petitioner. *Joseph H. Colman* and *Harold G. Cant* for respondent. Reported below: 236 F. 2d 853.

No. 486. DUNNING ET AL. *v.* Q. O. ORDNANCE CORP. C. A. 8th Cir. Certiorari denied. *Frank H. Terrell* and *Thomas W. Lanigan* for petitioners. *G. L. DeLacy* for respondent. Reported below: 228 F. 2d 929, 233 F. 2d 902.

No. 483. Antonio Roig Sucrs., S. En C., *v.* Sugar Board of Puerto Rico. C. A. 1st Cir. Certiorari denied. *James R. Beverley* and *Francisco Castro-Amy* for petitioner. *Jose Trias Monge,* Attorney General of Puerto Rico, and *Abe Fortas,* Special Assistant Attorney General, for respondent. Reported below: 235 F. 2d 347.

No. 488. Rosenfeld *v.* United States. C. A. 7th Cir. Certiorari denied. *William T. Fitzgerald* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 235 F. 2d 544.

No. 492. City and County of San Francisco *v.* National Distillers Products Corp. District Court of Appeal of California, First Appellate District. Certiorari denied. *Dion R. Holm* for petitioner. *Theodore R. Meyer* and *Hart H. Spiegel* for respondent. Reported below: 141 Cal. App. 2d 651, 297 P. 2d 61.

No. 493. Harry Slatkin Builders, Inc., *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *Fred W. Peel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *I. Henry Kutz* for respondent. Reported below: 235 F. 2d 189.

No. 497. Diesel Tanker A. C. Dodge, Inc., et al. *v.* J. M. Carras, Inc., et al. C. A. 2d Cir. Certiorari denied. *Christopher E. Heckman* for petitioners. *James Mansfield Estabrook* and *MacDonald Deming* for J. M. Carras, Inc., and *Abraham E. Freedman* for Elliott, respondents. Reported below: 234 F. 2d 374.

No. 498. Tallinna Laevaehisus (Tallinn Shipping Co.) et al. *v.* United States. Court of Claims.

Certiorari denied. *P. A. Beck* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 134 Ct. Cl. 813, 139 F. Supp. 762.

No. 500. J. M. CARRAS, INC., *v.* DIESEL TANKER A. C. DODGE, INC., ET AL. C. A. 2d Cir. Certiorari denied. *James M. Estabrook* and *MacDonald Deming* for petitioner. *Christopher E. Heckman* for Diesel Tanker A. C. Dodge, Inc., et al., and *Abraham E. Freedman* for Elliott, respondents. Reported below: 234 F. 2d 374.

No. 504. MARIE AND ALEX MANOOGIAN FUND, DOING BUSINESS AS METAL PARTS MANUFACTURING CO., *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Coit Allee* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 232 F. 2d 758.

No. 484. TALIAFERRO *v.* JUSTICE COURT OF SAN PABLO JUDICIAL DISTRICT, LOCKE, JUDGE. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 18, Misc. PARSONS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *John Ben Shepperd,* Attorney General of Texas, and *John A. Wild,* Assistant Attorney General, for respondents.

No. 48, Misc. SERRANO *v.* FAY, WARDEN. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Walter E. Dillon* and *Irving Anolik* for respondent.

No. 105, Misc. WALTER *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. 123, Misc. BALLERSTEDT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 234 F. 2d 526.

No. 167, Misc. COOK *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Special Assistant Attorney General, for respondent.

No. 174, Misc. PITTS *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se.* *John M. Dalton,* Attorney General of Missouri, and *Robert R. Welborn,* Assistant Attorney General, for respondent.

No. 230, Misc. PEARSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 245, Misc. MCHONEY ET AL. *v.* MARINE NAVIGATION CO., INC. C. A. 4th Cir. Certiorari denied. *Philip F. DiCostanzo* for petitioners. *Charles W. Waring* and *Walter X. Connor* for respondent. Reported below: 233 F. 2d 769.

No. 255, Misc. HUGHES ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 248, Misc. ALLOCCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 234 F. 2d 955.

No. 256, Misc. LEO *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 257, Misc. SCOTT *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 260, Misc. TRUMBLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 234 F. 2d 273.

No. 261, Misc. JONES *v.* CUMMINGS, WARDEN. Superior Court of Hartford County, Connecticut. Certiorari denied.

No. 262, Misc. BAKER *v.* MISSOURI. St. Louis Court of Appeals, Missouri. Certiorari denied.

No. 263, Misc. MEEKS *v.* LAINSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 236 F. 2d 395.

No. 264, Misc. BURKE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Maurice Edelbaum* for petitioner. *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 1 N. Y. 2d 876, 136 N. E. 2d 711.

No. 267, Misc. SMITH *v.* ILLINOIS. Circuit Court of Edgar County, Illinois. Certiorari denied.

No. 272, Misc. TOMASELLI *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 210 Md. 674, 124 A. 2d 253.

No. 274, Misc. BROOKINS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 276, Misc. MAHURIN *v.* NASH, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 234 F. 2d 666.

No. 277, Misc. GATES *v.* DORAME. Appellate Department, Superior Court of California, Los Angeles County. Certiorari denied.

No. 279, Misc. BALLEM *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 386 Pa. 20, 123 A. 2d 728.

No. 283, Misc. LEE *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 286, Misc. IN RE YANTZ. Court of Appeals of Maryland. Certiorari denied. Reported below: 210 Md. 343, 123 A. 2d 601.

No. 288, Misc. BYRD *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 210 Md. 662, 124 A. 2d 284.

No. 296, Misc. MYSHOLOWSKY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 1 App. Div. 2d 1035, 152 N. Y. S. 2d 252.

No. 298, Misc. COLLINS *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 299, Misc. SADOWY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 1 App. Div. 2d 1035, 152 N. Y. S. 2d 252.

No. 301, Misc. IN RE GLANCY. Supreme Court of California. Certiorari denied.

No. 302, Misc. AKERS *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 303, Misc. BENJAMIN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 165 Ohio St. 455, 135 N. E. 2d 765.

No. 305, Misc. MCGAHAN *v.* ALVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 307, Misc. CREBS *v.* HOFFMAN, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied.

No. 308, Misc. DEMPSEY *v.* MARTIN, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *James N. Lafferty* and *Victor H. Blanc* for respondent.

No. 310, Misc. SIMPSON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 313, Misc. GRIFFITHS *v.* OHIO ET AL. Court of Appeals of Ohio, Second District, Franklin County. Certiorari denied.

No. 316, Misc. DAVIS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 320, Misc. HODGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 235 F. 2d 85.

No. 321, Misc. HODGE *v.* DISTRICT COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT, ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 324, Misc. BROWN *v.* MARYLAND. Circuit Court of Washington County, Maryland. Certiorari denied.

No. 325, Misc. BARTHOLOME *v.* MARYLAND. Circuit Court of Washington County, Maryland. Certiorari denied.

No. 312, Misc. RENZ *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 449. DISTRICT OF COLUMBIA *v.* STONE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for petitioner. Reported below: 99 U. S. App. D. C. 32, 237 F. 2d 28.

No. 453. ROSENTHAL *v.* TENNESSEE. Supreme Court of Tennessee, Middle District. Certiorari denied. *James T. Haynes* and *L. E. Gwinn* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Nat Tipton,* Advocate General, for respondent. Reported below: —— Tenn. ——, 292 S. W. 2d 1.

No. 471. BARKER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Paul R. Harmel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 135 Ct. Cl. 42, 140 F. Supp. 415.

No. 489. VAN CURLER BROADCASTING CORP. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul A. Porter* and *George Bunn* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Warren E. Baker, Richard A. Solomon* and *Daniel R. Ohlbaum* for the United States and the Federal Communications Commission, and *D. M. Patrick* for the Hudson Valley Broadcasting Co., Inc., respondents. Reported below: 98 U. S. App. D. C. 432, 236 F. 2d 727.

No. 490. WATSON, ADMINISTRATOR, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Alfred C. B. McNevin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 135 Ct. Cl. 145, 146 F. Supp. 425.

No. 494. MARINE TRANSPORT LINES, INC., ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *J. Franklin Fort* and *Israel Convisser* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Leavenworth Colby* and *Herman Marcuse* for the United States. Reported below: 135 Ct. Cl. 874, 146 F. Supp. 222.

No. 499. HOLCOMB *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley* and *Samuel Resnicoff* for petitioner. *Solicitor General Rankin,*

Assistant Attorney General Doub and *Samuel D. Slade* for the United States. Reported below: 135 Ct. Cl. 612, 146 F. Supp. 224.

No. 224, Misc. WAGNER *v.* HIGLEY, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Murray A. Gordon* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *Lester S. Jayson* for respondents. Reported below: 98 U. S. App. D. C. 291, 235 F. 2d 518.

No. 229, Misc. HALL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Richard J. Blanchard* for the United States. Reported below: 98 U. S. App. D. C. 341, 235 F. 2d 838.

No. 259, Misc. IN RE LEMPIA. C. A. 9th Cir. Certiorari denied.

No. 266, Misc. BELINA *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: —— Miss. ——, 87 So. 2d 919.

No. 292, Misc. LANG *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *William W. Pierce* for petitioner. Reported below: —— Miss. ——, 87 So. 2d 265.

No. 293, Misc. LASTER *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. *Lester G. Seacat* for petitioner. Reported below: 365 Mo. 1076, 293 S. W. 2d 300.

No. 291, Misc. JONES *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: —— Miss. ——, 87 So. 2d 573.

No. 300, Misc. ROBERTS *v.* WESTERN PACIFIC RAILROAD CO. District Court of Appeal of California, First Appellate District. Certiorari denied. Petitioner *pro se*. *E. L. Van Dellen* for respondent. Reported below: 142 Cal. App. 2d 317, 298 P. 2d 120.

Rehearing Denied.

No. 337. CLARK *v.* UNITED STATES, *ante*, p. 882;

No. 339. GIBSON *v.* PHILLIPS PETROLEUM CO., *ante*, p. 874; and

No. 15, Misc. SNELL *v.* MAYO, PRISON CUSTODIAN, *ante*, p. 881. Petitions for rehearing denied.

No. 115. GARLINGTON ET AL. *v.* WASSON ET AL., *ante*, p. 806;

No. 182. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* ALLENDORF, SPECIAL ADMINISTRATRIX, *ante*, p. 833;

No. 246. MONROE ET AL. *v.* UNITED STATES, *ante*, p. 873;

No. 70, Misc. JACKSON *v.* CLINE & CHAMBERS COAL CO. ET AL., *ante*, p. 852;

No. 129, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* ELLIOTT ET AL., *ante*, p. 855; and

No. 131, Misc. KRUPOWICZ *v.* NEW YORK, *ante*, p. 813. Petitions for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications.

No. 259. DWOSKIN, ALIAS DEE, *v.* NEBRASKA, *ante*, p. 840. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

DECEMBER 10, 1956.

Decisions Per Curiam.

No. 495. HOLMSTROM *v.* ILLINOIS. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *John Chivari* for appellant. *Robert W. Qualey* for appellee. Reported below: 8 Ill. 2d 401, 134 N. E. 2d 246.

No. 413. NATIONAL LABOR RELATIONS BOARD *v.* F. W. WOOLWORTH CO. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment of the Court of Appeals is reversed. The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice. *Labor Board* v. *Truitt Mfg. Co.*, 351 U. S. 149; cf. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli* and *Frederick U. Reel* for petitioner. *John W. Burke, Jr.* and *George O. Bahrs* for respondent. Reported below: 235 F. 2d 319.

No. 509. SEIBERT ET AL. *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Morris Lavine* for appellants. *Solicitor General Rankin, Assistant Attorney General Townsend, James D. Hill, George B. Searls* and *Irwin A. Seibel* for the Attorney General, appellee. Reported below: 140 Cal. App. 2d 710, 296 P. 2d 45.

No. 511. DANTZLER, PRESIDENT, SOUTH CAROLINA NATUROPATHIC PHYSICIANS ASSOCIATION, ET AL. *v.* CALLISON, ATTORNEY GENERAL. Appeal from the Supreme Court of South Carolina. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Frederick Bernays Wiener, James H. Price* and *J. D. Poag* for appellants. *T. C. Callison,* Attorney General of South Carolina, and *James S. Verner* and *William A. Dallis,* Assistant Attorneys General, for appellee. Reported below: 230 S. C. 75, 94 S. E. 2d 177.

Miscellaneous Orders.

No. 253, Misc. THOMPSON *v.* PRICE, WARDEN; and

No. 426, Misc. EX PARTE FEDDER. Motions for leave to file petitions for writs of habeas corpus denied. *Morris Lavine* for petitioner in No. 426, Misc.

Probable Jurisdiction Noted.

No. 307. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* ILLINOIS ET AL.;

No. 502. UNITED STATES *v.* ILLINOIS ET AL.; and

No. 503. INTERSTATE COMMERCE COMMISSION *v.* ILLINOIS ET AL. Appeals from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *W. J. Quinn* and *Edwin R. Eckersall* for appellant in No. 307. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston* for the United States, appellant in No. 502. *Robert W. Ginnane* and *Leo H. Pou* for appellant in No. 503. *Latham Castle,* Attorney General, and *Harry R. Begley,* Special Assistant Attorney General, for the State of Illinois et al., and *Roger Sherman, Henry F. Tenney* and *S. Ashley Guthrie* for the Milwaukee Road Commuters' Association, appellees. Reported below: 146 F. Supp. 195.

Certiorari Granted. (See also No. 413, supra.)

No. 385. California *v.* Taylor et al. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. The Solicitor General is invited to file a brief, as *amicus curiae*. The Chief Justice took no part in the consideration or decision of this application. *Edmund G. Brown,* Attorney General of California, *Herbert E. Wenig,* Assistant Attorney General, and *Edward M. White* for petitioner. *Burke Williamson* and *Jack A. Williamson* for Taylor et al., respondents. Reported below: 233 F. 2d 251.

No. 234, Misc. Jackson *v.* Taylor, Acting Warden. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted limited to the gross sentence question. *Albert A. Carretta* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 234 F. 2d 611.

No. 285, Misc. Fowler *v.* Wilkinson, Warden. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to the gross sentence question. *Leon S. Epstein* and *Carl A. Herbig* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 234 F. 2d 615.

Certiorari Denied.

No. 86. Mitchell, Secretary of Labor, *v.* Brandtjen & Kluge, Inc. C. A. 1st Cir. Certiorari denied. *Solicitor General Rankin, Simon E. Sobeloff,* then Solicitor General, *Stuart Rothman* and *Bessie Margolin* for petitioner. *Paul R. Frederick* for respondent. Reported below: 228 F. 2d 291.

No. 357. IMPERIAL OIL LIMITED *v.* DRLIK. C. A. 6th Cir. Certiorari denied. *Lucian Y. Ray* for petitioner. *Abraham E. Freedman* for respondent. Reported below: 234 F. 2d 4.

No. 363. SAMPSELL ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. C. A. 4th Cir. Certiorari denied. *Herbert M. Brune, Jr.* for petitioners. *Bernard M. Savage* and *Wayland K. Sullivan* for the Brotherhood of Railroad Trainmen et al., respondents. Reported below: 235 F. 2d 569.

No. 396. DONAHOO *v.* THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD CO. Supreme Court of Missouri. Certiorari denied. *Sylvan Bruner* for petitioner. *Thos. T. Railey* for respondent. Reported below: 291 S. W. 2d 70.

No. 463. UNITED STATES *v.* TIEGER. C. A. 3d Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *William W. Ross* for the United States. *Samuel Voltaggio* for respondent. Reported below: 234 F. 2d 589.

No. 464. UNITED STATES *v.* COCHRAN. C. A. 5th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *William W. Ross* for the United States. Reported below: 235 F. 2d 131.

No. 513. MITCHELL, SECRETARY OF LABOR, *v.* HARTFORD STEAM BOILER INSPECTION & INSURANCE CO. C. A. 2d Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman* and *Bessie Margolin* for petitioner. *Francis W. Cole* for respondent. Reported below: 235 F. 2d 942.

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No. 512. BEHR *v.* MINE SAFETY APPLIANCES CO. ET AL. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg* for petitioner. *Paul E. Hutchinson* for respondents. Reported below: 233 F. 2d 371.

No. 514. UNITED STATES EX REL. ACKERMAN *v.* JOHNSTON, WARDEN. C. A. 3d Cir. Certiorari denied. *Marjorie Hanson Matson* for petitioner. *Albert A. Fiok* for respondent. Reported below: 235 F. 2d 958.

No. 516. FEENER BUSINESS SCHOOLS, INC., ET AL. *v.* SCHOOL OF SPEEDWRITING, INC. C. A. 1st Cir. Certiorari denied. *Edward T. Cauley* for petitioners. Reported below: 234 F. 2d 1.

No. 517. NEWPORT *v.* SAMPSELL, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Norman A. Bailie* and *Richard A. Turner* for Sampsell, respondent. Reported below: 233 F. 2d 944.

No. 518. COLLINS *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 4th Cir. Certiorari denied. *Thomas J. Lewis, Jr., Thomas J. Lewis* and *Robert K. Wise* for petitioner. *Douglas McKay* and *M. V. Barnhill, Jr.* for respondent. Reported below: 235 F. 2d 805.

No. 519. TAYLOR FORGE & PIPE WORKS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Henry E. Seyfarth* and *John F. Lane* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli, Frederick U. Reel* and *William J. Avrutis* for respondent. Reported below: 234 F. 2d 227.

No. 522. PARKER *v.* HOWELL ET AL. Supreme Court of Utah. Certiorari denied. *John J. Spriggs, Jr.* for petitioner. *Dennis McCarthy* for respondents. Reported below: 5 Utah 2d 106, 297 P. 2d 542.

No. 527. TRENTMAN ET AL. *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied. *Barkley L. Clanahan* for petitioners. *John C. Banks* for respondents. Reported below: 236 F. 2d 951.

No. 528. MITCHELL, SECRETARY OF LABOR, *v.* FEINBERG. C. A. 2d Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman* and *Bessie Margolin* for petitioner. Respondent *pro se.* Reported below: 236 F. 2d 9.

No. 208, Misc. MAXWELL, ALIAS BAGBY, *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 235 F. 2d 930.

No. 304, Misc. SALEMI *v.* DENNO. C. A. 2d Cir. Certiorari denied. *Osmond K. Fraenkel* for petitioner. *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 235 F. 2d 910.

No. 505. ALABAMA *v.* PLANTATION PIPE LINE CO. Supreme Court of Alabama. Certiorari denied. *John Patterson,* Attorney General of Alabama, and *William N. McQueen, William H. Burton* and *Willard W. Livingston,* Assistant Attorneys General, for petitioner. *Jos. F. Johnston* for respondent. Reported below: 265 Ala. 69, 89 So. 2d 549.

No. 438. PHILLIPS, EXECUTIVE DIRECTOR, EMPLOYMENT SECURITY COMMISSION OF ALASKA, *v.* FIDALGO ISLAND PACKING CO. ET AL. C. A. 9th Cir. Certiorari denied. *J. Gerald Williams,* Attorney General of Alaska, and *Edward A. Merdes,* Assistant Attorney General, for petitioner. Reported below: 230 F. 2d 638, 238 F. 2d 234.

No. 481. SHEDD *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Claude F. Pittman, Jr.* for petitioner. Reported below: —— Miss. ——, 87 So. 2d 898.

No. 523. BLANCHARD *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondent. Reported below: 98 U. S. App. D. C. 208, 233 F. 2d 699.

No. 185, Misc. GOLDSBY *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Loring B. Moore* and *William R. Ming, Jr.* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, for respondent. Reported below: —— Miss. ——, 86 So. 2d 27.

No. 207, Misc. COLE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Walton H. Hamilton* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 98 U. S. App. D. C. 238, 234 F. 2d 59.

No. 265, Misc. PAYTON *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 135 N. E. 2d 247.

No. 249, Misc. BERNSTEIN *v.* NATIONAL BROADCASTING Co., INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nathan M. Brown* for petitioner. *Percy A. Shay* and *Sidney H. Willner* for respondent. Reported below: 98 U. S. App. D. C. 112, 232 F. 2d 369.

Rehearing Denied.

No. 326. NUNN *v.* CALIFORNIA, *ante*, p. 883; and

No. 333. SALES AFFILIATES, INC., *v.* HELENE CURTIS INDUSTRIES, INC., ET AL., *ante*, p. 879. Petitions for rehearing denied.

No. 190. ELLIS *v.* OHIO TURNPIKE COMMISSION ET AL., *ante*, p. 806. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

DECEMBER 11, 1956.

Case Dismissed Under Rule 60.

No. 412, Misc. MAYES *v.* RANDOLPH, WARDEN. On petition for writ of certiorari to the Criminal Court of Cook County, Illinois. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court.

DECEMBER 17, 1956.

Decisions Per Curiam.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and

No. 4, Original. NEW YORK *v.* ILLINOIS ET AL.

Per Curiam: In view of the emergency in navigation caused by low water in the Mississippi River, Paragraph 3 of the decree in these causes issued on April 21, 1930 [281 U. S. 696], is temporarily modified to permit the diversion

to and including the 31st day of January 1957, from the Great Lakes-St. Lawrence System into the Illinois Waterway and the Mississippi River of such amount of water not exceeding an average of 8,500 cubic feet a second, in addition to domestic pumpage, as the Corps of Engineers, United States Army, shall determine will be useful in alleviating the emergency with respect to navigation currently existing without seriously interfering with navigation on the Illinois Waterway, at such times and in such amounts as the Corps of Engineers shall direct. The entry of this order shall not prejudice the legal rights of any of the parties to these causes with respect to any other diversion of the waters involved. After January 31, 1957, all provisions of the decree entered on April 21, 1930, shall remain in full force and effect until further order of this Court.

Vernon W. Thomson, Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin, *Miles Lord,* Attorney General, and *Joseph J. Bright,* Assistant Attorney General, for the State of Minnesota, *C. William O'Neill,* Attorney General, and *Larry H. Snyder,* Assistant Attorney General, for the State of Ohio, *Herbert B. Cohen,* Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the State of Pennsylvania, *Thomas M. Kavanagh,* Attorney General, and *Edmund E. Shepherd,* Solicitor General, for the State of Michigan, and *Jacob K. Javits,* Attorney General, and *James O. Moore, Jr.,* Solicitor General, for the State of New York, complainants.

Latham Castle, Attorney General, and *William C. Wines,* Assistant Attorney General, for the State of Illinois, and *Russell W. Root* and *Lawrence J. Fenlon* for the Metropolitan Sanitary District of Greater Chicago, defendants.

John M. Dalton, Attorney General, and *John W. Inglish,* Assistant Attorney General, for the State of

Missouri, *Jo M. Ferguson,* Attorney General, and *M. B. Holifield* and *David B. Sebree,* Assistant Attorneys General, for the State of Kentucky, *George F. McCanless,* Attorney General, and *Nat Tipton,* Advocate General, for the State of Tennessee, *Jack P. F. Gremillion,* Attorney General, for the State of Louisiana, *Joe T. Patterson,* Attorney General, and *Dugas Shands,* Assistant Attorney General, for the State of Mississippi, *Tom Gentry,* Attorney General, and *James L. Sloan,* Chief Assistant Attorney General, for the State of Arkansas, and *Dayton Countryman,* Attorney General, for the State of Iowa, intervening defendants.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL.

WHEREAS an order temporarily modifying the decree in these cases has this day been made because of an existing emergency, and whereas other prompt action to relieve the emergency may be required during the modification period in furtherance of the order,

IT IS ORDERED that all such matters be referred to MR. JUSTICE BURTON, Circuit Justice for the Seventh Circuit, with power to act.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL.

Per Curiam: The motion of the Metropolitan Sanitary District of Greater Chicago for clarification of the decree [281 U. S. 696] is hereby denied.

Russell W. Root and *Lawrence J. Fenlon* for movant. *John M. Dalton,* Attorney General, and *John W. Inglish,* Assistant Attorney General, for the State of Missouri, supported the motion. The States of Michigan, by *Thomas M. Kavanagh,* Attorney General, and *Edmund E. Shepherd,* Solicitor General; New York, by *Jacob K.*

Javits, Attorney General, and *James O. Moore, Jr.,* Solicitor General; and Wisconsin, by *Vernon W. Thomson,* Attorney General, and *Roy G. Tulane,* Assistant Attorney General, urged dismissal of the motion.

No. 404. Wisconsin Electric Power Co. *v.* City of Milwaukee. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* In this case probable jurisdiction is noted. The judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County* for consideration in the light of *Walker* v. *City of Hutchinson,* 352 U. S. 112.

Van B. Wake and *John F. Zimmermann* for appellant. *Walter J. Mattison* and *Harry G. Slater* for appellee. Reported below: 272 Wis. 575, 76 N. W. 2d 341.

No. 496. Pottharst *v.* Richardson & Bass et al. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *William M. Campbell, Jr.* for appellant. *Kalford K. Miazza* and *Bentley G. Byrnes* for the Orleans Levee Board, appellee. Reported below: 231 La. 299, 91 So. 2d 353.

No. 382, Misc. Jensen *v.* Oregon. Appeal from the Supreme Court of Oregon. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Edward C. Kelly* for appellant. *Seward Reese* for appellee. Reported below: 209 Ore. 239, 296 P. 2d 618.

No. 507. Landes *v.* Landes (Smith). Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Eugene*

*[This order amended, *post,* p. 958.]

Gressman for appellant. *Peter Campbell Brown* and *Seymour B. Quel* for appellee. Reported below: 1 N. Y. 2d 358, 135 N. E. 2d 562.

No. 432, Misc. HENDRICKS *v.* OKLAHOMA. Appeal from the Criminal Court of Appeals of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Sam H. Lattimore,* Assistant Attorney General, for appellee. Reported below: 297 P. 2d 576.

No. 54. UNITED STATES *v.* LEHIGH VALLEY RAILROAD CO. On petition for writ of certiorari to the Court of Claims. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the court below is reversed and the case is remanded to the Court of Claims for further proceedings not inconsistent with the opinion of this Court in *United States* v. *Western Pacific R. Co.,* 352 U. S. 59.

Simon E. Sobeloff, then Solicitor General, *Assistant Attorney General Burger, Melvin Richter* and *Morton Hollander* for the United States. Reported below: 133 Ct. Cl. 160.

Miscellaneous Orders.

No. 280. GUSS, DOING BUSINESS AS PHOTO SOUND PRODUCTS MANUFACTURING CO., *v.* UTAH LABOR RELATIONS BOARD. Appeal from the Supreme Court of Utah. (Probable jurisdiction noted, *ante,* p. 817.) The motion to add the United Steelworkers of America as a party appellee is denied. The United Steelworkers of America may file a brief, *amicus curiae,* if it desires. The Solicitor General is invited to file a brief, as *amicus curiae*. *Arthur J. Goldberg* and *David E. Feller* for movant.

No. 385, October Term, 1954. DANIMAN ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL.; and

No. 378. DANIMAN ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. The motion for leave to file petition for rehearing and for incidental relief is denied. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. The motion for leave to use the record in No. 385, October Term, 1954, *Daniman* v. *Board of Education,* 348 U. S. 933, is granted. Petition for writ of certiorari to the Court of Appeals of New York denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would grant the rehearing in accordance with the action taken in *Cahill* v. *New York, New Haven & Hartford R. Co.,* 351 U. S. 183. MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases. *Osmond K. Fraenkel* for appellants-petitioners. *Peter Campbell Brown, Seymour B. Quel* and *Bernard Friedlander* for appellees-respondents. Reported below: See 1 N. Y. 2d 855, 135 N. E. 2d 732.

No. 342. GAYLE ET AL., MEMBERS OF THE BOARD OF COMMISSIONERS OF MONTGOMERY, ALABAMA, ET AL. *v.* BROWDER ET AL., *ante,* p. 903. Petition for clarification and rehearing denied.

No. 294, Misc. SIMMONS *v.* NEW YORK. Motion for leave to file a petition for writ of certiorari or, in the alternative, a petition for writ of mandamus denied.

Probable Jurisdiction Noted. (*See No. 404, supra.*)

Certiorari Granted. (*See also No. 54, supra.*)

No. 465. FEDERAL TRADE COMMISSION *v.* STANDARD OIL CO. The motion for leave to file brief of National Congress of Petroleum Retailers, Inc., and Retail Gaso-

line Dealers Association of Michigan, Inc., as *amici curiae*, is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner* and *Robert B. Dawkins* for petitioner. *Weymouth Kirkland, Howard Ellis, Hammond E. Chaffetz, W. H. Van Oosterhout* and *Thomas E. Sunderland* for respondent. *Cyrus Austin* for the National Congress of Petroleum Retailers, Inc., et al. Reported below: 233 F. 2d 649.

No. 271, Misc. NELSON ET AL. *v.* TENNESSEE. The motion for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the Supreme Court of Tennessee, Eastern District, granted limited to the jury question. *Hobart F. Atkins* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Nat Tipton,* Advocate General, for respondent. Reported below: —— Tenn. ——, 292 S. W. 2d 727.

Certiorari Denied. (*See also No. 378 and Misc. Nos. 294 and 432, supra.*)

No. 472. EASTERN MASSACHUSETTS STREET RAILWAY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Charles W. Mulcahy* for petitioner. *Solicitor General Rankin, Theophil C. Kammholz, Dominick L. Manoli* and *Fannie M. Boyls* for respondent. Reported below: 235 F. 2d 700.

No. 524. AUTOMATIC CIGARETTE SALES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Thurman Hill* and *Arthur J. Swanick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Louise Foster* for respondent. Reported below: 234 F. 2d 825.

No. 526. REID, DOING BUSINESS AS COLLEGE BOOK EXCHANGE, *v.* HARPER & BROTHERS. C. A. 2d Cir. Certiorari denied. *Thurman Arnold* and *Norman Diamond* for petitioner. *Horace S. Manges* and *Alexander S. Andrews* for respondent. Reported below: 235 F. 2d 420.

No. 529. COLEMAN COMPANY, INC., *v.* HOLLY MANUFACTURING CO., INC. C. A. 9th Cir. Certiorari denied. *Dean Acheson, W. Graham Claytor, Jr.* and *John F. Eberhardt* for petitioner. *James B. Christie* for respondent. Reported below: 233 F. 2d 71.

No. 531. PENNSYLVANIA *v.* EASTMAN KODAK CO. Supreme Court of Pennsylvania, Middle District. Certiorari denied. *Herbert B. Cohen,* Attorney General of Pennsylvania, and *Edward Friedman,* Deputy Attorney General, for petitioner. *Sanford D. Beecher* for respondent. Reported below: 385 Pa. 607, 124 A. 2d 100.

No. 535. MOZER ET AL., DOING BUSINESS AS MOZER BROS., *v.* HI-YIELD CHEMICAL CO. ET AL. C. A. 5th Cir. Certiorari denied. *W. F. Moore* for petitioners. *Louis W. Woosley* for respondents. Reported below: 234 F. 2d 906.

No. 542. HARRISON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Martin A. Rosenberg* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for respondent. Reported below: 235 F. 2d 587.

No. 543. GENOVESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Joseph A. Fanelli* and *Joseph H. Freehill* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 236 F. 2d 757.

No. 547. MADDEN *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. *James P. Mozingo, III,* and *John L. Nettles* for petitioner. *Geo. H. Ward* for respondent. Reported below: 235 F. 2d 198.

No. 549. ESKIMO KOOLER CORP. *v.* ESKIMO PIE CORP. C. A. 7th Cir. Certiorari denied. *George E. Frost* for petitioner. *Abraham J. Nydick* for respondent. Reported below: 235 F. 2d 3.

No. 561. AUREX CORPORATION ET AL. *v.* BELTONE HEARING AID CO. C. A. 7th Cir. Certiorari denied. *William C. Wines* and *Chas. W. Rummler* for petitioners. *Will Freeman* and *George E. Frost* for respondent. Reported below: 236 F. 2d 644.

No. 501. POLAROID CORPORATION *v.* UNITED STATES. The motion for leave to file supplemental petition for writ of certiorari is granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied. *David Saperstein* and *Harry P. Goldstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Hilbert P. Zarky* for the United States. Reported below: 235 F. 2d 276.

No. 541. ALLIED CLEANING CONTRACTORS, INC., *v.* ALLIED MAINTENANCE CORP. ET AL.; and

No. 544. ALLIED MAINTENANCE CORP. *v.* ALLIED CLEANING CONTRACTORS, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Bruce A. Pettijohn, Jr., William H. Stieglitz* and *Harry Schechter* for petitioner in No. 541. *Russell T. Mount* for petitioner in No. 544. *Vincent L. Leibell, Jr.* for Trans World Airlines, Inc., and *Charles L. Sylvester* for Kozman, respondents. Reported below: 236 F. 2d 527.

No. 532. MURPHY *v.* WILSON, SECRETARY OF DEFENSE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondents. Reported below: 99 U. S. App. D. C. 4, 236 F. 2d 737.

No. 533. KRIVOSKI *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Ralph S. Spritzer, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 136 Ct. Cl. —, 145 F. Supp. 239.

No. 537. BILTMORE MUSIC CORP. *v.* KITTINGER. The motion for leave to file brief of the Authors League of America, Inc., as *amicus curiae,* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Milton A. Rudin* for petitioner. *Almon S. Nelson* for respondent. *Solicitor General Rankin* filed a memorandum for the United States. *Osmond K. Fraenkel* for the Authors League of America, Inc. Reported below: 238 F. 2d 373.

No. 550. MCKENNA *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 135 Ct. Cl. 30.

No. 349, Misc. SEFTON *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *John W. Bonner* and *Toy R. Gregory* for petitioner. Reported below: 72 Nev. —, 295 P. 2d 385.

No. 377, Misc. ELLMORE *v.* BRUCKER, SECRETARY, DEPARTMENT OF THE ARMY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lowry N. Coe* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondents. Reported below: 99 U. S. App. D. C. 1, 236 F. 2d 734.

No. 378, Misc. SMITH *v.* DULLES, SECRETARY OF STATE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Francis C. Brooke* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondents. Reported below: 99 U. S. App. D. C. 6, 236 F. 2d 739.

Rehearing Denied. (*See also No. 342, and No. 385, October Term, 1954, supra.*)

No. 343. OWEN ET AL., MEMBERS OF THE ALABAMA PUBLIC SERVICE COMMISSION, ET AL. *v.* BROWDER ET AL., *ante*, p. 903;

No. 358. COLD METAL PROCESS CO. ET AL. *v.* REPUBLIC STEEL CORP., *ante*, p. 891;

No. 367. HINELINE *v.* UNITED STATES, *ante*, p. 891; and

No. 433. MCGOWEN *v.* TEXAS, *ante*, p. 902. Petitions for rehearing denied.

No. 352. SHEPPARD *v.* OHIO, *ante*, p. 910. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 163. CROSBY ET AL. *v.* UNITED STATES, *ante*, p. 831. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

JANUARY 12, 1957.

Dismissals Under Rule 60.

No. 266. HOME UTILITIES CO., INC., *v.* EASTMAN KODAK CO. Certiorari, 352 U. S. 821, to the United States Court of Appeals for the Fourth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Melvin J. Sykes* for petitioner. *David R. Owen* for respondent. Reported below: 234 F. 2d 766.

No. 573. JOHNSON ET AL. *v.* UNION PACIFIC RAILROAD CO. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The Pacific Fruit Express Co. is dismissed as a party petitioner herein per stipulation pursuant to Rule 60 of the Rules of this Court. *William D. Donnelly* was on the motion for Johnson et ux., petitioners. *Bryan P. Leverich* for respondent. Reported below: 233 F. 2d 427.

JANUARY 14, 1957.

Decisions Per Curiam.

No. 506. IN RE ADDISON. Appeal from the Supreme Court of Pennsylvania, Eastern District. *Per Curiam:* The motion for leave to file and the motion to dismiss are granted. The appeal is dismissed for want of a substantial federal question. *Jacob J. Kilimnik* for appellant. *David Berger* for the City of Philadelphia, appellee. Reported below: 385 Pa. 48, 122 A. 2d 272.

No. 508. WALKER, ADMINISTRATRIX, *v.* CALIFORNIA ET AL. Appeal from the District Court of Appeal of California, Third Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Appellant *pro se*. *Edmund G. Brown,* Attorney General of Cali-

fornia, and *William J. Power,* Deputy Attorney General, for appellees. Reported below: 142 Cal. App. 2d 123, 297 P. 2d 1036.

No. 588. SPIELVOGEL *v.* FORD, COMMISSIONER, DEPARTMENT OF WATER SUPPLY, GAS AND ELECTRICITY OF THE CITY OF NEW YORK, ET AL. Appeal from the Supreme Court of New York, New York County. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Herman J. Zawin* and *I. Stanley Stein* for appellant. *Peter Campbell Brown, Seymour B. Quel* and *Anthony Curreri* for appellees. Reported below: See 1 N. Y. 2d 558, 136 N. E. 2d 856.

No. 341, Misc. SCHON *v.* SCHON. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal is dismissed for want of jurisdiction. Reported below: 88 So. 2d 634.

No. 394, Misc. LEIGHT *v.* SCHECHTER, PERSONNEL DIRECTOR AND CHAIRMAN, MUNICIPAL CIVIL SERVICE COMMISSION, ET AL. Appeal from and petition for writ of certiorari to the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. The petition for writ of certiorari is denied. Appellant-petitioner *pro se. Peter Campbell Brown* and *Seymour B. Quel* for appellees-respondents. Reported below: 1 N. Y. 2d 644, 919, 136 N. E. 2d 917.

No. 573. JOHNSON ET AL. *v.* UNION PACIFIC RAILROAD CO. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of *Russell* v. *City of Idaho Falls,* No. 8431 [78 Idaho —, 305 P. 2d

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740], decided by the Supreme Court of Idaho, December 24, 1956. The case is remanded to the Court of Appeals for proceedings consistent with this holding. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN would not grant the petition for writ of certiorari, but in any event, upon its being granted, would vacate the judgment of the Court of Appeals and remand the case for reconsideration by that court in light of the decision of the Supreme Court of Idaho in the case of *Russell* v. *City of Idaho Falls,* [*supra*], decided by the latter court December 24, 1956, after the decision in the present case. *William D. Donnelly* for petitioners. *Bryan P. Leverich* for respondent. Reported below: 233 F. 2d 427.

Miscellaneous Orders.

No. 404. WISCONSIN ELECTRIC POWER CO. *v.* CITY OF MILWAUKEE. The order entered in this case on December 17, 1956, 352 U. S. 948, is amended to provide for a remand of the case to the Supreme Court of Wisconsin.

No. 566. BARTKUS *v.* ILLINOIS. Certiorari, 352 U. S. 907, to the Supreme Court of Illinois. It is ordered that *Walter T. Fisher, Esquire,* of Chicago, Illinois, a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 567. HOAG *v.* NEW JERSEY. Certiorari, 352 U. S. 907, to the Supreme Court of New Jersey. It is ordered that *Robert E. Knowlton, Esquire,* of Camden, New Jersey, be appointed to serve as counsel for the petitioner in this case.

No. 569. MOORE *v.* MICHIGAN. Certiorari, 352 U. S. 907, to the Supreme Court of Michigan. It is ordered that *William H. Culver, Esquire,* of Kalamazoo, Michigan, be appointed to serve as counsel for the petitioner in this case.

No. 568. LADNER *v.* UNITED STATES. Certiorari, 352 U. S. 907, to the United States Court of Appeals for the Fifth Circuit. It is ordered that *Harold Rosenwald, Esquire,* of Boston, Massachusetts, a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 64. LIBSON SHOPS, INC., *v.* KOEHLER, DISTRICT DIRECTOR OF INTERNAL REVENUE. Certiorari, 351 U. S. 961, to the United States Court of Appeals for the Eighth Circuit. The motion for leave to file brief of Newmarket Manufacturing Company, as *amicus curiae,* is granted with leave to parties to respond if so advised. *Louis Eisenstein* for movant.

No. 92. SCHWARE *v.* BOARD OF BAR EXAMINERS OF NEW MEXICO. Certiorari, 352 U. S. 821, to the Supreme Court of New Mexico. The motion for leave to file brief of Harriet Buhai, as *amicus curiae,* is denied.

No. 103. NATIONAL LABOR RELATIONS BOARD *v.* TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L. Certiorari, 352 U. S. 818, to the United States Court of Appeals for the Second Circuit. The motion of Linen and Credit Exchange et al. for leave to appear and present oral argument, as *amici curiae,* is denied.

No. 572. PEREZ *v.* BROWNELL, ATTORNEY GENERAL. Certiorari, 352 U. S. 908, to the United States Court of Appeals for the Ninth Circuit. The motion for waiver of payment of Clerk's costs and to print petitioner's briefs and record at public expense is granted. *Fred Okrand* for movant.

No. 216. UNITED STATES *v.* NEWMARKET MANUFACTURING CO. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. The motion for leave to file supplement to brief for respondent in opposition is granted. *Louis Eisenstein* for movant.

No. 401. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL. Appeal from the United States Court of Appeals for the Sixth Circuit. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *G. Edwin Slater* for the City of Detroit, and *Philip A. McHugh* and *Albert E. Champney* for Wayne County, Michigan, appellants. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky* and *Lyle M. Turner* for the United States, and *Victor W. Klein* for the Murray Corporation of America, appellees. *Walter J. Mattison* and *Harry G. Slater* filed a brief for the City of Milwaukee, as *amicus curiae,* supporting appellants. Reported below: 234 F. 2d 380.

No. 201. HOOK & ACKERMAN, INC., *v.* HOOK, EXECUTRIX, ET AL. The motion to dismiss petition for writ of certiorari of counsel for John A. McCance, Receiver for Hook & Ackerman, Inc., is denied. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Harry Price* for petitioner. *William B. Jaspert* for movant and for Hook & Miller, respondent. Reported below: 233 F. 2d 180.

No. 361, Misc. MCCARTER *v.* RANDOLPH, WARDEN, ET AL. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied and motion for leave to file petition for writ of habeas corpus denied.

No. 359, Misc. EAGLE *v.* CHERNEY ET AL. Motion for leave to file further petition for writ of certiorari denied.

No. 360, Misc. DAVIS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari, habeas corpus and other relief denied.

No. 375, Misc. NICHOLS *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. Motion for leave to file petition for writ of certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application.

No. 391, Misc. GOODSON *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of certiorari and petition for writ of mandamus denied.

No. 327, Misc. HOWARD *v.* UNITED STATES ET AL.;
No. 330, Misc. IN RE WELLS;
No. 332, Misc. IN RE TABANO;
No. 333, Misc. GOULDING *v.* UNITED STATES;
No. 339, Misc. IN RE ANDERSON;
No. 340, Misc. KING *v.* MCNEILL;
No. 343, Misc. IN RE MILLER;
No. 355, Misc. MAHAR *v.* LAINSON, WARDEN;
No. 365, Misc. HIBBS *v.* MCLEOD, WARDEN, ET AL.; and
No. 388, Misc. IN RE HARRIS. Motions for leave to file petitions for writs of habeas corpus denied.

No. 358, Misc. BUTLER *v.* LAWS, CHIEF JUDGE, U. S. DISTRICT COURT; and
No. 363, Misc. DAVIS *v.* PENNSYLVANIA. Motions for leave to file petitions for writs of mandamus denied.

No. 376, Misc. TENNESSEE *v.* BOYD, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Clark P. Moss,* District Attorney General of Tennessee, and *L. E. Gwinn* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for respondents.

No. 406, Misc. COOPER *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied. *Wade H. Cooper, pro se.* *Solicitor General Rankin* for the United States.

Probable Jurisdiction Noted.

No. 559. UNITED STATES *v.* SHARPNACK. Appeal from the United States District Court for the Western District of Texas. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 602. STAUB *v.* CITY OF BAXLEY. Appeal from the Court of Appeals of Georgia. Probable jurisdiction noted. *Morris P. Glushien* and *Bernard Dunau* for appellant. *J. H. Highsmith* for appellee. Reported below: 94 Ga. App. 18, 93 S. E. 2d 375.

No. 61. ALBERTS *v.* CALIFORNIA. Appeal from the Superior Court of California, Los Angeles County, Appellate Department. Probable jurisdiction noted. *Stanley Fleishman* and *William B. Murrish* for appellant. *Adolph Alexander* for appellee. Reported below: 138 Cal. App. 2d 909, 292 P. 2d 90.

No. 107. KINGSLEY BOOKS, INC., ET AL. *v.* BROWN, CORPORATION COUNSEL. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Emanuel Redfield* for appellants. *Peter Campbell Brown* and *Seymour B. Quel* for appellee. Reported below: 1 N. Y. 2d 177, 134 N. E. 2d 461.

No. 487. UNITED STATES ET AL. *v.* CITY OF DETROIT. Appeal from the Supreme Court of Michigan. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky* and *Lyle M. Turner* for the United States, and *Glenn M. Coulter* for

the Borg-Warner Corporation, appellants. *Andrew DiMaggio* for appellee. Reported below: 345 Mich. 601, 77 N. W. 2d 79.

No. 564. UNITED STATES *v.* TOWNSHIP OF MUSKEGON ET AL. Appeal from the Supreme Court of Michigan. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky* and *Lyle M. Turner* for the United States. *Harold M. Street* for appellees, and *Robert A. Cavanaugh* for Muskegon County, appellee. Reported below: 346 Mich. 218, 77 N. W. 2d 799.

No. 565. CONTINENTAL MOTORS CORP. ET AL. *v.* TOWNSHIP OF MUSKEGON ET AL. Appeal from the Supreme Court of Michigan. Probable jurisdiction noted. *Victor W. Klein* for the Continental Motors Corporation, appellant. *Harold M. Street* for appellees, and *Robert A. Cavanaugh* for Muskegon County, appellee. Reported below: 346 Mich. 218, 77 N. W. 2d 799.

Certiorari Granted. (*See also No. 573, supra.*)

No. 563. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL. C. A. 6th Cir. Certiorari granted. *G. Edwin Slater* for the City of Detroit, and *Philip A. McHugh* and *Albert E. Champney* for the County of Wayne, petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Hilbert P. Zarky* for the United States, and *Victor W. Klein* for the Murray Corporation of America, respondents. Reported below: 234 F. 2d 380.

No. 607. TAYLOR ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Gordon Browning* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 236 F. 2d 649.

No. 582. ROTH *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted, limited to questions 1, 2, and 3 presented by the petition for the writ which read as follows:

"1. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?

"2. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

"3. Does the federal obscenity statute (18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?"

David von G. Albrecht, David P. Siegel and *Peter Belsito* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 237 F. 2d 796.

No. 525. UNITED STATES *v.* CENTRAL EUREKA MINING CO. ET AL. Court of Claims. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. *Edward W. Bourne, Eugene Z. Du Bose* and *Edward E. Rigney* for the Homestake Mining Co., *Phillip Barnett* and *Ralph D. Pittman* for the Central Eureka Mining Co., *O. R. McGuire, Jr.* for the Alaska-Pacific Consolidated Mining Co., *George Herrington* and *William H. Orrick, Jr.* for the Idaho Maryland Mines Corporation, and *Samuel Green, John W. Cutler* and *John D. Costello* for the Bald Mountain Mining Co. et al., respondents. Reported below: 134 Ct. Cl. 1, 130, 138 F. Supp. 281, 146 F. Supp. 476.

No. 557. KERNAN, ADMINISTRATOR, ET AL. *v.* AMERICAN DREDGING CO. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* for petitioners. *T. E. Byrne, Jr.* and *Mark D. Alspach* for respondent. Reported below: 235 F. 2d 618.

No. 574. UNITED STATES *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. C. A. 1st Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Ralph S. Spritzer, Melvin Richter* and *Morton Hollander* for the United States. *Edmund M. Sweeney* for respondent. Reported below: 236 F. 2d 101.

No. 538. RATHBUN *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted, limited to question 1 presented by the petition for the writ which reads as follows:

"1. Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to wit Sec. 605, Title 47, U. S. C. A."

E. F. Conly for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 236 F. 2d 514.

No. 401, Misc. REEVES *v.* ALABAMA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Alabama granted. *Peter A. Hall, Orzell Billingsley, Jr.* and *Jack Greenberg* for petitioner. *John Patterson,* Attorney General of Alabama, *Bernard F. Sykes,* Assistant Attorney General, and *Robert B. Stewart* for respondent. Reported below: 264 Ala. 476, 88 So. 2d 561.

No. 539. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* GONZALES. District Court of Appeal of California, First Appellate District. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the National Labor Relations Board. *Plato E. Papps* for petitioners. Reported below: 142 Cal. App. 2d 207, 298 P. 2d 92.

No. 545. UNITED STATES EX REL. LEE KUM HOY ET AL. *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted, limited to the question of whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry to this country. *Edward J. Ennis* for Lee Moon Wah, petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 237 F. 2d 307.

Certiorari Denied. (*See also No. 201 and Misc. Nos. 359, 360, 361, 375, 391 and 394, supra.*)

No. 457. CONTINENTAL OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Roland B. Voight* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross* and *Willard W. Gatchell* for respondent. Reported below: 236 F. 2d 839.

No. 536. DAVID *v.* MICHIGAN. Circuit Court of Genesee County, Michigan. Certiorari denied. *Howard D. Cline* and *Francis J. George* for petitioner. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 459. INTERSTATE POWER CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 476. NORTHERN NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. *Miles Lord,* Attorney General, and *Joseph J. Bright,* Assistant Attorney General, for the State of Minnesota, *Clement F. Springer* for the Interstate Power Co., *Carl W. Cummins* for the Northern States Power Co., *Irvin Fane* for the Kansas City Power & Light Co., *Henry M. Gallagher* for the Central Natural Gas Co., *Patrick L. Farnand, G. T. Mullin* and *John F. Bonner* for the Minneapolis Gas Co., and *John W. Scott* for the Minnesota Valley Natural Gas Co., petitioners in No. 459. *Lawrence I. Shaw, F. Vinson Roach, Patrick J. McCarthy* and *Richard J. Connor* for petitioner in No. 476. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell, Howard E. Wahrenbrock* and *William L. Ellis* for the Federal Power Commission, *Lloyd J. Marti* for the Central Electric & Gas Co., *Raymond A. Smith* for the Council Bluffs Gas Co., and *George C. Pardee* for the Metropolitan Utilities District of Omaha, respondents. Reported below: 236 F. 2d 372.

No. 530. HUMBLE OIL & REFINING CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Wm. H. Holloway, Carl Illig, Wm. J. Merrill, Bernard A. Foster, Jr.* and *Nelson Jones* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell, Howard E. Wahrenbrock* and *C. Louis Knight* for respondent. Reported below: 236 F. 2d 819.

No. 555. TRIEBER *v.* ENGLAND, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Herbert L. Faulkner* for respondent. Reported below: 237 F. 2d 117.

No. 553. Kus *v.* United States. C. A. 7th Cir. Certiorari denied. *Peter Fitzpatrick* and *Gerald M. Chapman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 234 F. 2d 817.

No. 556. Mikelberg et ux. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *William A. Valentine* and *John H. Connaughton* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 234 F. 2d 34.

No. 558. Magnolia Petroleum Co. et al. *v.* Federal Power Commission. C. A. 5th Cir. Certiorari denied. *Charles B. Wallace* and *John E. McClure* for the Magnolia Petroleum Co., *Cullen R. Liskow* for the Superior Oil Co., *Clayton L. Orn, Robert M. Vaughan, James D. Parriott, W. H. Everett, C. F. Currier* and *Robert E. May* for the Ohio Oil Co., and *Jacques P. Adoue* for West, petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 236 F. 2d 785.

No. 560. Balanovski et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Donald L. Stumpf* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 236 F. 2d 298.

No. 575. Arvidson et al. *v.* Reynolds Metals Co. C. A. 9th Cir. Certiorari denied. *Donald A. Schafer* for petitioners. *Lindsay L. Thompson* and *Gustav B. Margraf* for respondent. Reported below: 236 F. 2d 224.

No. 576. ROSENBLUM *v.* UNITED STATES; and

No. 577. ANSELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frederick H. Block* for petitioner in No. 576. *Bernard Austin* for petitioners in No. 577. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 236 F. 2d 502.

No. 578. E. F. DREW & CO., INC., *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Samuel J. Loewenstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 235 F. 2d 735.

No. 579. UNION OIL CO. OF CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *George D. Horning, Jr.* for the Union Oil Co. of California, and *Loftus E. Becker* for the Louisiana Land & Exploration Co., petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 236 F. 2d 816.

No. 580. BURKE ET AL. *v.* ADAMS DAIRY, INC. Supreme Court of Missouri. Certiorari denied. *Harry H. Craig* and *J. T. Wiley, Jr.* for petitioners. *J. Leonard Schermer* for respondent. Reported below: 293 S. W. 2d 281.

No. 581. ROLLINS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *James A. Jameson* for petitioner. *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 583. TEXAS COMPANY *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Roger J. Whiteford, John J. Wilson* and *Edward M. Freeman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 236 F. 2d 813.

No. 584. HUNT OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Robert E. May* and *Omar L. Crook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 236 F. 2d 828.

No. 585. LEE, TRUSTEE, *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Robert E. May* and *Omar L. Crook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 236 F. 2d 835.

No. 586. SHANK, TRUSTEE, *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Robert E. May* and *Omar L. Crook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 236 F. 2d 830.

No. 592. S. J. GROVES & SONS CO., INC., *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Joseph Lorenz* for petitioner. *Philip Price* and *Robert M. Landis* for respondent. Reported below: 236 F. 2d 760.

No. 594. DANIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Neil Brans* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 234 F. 2d 102.

No. 598. NACHTMAN *v.* JONES & LAUGHLIN STEEL CORP. C. A. 3d Cir. Certiorari denied. *David G. Bress* and *Sheldon E. Bernstein* for petitioner. *Walter J. Blenko* for respondent. Reported below: 235 F. 2d 211.

No. 600. J. M. HUBER CORP. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. *Henry H. Fowler* and *Marx Leva* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, William W. Ross, Willard W. Gatchell, Howard E. Wahrenbrock* and *William L. Ellis* for the Federal Power Commission, and *Lawrence I. Shaw, F. Vinson Roach* and *Justin R. Wolf* for the Northern Natural Gas Co., respondents. Reported below: 236 F. 2d 550.

No. 604. CAPEHART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Hayden C. Covington* and *Victor F. Schmidt* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 237 F. 2d 388.

No. 606. ADAMS ET AL., TRUSTEES, *v.* CONSTRUCTION AGGREGATES CORP. C. A. 2d Cir. Certiorari denied. *Cletus Keating* and *John F. Gerity* for petitioners. *Leonard J. Matteson* and *Richard F. Shaw* for respondent. Reported below: 237 F. 2d 884.

No. 554. TALIAFERRO *v.* TALIAFERRO. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 587. New York, New Haven & Hartford Railroad Co. *v.* Cahill. The motion for leave to use the record in *Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U. S. 183, is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *William T. Griffin* and *Herbert Burstein* for petitioner. *Randolph J. Seifert* and *William A. Blank* for respondent. Reported below: 236 F. 2d 410.

No. 591. Taliaferro, doing business as Davis Auto Exchange, *v.* Insurance Commission of California et al. District Court of Appeal of California, First Appellate District. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, and *Harold B. Haas,* Deputy Attorney General, for respondents. Reported below: 142 Cal. App. 2d 487, 298 P. 2d 914.

No. 605. Petrowski et al. *v.* Hawkeye-Security Insurance Co. The motion for leave to use the record in *Petrowski* v. *Hawkeye-Security Insurance Co.*, 350 U. S. 495, is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Richard P. Tinkham, Jr.* for petitioners. *Herbert C. Hirschboeck* and *Victor M. Harding* for respondent. Reported below: 237 F. 2d 609.

No. 610. Russo *v.* United States. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 235 F. 2d 477.

No. 145, Misc. Ford *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 2d 835.

No. 162, Misc. PETTIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 184, Misc. TURNER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 247, Misc. LOPER *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 297, Misc. UNITED STATES EX REL. FARMER *v.* THOMPSON. C. A. 3d Cir. Certiorari denied.

No. 309, Misc. WESTBROOK *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 328, Misc. KETTER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 329, Misc. GROSS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 331, Misc. GUIDICE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 335, Misc. ST. CLAIR *v.* WARDEN, MISSOURI STATE PRISON, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 336, Misc. JONES *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 348, Misc. CROSSLY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

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No. 353, Misc. SAMPSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 354, Misc. PAQUA *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 356, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 364, Misc. WATSON *v.* SKILLMAN, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 2d 659.

No. 368, Misc. LONG *v.* MARYLAND. Circuit Court for Washington County, Maryland. Certiorari denied.

No. 370, Misc. BROWN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 371, Misc. SCALF *v.* COINER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 374, Misc. HARRIS *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 380, Misc. HEARD *v.* BANNAN, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 385, Misc. ROMEO *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 387, Misc. WADE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 386, Misc. PANARIELLO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 390, Misc. VICK *v.* MEMPHIS AND SHELBY COUNTY BAR ASSOCIATION, INC. Supreme Court of Tennessee. Certiorari denied. Petitioner *pro se*. *Sam P. Walker* for respondent.

No. 392, Misc. ADAMS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 397, Misc. OUGHTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 344, Misc. NOVAK *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 546. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 878, ET AL. *v.* BLASSINGAME ET AL. Supreme Court of Arkansas. Certiorari denied. *Tom Gentry* for petitioners. Reported below: 226 Ark. 614, 293 S. W. 2d 444.

No. 548. BUFFALO FAULTLESS PANTS CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles M. Trammell* and *Bert B. Rand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 135 Ct. Cl. 464, 142 F. Supp. 594.

No. 562. GIVENS *v.* MOULTON. Supreme Court of Alabama. Certiorari denied. *Charles Bragman* for petitioner. Reported below: 264 Ala. 417, 87 So. 2d 839; 265 Ala. 117, 89 So. 2d 918.

No. 595. SCHOFIELD ET AL. *v.* BENSON, SECRETARY OF AGRICULTURE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert W. Lishman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herman Marcuse* for the Secretary of Agriculture, and *Reuben Hall* and *John W. Cragun* for the New England Milk Producers' Association et al., respondents. Reported below: 98 U. S. App. D. C. 424, 236 F. 2d 719.

No. 282, Misc. FORD *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondents. Reported below: 234 F. 2d 869.

No. 334, Misc. BURNETT *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 365 Mo. —, 293 S. W. 2d 335.

No. 366, Misc. TRAYNHAM *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 609, 125 A. 2d 675.

Rehearing Denied.

No. 436. BOWDEN *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 916;

No. 471. BARKER *v.* UNITED STATES, *ante*, p. 935;

No. 523. BLANCHARD *v.* WATSON, COMMISSIONER OF PATENTS, *ante*, p. 944; and

No. 229, Misc. HALL *v.* UNITED STATES, *ante*, p. 936. Petitions for rehearing denied.

No. 512. BEHR *v.* MINE SAFETY APPLIANCES CO. ET AL., *ante*, p. 942. Rehearing denied. MR. JUSTICE REED took no part in the consideration or decision of this application.

No. 443. SEYBOLD ET AL. *v.* WESTERN ELECTRIC CO. ET AL., *ante*, p. 918. Motion for leave to file brief of Alliance of Independent Telephone Unions, as *amicus curiae*, granted. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of these applications.

No. 405, Misc., October Term, 1955. SMEREKA ET AL. *v.* MICHIGAN, 350 U. S. 1014. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 393. BERNSTEIN ET AL. *v.* UNITED STATES, *ante*, p. 915; and

No. 405. MEKOLICHICK ET AL. *v.* UNITED STATES, *ante*, p. 908. Motions for leave to file petitions for rehearing granted. Petitions for rehearing denied.

JANUARY 21, 1957.

Decisions Per Curiam.

No. 599. FEDERAL HOUSING ADMINISTRATION *v.* THE DARLINGTON, INC. Appeal from the United States District Court for the Eastern District of South Carolina. *Per Curiam:* Probable jurisdiction is noted. In view of the refusal of the appellant to approve rental schedules for furnished apartments in appellee's apartment project unless appellee agrees not to rent apartments for periods of less than 30 days, a cause of action for injunctive relief is stated. An injunction restraining enforcement of an Act of Congress for repugnance to the Constitution cannot, however, be granted by any District Court unless the application is heard and determined by a three-judge District Court, 28 U. S. C. § 2282. The judgment is

therefore reversed and the case is remanded for consideration by a three-judge District Court. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter* and *Herman Marcuse* for appellant. Reported below: 142 F. Supp. 341.

No. 75. UNITED STATES *v.* SCHNEER'S ATLANTA, INC. Certiorari, 351 U. S. 981, to the United States Court of Appeals for the Fifth Circuit. Argued January 15–16, 1957. Decided January 21, 1957. *Per Curiam:* The judgment of the Court of Appeals is reversed and the judgment of the United States District Court for the Northern District of Georgia is reinstated. Defense Production Act of 1950, § 706 (b), 64 Stat. 817, 50 U. S. C. App. § 2156 (b). *Samuel D. Slade* argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *B. Jenkins Middleton*. *M. H. Blackshear, Jr.* argued the cause and filed a brief for respondent. Reported below: 229 F. 2d 612.

No. 153, Misc. GONZALEZ *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In light of the memorandum of the Solicitor General and upon our consideration of the entire record, the order is vacated and the cause is remanded to the Court of Appeals for consideration on the merits as a timely appeal under the Federal Rules of Civil Procedure. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 233 F. 2d 825.

Miscellaneous Orders.

No. 11, Original. UNITED STATES *v.* LOUISIANA. The motion by the State of Louisiana to take depositions and the motion by the United States for judgment are set for hearing on Monday, April 8th, next. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Attorney General Brownell* and *Solicitor General Rankin* for the United States. *Jack P. F. Gremillion,* Attorney General, *W. Scott Wilkinson, Edward M. Carmouche* and *John L. Madden,* Special Assistant Attorneys General, *Bailey Walsh, Hugh M. Wilkinson* and *Victor A. Sachse* for the State of Louisiana.

No. 115. GARLINGTON ET AL. *v.* WASSON ET AL. The motion to treat the appeal papers as a petition for writ of certiorari is granted and the order entered in this case on October 8, 1956, 352 U. S. 806, is amended to read as follows:

"*Per Curiam:* The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

Elmer McClain for movants. Reported below: 279 S. W. 2d 668.

No. 475. MOREY, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL. *v.* DOUD ET AL., DOING BUSINESS AS BONDIFIED SYSTEMS, ET AL. Appeal from the United States District Court for the Northern District of Illinois. (Probable jurisdiction noted, 352 U. S. 923.) The motion to substitute Benjamin S. Adamowski as a party appellant in the place and stead of John Gutknecht is granted. *Latham Castle,* Attorney General of Illinois, for movants. Reported below: 146 F. Supp. 887.

Probable Jurisdiction Noted. (*See also No. 599, supra.*)

No. 644. NORTHERN PACIFIC RAILWAY CO. ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Western District of Washington. Probable jurisdiction noted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *M. L. Countryman, Jr.* for appellants. *Solicitor General Rankin* for the United States. Reported below: 142 F. Supp. 679.

Certiorari Granted. (*See also No. 153, Misc., supra.*)

No. 552. WILSON ET AL. *v.* LOEW'S INCORPORATED ET AL. District Court of Appeal of California, Second Appellate District. Certiorari granted. *Robert W. Kenny, Ben Margolis* and *Samuel Rosenwein* for petitioners. *Irving M. Walker* and *Guy Richards Crump* for Wood et al., respondents. *A. L. Wirin* filed a brief for the American Civil Liberties Union, Southern California Branch, as *amicus curiae,* in support of the petition. Reported below: 142 Cal. App. 2d 183, 298 P. 2d 152.

No. 540. CIVIL AERONAUTICS BOARD *v.* HERMANN ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Franklin M. Stone* and *Robert Burstein* for petitioner. Reported below: 237 F. 2d 359.

No. 596. UNITED STATES *v.* KORPAN. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* for respondent. Reported below: 237 F. 2d 676.

No. 615. WIENER *v.* UNITED STATES. Court of Claims. Certiorari granted. *I. H. Wachtel* for peti-

tioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 135 Ct. Cl. 827, 142 F. Supp. 910.

Certiorari Denied. (*See also No. 115, supra.*)

No. 593. DAVIS *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Malcolm B. Montgomery* for petitioner. Reported below: —— Miss. ——, 87 So. 2d 900.

No. 613. VALLEY BELL DAIRY CO., INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Homer A. Holt, Stanley C. Morris* and *John V. Ray* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston* and *Victor H. Kramer* for the United States. Reported below: 238 F. 2d 713.

No. 362, Misc. RIGGLE *v.* WYOMING. Supreme Court of Wyoming. Certiorari denied. *Herbert S. French* for petitioner. *George F. Guy,* Attorney General of Wyoming, *Howard B. Black,* Deputy Attorney General, and *Arthur F. Fisher, Ellen Crowley* and *Bruce P. Badley,* Assistant Attorneys General, for respondent. Reported below: 76 Wyo. ——, ——, 298 P. 2d 349, 300 P. 2d 567.

No. 236. GULF REFINING CO. *v.* PRICE ET AL. C. A. 5th Cir. Certiorari denied. *Archie D. Gray* and *Melvin Evans* for petitioner. *Jack P. F. Gremillion,* Attorney General, filed a brief for the State of Louisiana, as *amicus curiae,* in support of the petition. Reported below: 232 F. 2d 25.

No. 601. LEWIS ET UX. *v.* CARVER, TRUSTEE. C. A. 10th Cir. Certiorari denied. *John B. Ogden* for petitioners. Reported below: 237 F. 2d 516.

No. 612. OLENDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Leo R. Friedman* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 237 F. 2d 859.

No. 625. VIRIKS REDERI A/S (VIRIK, MANAGER) *v.* POLARUS STEAMSHIP CO., INC. C. A. 2d Cir. Certiorari denied. *MacDonald Deming* for petitioner. *Wilbur E. Dow, Jr.* for respondent. Reported below: 236 F. 2d 270.

No. 628. CURRY ET AL. *v.* GATES ET AL. Supreme Court of Oklahoma. Certiorari denied. *Forrest M. Darrough* for petitioners. *Chas. L. Orr* for respondents. Reported below: 301 P. 2d 659.

No. 306, Misc. GORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 234 F. 2d 658.

No. 323, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 236 F. 2d 894.

Rehearing Denied.

No. 518. COLLINS *v.* ATLANTIC COAST LINE RAILROAD CO., *ante*, p. 942; and

No. 522. PARKER *v.* HOWELL ET AL., *ante*, p. 943. Petitions for rehearing denied.

JANUARY 24, 1957.

Case Dismissed Under Rule 60.

No. 373. LESTER *v.* UNITED STATES ET AL. Certiorari, 352 U. S. 889, to the United States Court of Appeals for the Second Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. On the stipulation were *Edward J. Behrens* for petitioner, and *Solicitor General Rankin* for the United States and *William S. O'Connor* for the Marine Basin Co., respondents. Reported below: 234 F. 2d 625.

JANUARY 28, 1957.

Decisions Per Curiam.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL.

Per Curiam: In view of the continuing emergency in navigation caused by low water in the Mississippi River, Paragraph 3 of the decree in these causes issued on April 21, 1930 [281 U. S. 696], is further temporarily modified to permit the diversion to and including the 28th day of February 1957, from the Great Lakes-St. Lawrence System into the Illinois Waterway and the Mississippi River of such amount of water not exceeding an average of 8,500 cubic feet a second, in addition to domestic pumpage, as the Corps of Engineers, United States Army, shall determine will be useful in alleviating the emergency with respect to navigation currently existing without seriously interfering with navigation on the Illinois Waterway, at such times and in such amounts as the Corps of Engineers shall direct. The entry of this order shall not prejudice the legal rights of any of the parties to these causes with respect to any other diversion of the waters involved. After February 28, 1957, all pro-

visions of the decree entered on April 21, 1930, shall remain in full force and effect until further order of this Court.

Stewart G. Honeck, Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin, *William Saxbe,* Attorney General, and *James S. DeLeon,* Assistant Attorney General, for the State of Ohio, *Thomas M. Kavanagh,* Attorney General, and *Edmund E. Shepherd,* Solicitor General, for the State of Michigan, and *Louis J. Lefkowitz,* Attorney General, and *James O. Moore, Jr.,* Solicitor General, for the State of New York, complainants.

Latham Castle, Attorney General, and *William C. Wines,* Assistant Attorney General, for the State of Illinois, and *Russell W. Root* and *Lawrence J. Fenlon* for the Metropolitan Sanitary District of Greater Chicago, defendants.

Joe T. Patterson, Attorney General, and *Dugas Shands,* Assistant Attorney General, for the State of Mississippi, intervening defendant.

Solicitor General Rankin, John F. Davis and *David R. Warner* filed a memorandum on behalf of the United States, as *amicus curiae.*

For previous order, see *ante,* p. 945.

No. 2, Original. WISCONSIN *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL.

WHEREAS an order temporarily modifying the decree in these cases has this day been made because of an existing emergency, and whereas other prompt action to relieve the emergency may be required during the modification period in furtherance of the order,

IT IS ORDERED that all such matters be referred to MR. JUSTICE BURTON, Circuit Justice for the Seventh Circuit, with power to act.

No. 137. GOLD *v.* UNITED STATES. Certiorari, 352 U. S. 819, to the United States Court of Appeals for the District of Columbia Circuit. Argued January 22–23, 1957. Decided January 28, 1957. *Per Curiam:* The judgment is reversed and the case remanded to the District Court with directions to grant a new trial because of official intrusion into the privacy of the jury. *Remmer* v. *United States,* 350 U. S. 377; 347 U. S. 227. The fact that the intrusion was unintentional does not remove the effect of the intrusion. MR. JUSTICE REED, with whom MR. JUSTICE BURTON and MR. JUSTICE CLARK join, has filed a dissent. MR. JUSTICE CLARK has filed a separate dissent. *Harold I. Cammer* and *Joseph Forer* argued the cause for petitioner. With them on the brief was *David Rein. Joseph A. Lowther* argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Tompkins* and *Philip R. Monahan.* Reported below: 99 U. S. App. D. C. 136, 237 F. 2d 764.

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

The *Remmer* case, dealing with a Federal Bureau of Investigation inquiry into a suspected approach to a juror by a defendant, is not in our judgment controlling in this FBI inquiry of people who happened to be *Gold* jurors concerning a different Communist case. Compare the facts and conclusions of law in *Remmer* v. *United States,* 350 U. S. 377, 381, 382, and 347 U. S. 227, with the facts stated in *Gold* v. *United States,* 99 U. S. App. D. C. 136, 147, 237 F. 2d 764, 775.

While a presumption of prejudice arises when a juror in a criminal case receives a private communication bearing even remotely on the trial, the question in each such case is whether that presumption has been rebutted. Cf.

Remmer v. *United States,* 347 U. S. 227, 229, and *Mattox* v. *United States,* 146 U. S. 140, 149–150.

We think the record showing of the jurors' reaction to the present inquiry, Record 1586–1673, adequately supports the trial judge's conclusion that no effect upon the jurors adverse to the defendant, because of the accidental intrusion upon their privacy, could reasonably be anticipated.

The juror and the alternate who felt disturbed by the incident were discharged. In our view this made it proper to go ahead, as the court did, with the trial.

MR. JUSTICE CLARK, dissenting.

While I too feel that the narrow ground of *Remmer's* case should not be used to bring about reversal here, I am also disturbed by the refusal of the Court to decide other important questions urged upon us by both parties and ready for disposition. Among these are the applicability of the perjury rule of evidence to the false statement statute, eligibility of government employees to serve as jurors, admissibility of evidence of prior activity in the Communist Party to disprove the sincerity of a resignation therefrom, the use of expert witnesses to prove continuing membership and the correctness of the court's charges as to membership in the Party, etc. It seems to me that proper judicial administration requires this Court to decide these important issues, particularly since they will again arise at the retrial. Furthermore, similar cases involving the same legal points are pending in various districts throughout the country. The refusal of the majority today to pass upon them thus deprives the federal judiciary of this Court's opinion, which renders today's error multifold. It will cause undue hardship in the trial of all of these cases, not only on the Government but on the defendants as well. I therefore dissent.

No. 597. Retail Clerks International Association, Local No. 560, et al. *v.* J. J. Newberry Co. Appeal from the Supreme Court of Idaho. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted. The judgment of the Supreme Court of Idaho is reversed. *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468; *Garner* v. *Teamsters Union,* 346 U. S. 485.

S. G. Lippman, Joseph E. Finley and *Clarence M. Beck* for appellants. *Lemuel Skidmore* for appellee. Reported below: 78 Idaho ——, 298 P. 2d 375.

Miscellaneous Order.

No. 312, October Term, 1955. United States *v.* Ohio Power Co., 350 U. S. 862, 919, 351 U. S. 980. On petition for rehearing. The Ohio Power Company is requested to file a response to the petition for rehearing in this case within 15 days. Mr. Justice Brennan took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted.

No. 396, Misc. Gordon *v.* Texas. Appeal from the Court of Criminal Appeals of Texas. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *B. R. Stewart* for appellant. Reported below: —— Tex. Cr. R. ——, —— S. W. 2d ——.

Certiorari Granted. (*See also No. 597, supra.*)

No. 20, Misc. Favors *v.* Coiner, Acting Warden. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Appeals of West Virginia granted. Petitioner *pro se. John G. Fox,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent.

No. 666. COSTELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Edward Bennett Williams, Morris Shilensky* and *Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. *Peyton Ford* and *Alan Y. Cole* filed a brief for Davis, as *amicus curiae,* urging that the petition be granted. Reported below: 239 F. 2d 177.

No. 635. AMERICAN AIRLINES, INC., *v.* NORTH AMERICAN AIRLINES, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Howard C. Westwood* for petitioner. *Hardy K. Maclay* and *Walter D. Hansen* for North American Airlines, Inc., respondent. Reported below: 98 U. S. App. D. C. 366, 235 F. 2d 863.

Certiorari Denied.

No. 611. AHTANUM IRRIGATION DISTRICT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Don Eastvold,* Attorney General, and *E. P. Donnelly,* Assistant Attorney General, for the State of Washington, and *Cutler W. Halverson* for the Ahtanum Irrigation District, petitioners. *Solicitor General Rankin* for the United States. Reported below: 236 F. 2d 321.

No. 616. MOUNT VERNON MORTGAGE CORP. ET AL. *v.* UNITED STATES, AS PARENS PATRIAE, BY ITS ATTORNEY GENERAL, AND J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, IN BEHALF OF THE NATIONAL HOME LIBRARY FOUNDATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Dean Acheson* and *Donald Hiss* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 98 U. S. App. D. C. 429, 236 F. 2d 724.

No. 617. HUGHES ET AL. *v.* GREAT AMERICAN INDEMNITY CO. C. A. 5th Cir. Certiorari denied. *Benjamin C. King* for petitioners. Reported below: 236 F. 2d 71.

No. 626. CENTRAL-ILLINOIS SECURITIES CORP. ET AL. *v.* BRICKLEY, TRUSTEE, ET AL.; and

No. 630. EQUITY CORPORATION *v.* BRICKLEY, TRUSTEE, ET AL. C. A. 1st Cir. Certiorari denied. *Morris L. Forer* for petitioners in No. 626. *David Schenker* for petitioner in No. 630. *Solicitor General Rankin, John F. Davis, Thomas G. Meeker, Aaron Levy* and *Robert S. Keebler* for the Securities and Exchange Commission, *Ganson Purcell* and *C. Roger Nelson* for the Board of Directors of International Hydro-Electric System, and *Henry J. Friendly* for Bunnen et al., respondents. Reported below: 237 F. 2d 839.

No. 629. GREENFIELD ET AL. *v.* L. K. LAND CORP. Court of Appeals of New York. Certiorari denied. *Harold L. Turk* for petitioners. *David von G. Albrecht* for respondent. Reported below: 1 N. Y. 2d 465, 154 N. Y. S. 2d 32.

No. 284, Misc. MCNAIR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Owen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 98 U. S. App. D. C. 359, 235 F. 2d 856.

No. 634. MEYERS ET UX. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ellsworth T. Simpson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for the United States. Reported below: 136 Ct. Cl. ——, 142 F. Supp. 365.

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No. 621. PREISLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 238 F. 2d 238.

No. 631. CORBETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Vern Countryman* and *Alfred L. Scanlan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 238 F. 2d 557.

No. 469, Misc. IN RE ALLEN ET AL. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Sidney Feinberg* for petitioners. *Edmund G. Brown,* Attorney General, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for the State of California. Reported below: 47 Cal. 2d 55, 301 P. 2d 577.

Rehearing Denied.

No. 550. MCKENNA *v.* UNITED STATES, *ante,* p. 954;

No. 561. AUREX CORPORATION ET AL. *v.* BELTONE HEARING AID CO., *ante,* p. 953;

No. 248, Misc. ALLOCCO *v.* UNITED STATES, *ante,* p. 931; and

No. 382, Misc. JENSEN *v.* OREGON, *ante,* p. 948. Petitions for rehearing denied.

Orders Appointing Deputy Clerks.

IT IS ORDERED that Edmund P. Cullinan be, and he hereby is, appointed a Deputy Clerk of this Court.

IT IS ORDERED that Richard Joseph Blanchard be appointed a Deputy Clerk of this Court effective on February 18, 1957.

FEBRUARY 25, 1957.

Decisions Per Curiam.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. *Per Curiam:* The motions to amend the bill of complaint are denied. The motion to dismiss is granted and the bill of complaint is dismissed because of the absence of the United States as an indispensable party. *Will Wilson,* Attorney General, *Will Davis,* Assistant Attorney General, and *Eugene T. Edwards,* Special Assistant Attorney General, for the State of Texas, plaintiff. *Fred M. Standley,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General, for the State of New Mexico, and *Martin A. Threet* for the Middle Rio Grande Conservancy District et al., defendants. *Solicitor General Rankin* and *George S. Swarth* filed a memorandum for the United States.

No. 637. UNITED LIQUORS CORP. ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Western District of Tennessee. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Hal Gerber, Robert L. Taylor, Thurmond Arnold, Charles A. Noone* and *Harry C. Pierotti* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston* for the United States.

No. 652. RADFORD *v.* GARY, GOVERNOR OF OKLAHOMA, ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The judgment is affirmed. *Colegrove* v. *Green,* 328 U. S. 549; *Kidd* v. *McCanless,* 352 U. S. 920.

Sid White for appellant. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Fred Hansen,* First Assistant Attorney General, for appellees. Reported below: 145 F. Supp. 541.

No. 632. LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, *v.* NATIONAL SCREEN SERVICE CORP. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* We agree with the Court of Appeals that the motion for summary judgment should have been denied. However, in our view, this disposition of the case made it unnecessary for the Court of Appeals to pass on any other issue than that of the *per se* invalidity of exclusive contracts under the Sherman Act. In order that the District Court not be bound by the consideration the Court of Appeals gave to the remaining issues, and without reaching any of the same, we grant the petition for writ of certiorari, vacate the judgments, and remand the cause to the District Court for trial. MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, has filed a dissent. *Francis T. Anderson* for petitioners. *Louis Nizer* for respondent. Reported below: 238 F. 2d 59.

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

The District Court granted the motion of plaintiffs, the petitioners here, for summary judgment. The Court of Appeals, having found that summary judgment was not warranted, remanded the case for "[t]rial of the disputed factual issues." 238 F. 2d 59, 68. This Court also holds that the motion for summary judgment should have been denied by the District Court: it grants certiorari and vacates the judgment of the Court of Appeals, but directs the District Court to do precisely what the Court of Appeals directed that court to do. This is the legal situation unless I wholly misconceive the matter.

Since the Court's disposition of the petition for certiorari affects the proper administration of its own busi-

ness as well as the relation between this Court and Courts of Appeals, the matter deserves exposition.

The Court of Appeals thus stated what it called the critical issue before it: "Was there, in the cases involved in these appeals [there were other cases affecting other parties], a genuine issue as to a material fact which, under well-settled principles, precluded the entry of summary judgments adjudicating the defendant-appellant, National Screen Service Corporation ('National') to be an unlawful monopoly?" 238 F. 2d, at 60–61. Having found that there were triable issues of fact, it concluded that summary judgment should not have been entered and sent the case back for trial. This Court now echoes these conclusions: the motion for summary judgment should have been denied and the plaintiffs must establish their claim at trial.

The explanation of the puzzle must lie in the statement that this Court is doing what it is doing "[i]n order that the District Court not be bound by the consideration the Court of Appeals gave to the remaining issues . . . ." This is an oblique concern about the so-called "law of the case." The only "law of the case" decided by the Court of Appeals is the legal issue on which this Court agrees with the Court of Appeals. Nowhere is there a suggestion in the petition for certiorari that when the case goes back to the District Court, the trial will be restricted in determining the facts relevant to a claim under the antitrust laws. (Indeed, petitioners' only suggestion that the new trial directed by the Court of Appeals will not leave all relevant issues open for trial is that the Court of Appeals indicated that some issues "require determination by the trier of facts," while the petitioners suggest that these are issues to be determined by the trial court as a matter of law.)

One cannot read the thirteen pages of argument in support of the petition here and not be left with the conviction that the adjudication before the Court of Appeals was exclusively of the issue as the Court of Appeals stated it. That is "the law of the case," so far as that phrase has meaning, and nothing else. In the federal courts "the law of the case" is not a legal principle. It is a bogey that has been exposed, a ghost that has been laid, since Mr. Justice Holmes' opinion for the Court in *Messenger* v. *Anderson,* 225 U. S. 436, 444. The misuse of the rule of practice embodied in the conception of "law of the case," we had occasion to reject in *United States* v. *United States Smelting Refining & Mining Co.,* 339 U. S. 186, 198: "It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri.*" Here the only thing that was decided was, as this Court holds, rightly decided—namely, that on the facts summary judgment is precluded and the case must go to trial.

In granting the writ of certiorari, the Court sets aside all consideration by the Court of Appeals of issues other than "that of the *per se* invalidity of exclusive contracts under the Sherman Act." It is a customary practice for a Court of Appeals, in sending a case back to a District Court for trial, to give guidance on issues that may arise in the course of the trial in order to avoid needless appeals and retrials. No doubt a District Court must follow the adjudication of a Court of Appeals on reversal and remand of a case. But here the only adjudication was that the case be tried on all the relevant issues. We review judgments not talk. The basis of the reversal was a consideration by the Court of Appeals of opinions of this Court, and more particularly of our recent decisions in *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, and *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377. What this Court has decided in those and

other antitrust cases, and not any passing observations by a Court of Appeals, are the controlling directions for the District Court.

If the opinion of the Court of Appeals in this case disregarded controlling rulings of this Court, the District Court is of course not bound to disregard such decisions of this Court. A District Court can hardly fail in its duty to its Court of Appeals in obeying what decisions of this Court command. On the other hand, if the Court of Appeals has expressed views that do not run counter to what this Court has decided, this Court should not direct the District Court to disregard them. Surely, this Court should not go out of its way to purport to pass on these questions at this stage of the proceedings, especially when the questions are abstract, and more particularly in such summary fashion. If we begin to grant petitions for certiorari although we agree with the judgment of a Court of Appeals because, perchance, in the opinion some dubious remarks may have been made that cannot as a matter of law control the trial of the cause (I am not implying that such is the case here), a new fecund source of business will still further swell the docket of this Court. Of course, if ever the contingency arises when a Court of Appeals challengingly or ignorantly disregards the controlling law as set forth by this Court, the means for correction here are ample and sure.

I would deny the petition.

No. 84. Central of Georgia Railway Co. *v.* Brotherhood of Railroad Trainmen, Local Lodge No. 721, et al. Certiorari, 352 U. S. 865, to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* Upon the suggestion of mootness the writ is dismissed on the ground that the cause is moot. *John B. Miller* for petitioner. *Benning M. Grice* and *Wayland K. Sullivan* for respondents. Reported below: 229 F. 2d 901.

No. 510. LEONARD *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The motion to remand is granted and the case is remanded to the United States District Court for the District of Wyoming for consideration of a settlement agreement. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 235 F. 2d 330.

No. 498, Misc. NAGLE *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania, Eastern District. *Per Curiam:* The appeal is dismissed. *Charles F. G. Smith* for appellant.

Miscellaneous Orders.

No. 36. ALLEGHANY CORPORATION ET AL. *v.* BRESWICK & CO. ET AL.; and

No. 114. INTERSTATE COMMERCE COMMISSION *v.* BRESWICK & CO. ET AL. Appeals from the United States District Court for the Southern District of New York. (Probable jurisdiction noted, 351 U. S. 903, 352 U. S. 816.) The motion of appellees for special leave to file supplemental brief after argument is granted. *George Brussel, Jr.* for Breswick & Co. et al., and *Randolph Phillips, pro se,* appellees.

No. 103. NATIONAL LABOR RELATIONS BOARD *v.* TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L. Certiorari, 352 U. S. 818, to the United States Court of Appeals for the Second Circuit. The motion of Linen and Credit Exchange et al. for special leave to file *amici curiae* brief after argument is denied.

No. 719. FAVORS *v.* COINER, ACTING WARDEN. Certiorari, 352 U. S. 987, to the Supreme Court of Appeals of West Virginia. It is ordered that *David Ginsburg, Esquire,* of Washington, D. C., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 609. UNITED STATES *v.* PROCTER & GAMBLE CO. ET AL. Appeal from the United States District Court for the District of New Jersey. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States. *Kenneth C. Royall, Charles Sawyer, Frederick W. R. Pride* and *Richard W. Barrett* for the Procter & Gamble Co., *Mathias F. Correa* and *Jerrold G. Van Cise* for the Colgate-Palmolive Co., *Abe Fortas* for Lever Brothers Co., and *Adrien F. Busick* and *Shelby Fitze* for the Association of American Soap & Glycerine Producers, Inc., appellees. Reported below: 19 F. R. D. 122, 247.

No. 9. UNITED STATES *v.* SHOTWELL MANUFACTURING CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The motion of Frank J. Huebner to withdraw from opposition to the Government's petition for writ of certiorari is granted. The motion of *Harold A. Smith* et al. for leave to withdraw as counsel for Frank J. Huebner is granted. The petition for writ of certiorari is granted, limited to the issues raised in the amended motion to remand and supplement thereto and the respondents' answer to the amended motion to remand. *Simon E. Sobeloff,* then Solicitor General, *Solicitor General Rankin, H. Brian Holland,* then Assistant Attorney General, *Assistant Attor-*

ney General Rice and *Joseph M. Howard* for the United States. *Harold A. Smith* and *Howard Ellis* for the Shotwell Manufacturing Co. et al., respondents. Reported below: 225 F. 2d 394.

No. 10. SHOTWELL MANUFACTURING CO. ET AL. *v.* UNITED STATES. On cross-petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The motion of Frank J. Huebner to withdraw from the conditional cross-petition for writ of certiorari is granted. The motion of *Harold A. Smith* et al. for leave to withdraw as counsel for Frank J. Huebner is granted. The motion to treat the conditional cross-petition for writ of certiorari as an unconditional cross-petition for writ of certiorari is granted. The cross-petition for writ of certiorari in this case is denied. *Harold A. Smith* and *Howard Ellis* for the Shotwell Manufacturing Co. et al., petitioners. *Simon E. Sobeloff,* then Solicitor General, *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 225 F. 2d 394.

No. 363. SAMPSELL ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL., *ante,* p. 941. Motion for leave to file petition for writ of certiorari under 28 U. S. C. § 1651 denied. Rehearing denied.

No. 562. GIVENS *v.* MOULTON, *ante,* p. 975. Petition for other relief denied. Rehearing denied.

No. 290, Misc. BOYD *v.* JONES ET AL. Application denied.

No. 460, Misc. SHEPHERD *v.* UNITED STATES; and

No. 507, Misc. BANNING *v.* MURRAH, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 373, Misc. WILLIAMS *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY;
No. 403, Misc. EX PARTE JONES;
No. 404, Misc. WILLIAMS *v.* RAGEN, WARDEN;
No. 414, Misc. EX PARTE JACKSON;
No. 423, Misc. EX PARTE EMANUEL;
No. 431, Misc. HANNON *v.* WARDEN, MISSOURI STATE PENITENTIARY;
No. 436, Misc. CHAPMAN *v.* ALVIS, WARDEN;
No. 438, Misc. LEWIS *v.* LOONEY, WARDEN;
No. 452, Misc. FRANKLIN *v.* INDIANA;
No. 453, Misc. PALMER *v.* LOONEY, WARDEN;
No. 456, Misc. MCCALL *v.* NORTH CAROLINA;
No. 501, Misc. HARRELL *v.* HAGERMAN, WARDEN;
No. 521, Misc. CAMERON *v.* GLADDEN, WARDEN; and
No. 524, Misc. TURMEL *v.* ROBBINS, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 450, Misc. MEEKS *v.* WIMMER ET AL. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted. (*See also Nos. 9, 510 and 632, supra.*)

No. 638. BYRD *v.* BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC. C. A. 4th Cir. Certiorari granted. *Henry Hammer* and *Henry H. Edens* for petitioner. *Wesley M. Walker* for respondent. Reported below: 238 F. 2d 346.

No. 672. NATIONAL LABOR RELATIONS BOARD *v.* DISTRICT 50, UNITED MINE WORKERS OF AMERICA, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Theophil C. Kammholz, Stephen Leonard, Dominick L. Manoli* and *Frederick U. Reel* for petitioner. *Cramp-*

ton Harris, Yelverton Cowherd and *Alfred D. Treherne* for District 50, United Mine Workers of America, respondent. Reported below: 99 U. S. App. D. C. 104, 237 F. 2d 585.

No. 258, Misc. FORD *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *John P. Lomenzo* and *Sydney R. Rubin* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 237 F. 2d 57.

No. 483, Misc. MCALLISTER *v.* MAGNOLIA PETROLEUM CO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Civil Appeals of Texas, Fifth Supreme Judicial District, granted. *Arthur J. Mandell* for petitioner. *Chas. B. Wallace* and *Frank C. Bolton, Jr.* for respondent. Reported below: 290 S. W. 2d 313.

No. 350, Misc. MASCIALE *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *Merrell E. Clark, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 236 F. 2d 601.

Certiorari Denied. (*See also Nos. 10 and 363 and Misc. No. 450, supra.*)

No. 633. PENLAND *v.* GOLDEN ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 143 Cal. App. 2d 583, 300 P. 2d 279.

No. 76. PRECISION SCIENTIFIC CO. *v.* INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Barnabas F. Sears* and *James M. Barnes* for petitioner. *Nathan Witt, Joseph Forer* and *David Rein* for respondent. Reported below: 96 U. S. App. D. C. 416, 226 F. 2d 780.

No. 639. SCHYMAN *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS ET AL. Supreme Court of Illinois and Appellate Court of Illinois, First District. Certiorari denied. *Edward Brodkey* for petitioner. Reported below: 9 Ill. App. 2d 504, 133 N. E. 2d 551.

No. 641. HAMMERS *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MATTOON, ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Matthew Steinberg* for petitioner. *R. G. Real* for respondent. Reported below: See 10 Ill. App. 2d 218, 134 N. E. 2d 647.

No. 642. UNDERWOOD ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 5th Cir. Certiorari denied. *P. Z. Jones* for petitioners. *Joseph H. Wright, John W. Freels, Mitchell Emmett Ward* and *R. L. Dent* for respondent. Reported below: 235 F. 2d 868.

No. 645. ST. LOUIS COMPANY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Eli Frank, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. Reported below: 237 F. 2d 151.

No. 649. ARTIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Kalman A. Goldring* and *Sydney G. Kusworm, Sr.* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 238 F. 2d 237.

No. 646. United Mail Order, Warehouse & Retail Employees Union, Local 20, et al. *v.* Montgomery Ward & Co., Inc. Supreme Court of Illinois. Certiorari denied. *Francis Heisley* for petitioners. *David L. Dickson* for respondent. Reported below: 9 Ill. 2d 101, 137 N. E. 2d 47.

No. 650. Bradford *v.* United States. C. A. 2d Cir. Certiorari denied. *E. F. W. Wildermuth* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 238 F. 2d 395.

No. 651. Clark *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 9 Ill. 2d 46, 137 N. E. 2d 54.

No. 653. Wilson *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *Harold M. Tyler* for petitioner.

No. 656. Mack et al. *v.* Pennsylvania et al. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Charles E. Kenworthey* and *Fred B. Trescher* for petitioners. *Edwin J. Morrell* for respondents. Reported below: 386 Pa. 251, 126 A. 2d 679.

No. 657. Ma Chuck Moon et al. *v.* Dulles, Secretary of State, et al. C. A. 9th Cir. Certiorari denied. *Will G. Beardslee* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: 237 F. 2d 241.

No. 665. Richman *v.* Tidwell et al. C. A. 9th Cir. Certiorari denied. *Joseph T. Enright* for petitioner. *Richard Fitzpatrick* for Hallberg, respondent. Reported below: 234 F. 2d 361.

No. 670. Aetna Life Insurance Co. *v.* Texas Gulf Sulphur Co.; and

No. 673. Texas Gulf Sulphur Co. *v.* Aetna Life Insurance Co. C. A. 5th Cir. Certiorari denied. *John C. White* and *W. Braxton Dew* for the Aetna Life Insurance Co. *F. G. Coates* for the Texas Gulf Sulphur Co. Reported below: 235 F. 2d 791.

No. 671. Central-States Corporation *v.* Trinity Universal Insurance Co. C. A. 10th Cir. Certiorari denied. *Samuel Morgan, Martin W. Bell* and *Henry B. Keiser* for petitioner. *Howard T. Fleeson* and *Dale M. Stucky* for respondent. Reported below: 237 F. 2d 875.

No. 676. Mumma *v.* United States. C. A. 3d Cir. Certiorari denied. *Robert V. Morse* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell* for the United States. Reported below: 237 F. 2d 795.

No. 678. New York, Chicago & St. Louis Railroad Co. *v.* Masiglowa. C. A. 6th Cir. Certiorari denied. *Edwin Knachel, Donald E. Ryan* and *Richard C. Ogline* for petitioner. *Elmer I. Schwartz* for respondent. Reported below: 237 F. 2d 917.

No. 680. Wabash Railroad Co. *v.* Link. C. A. 7th Cir. Certiorari denied. *John L. Davidson, Jr.* and *L. Duncan Lloyd* for petitioner. Reported below: 237 F. 2d 1.

No. 683. Citizens Casualty Co. of New York *v.* L. C. Jones Trucking Co., Inc., et al. C. A. 10th Cir. Certiorari denied. *Duke Duvall* for petitioner. *M. A. Ned Looney* for the National Surety Corporation, respondent. Reported below: 238 F. 2d 369.

No. 685. RCA COMMUNICATIONS, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John T. Cahill, John W. Nields, Lawrence J. McKay* and *Howard R. Hawkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Warren E. Baker* and *Richard A. Solomon* for the Federal Communications Commission, and *James A. Kennedy, John F. Gibbons, Burton K. Wheeler* and *Robert G. Seaks* for the Mackay Radio & Telegraph Co., Inc., respondents. Reported below: 99 U. S. App. D. C. 163, 238 F. 2d 24.

No. 688. REICH ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 239 F. 2d 134.

No. 689. BUDZILENI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Pearl M. Hart* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 237 F. 2d 528.

No. 690. CARREIRO ET AL. *v.* BAEKGAARD. C. A. 9th Cir. Certiorari denied. *Leslie C. Gillen* for petitioners. *William C. Wines, John A. McElligott* and *Errett O. Graham* for respondent. Reported below: 237 F. 2d 459.

No. 696. TIME SAVER TOOLS, INC., ET AL. *v.* BLISH, MIZE & SILLIMAN HARDWARE CO. ET AL. C. A. 10th Cir. Certiorari denied. *Edward I. Rothschild* for petitioners. *Cedric W. Porter* for respondents. Reported below: 236 F. 2d 913.

No. 691. DAULTON, ADMINISTRATRIX, *v.* SOUTHERN PACIFIC CO. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* for petitioner. *Clarence J. Young* for respondent. Reported below: 237 F. 2d 710.

No. 700. CITY OF WENDELL, IDAHO, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Branch Bird* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney* and *William W. Ross* for the United States. Reported below: 237 F. 2d 51.

No. 753. BRIDGFORD *v.* SAMPSELL, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Kyle Z. Grainger* for petitioner. *Thomas S. Tobin* for respondent. Reported below: 237 F. 2d 182.

No. 693. MARKS *v.* POLAROID CORPORATION. C. A. 1st Cir. Motion for leave to file brief of Matthew Fox, as *amicus curiae,* granted. Certiorari denied. *Floyd H. Crews* for petitioner. *Donald L. Brown* for respondent. Reported below: 237 F. 2d 428.

No. 1, Misc. MATTHEWS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 13, Misc. PATTERSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Latham Castle* for respondent.

No. 60, Misc. CROSS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 315, Misc. HATCHETT *v.* O'BRIEN ET AL. C. A. 6th Cir. Certiorari denied.

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No. 86, Misc. Woods *v.* California. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, *Frank J. Mackin,* Assistant Attorney General, and *William E. James,* Deputy Attorney General, for respondent. Reported below: 139 Cal. App. 2d 515, 293 P. 2d 901.

No. 345, Misc. Johnson *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 235 F. 2d 159.

No. 352, Misc. Escalante *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 357, Misc. Thomas *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 234 F. 2d 815.

No. 369, Misc. Manley *v.* Nash, Warden. Supreme Court of Missouri. Certiorari denied.

No. 379, Misc. Magnus, Administrator, *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 234 F. 2d 673.

No. 384, Misc. Ferenz *v.* Folsom, Secretary of Health, Education, and Welfare. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for respondent. Reported below: 237 F. 2d 46.

No. 389, Misc. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 238 F. 2d 84.

No. 393, Misc. KING *v.* CALIFORNIA COMPANY ET AL. C. A. 5th Cir. Certiorari denied. *Forrest B. Jackson* for petitioner. *Earl T. Thomas, S. B. Laub, C. C. Richmond, Bonner R. Landman, Archie D. Gray* and *Eugene T. Adair* for respondents. Reported below: 224 F. 2d 193, 236 F. 2d 413.

No. 395, Misc. VAN NEWKIRK *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL. C. A. 2d Cir. Certiorari denied.

No. 399, Misc. POLLACK *v.* ASPBURY ET AL. C. A. 2d Cir. Certiorari denied.

No. 400, Misc. BLOXOM *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 402, Misc. COLE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 407, Misc. MEYERS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 408, Misc. MCLAUGHLIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 409, Misc. KENDRICK *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 410, Misc. SCALLEY *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 411, Misc. CERVANTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 413, Misc. O'BRIEN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 416, Misc. HERGE *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 417, Misc. RYAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 418, Misc. PILKINGTON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 2 App. Div. 2d 731, 152 N. Y. S. 2d 559.

No. 419, Misc. KAPLAN *v.* MCNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 420, Misc. ANDERSON ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 421, Misc. HOLT *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 619, 125 A. 2d 842.

No. 422, Misc. RICHARDSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 424, Misc. MILES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 425, Misc. DAUGHARTY *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 428, Misc. FATHEREE *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 429, Misc. HENDERSON *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

Nos. 430, Misc., and 476, Misc. SMITH *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 433, Misc. MUSSER *v.* MYERS, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 437, Misc. ALLEN *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 439, Misc. KELLISON *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 443, Misc. HURLEY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 444, Misc. MORRIS *v.* FLORIDA ET AL. Supreme Court of Florida. Certiorari denied.

No. 446, Misc. STARYAK *v.* RAGEN, WARDEN. Circuit Court of Macoupin County, Illinois. Certiorari denied.

No. 447, Misc. MANARO *v.* RAGEN, WARDEN, ET AL. Circuit Court of Will County, Illinois. Certiorari denied.

No. 458, Misc. JACKSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 599, 125 A. 2d 840.

No. 459, Misc. OPPENHEIMER *v.* GENERAL CABLE CORP. ET AL. Supreme Court of California. Certiorari denied.

No. 461, Misc. KRAMER *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. *Lyman Brownfield* for petitioner. Reported below: 165 Ohio St. 510, 137 N. E. 2d 752.

No. 463, Misc. STREETER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 465, Misc. CHAPMAN *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 466, Misc. HARDIN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 467, Misc. SKELLY *v.* RAGEN, WARDEN. Circuit Court of Mason County, Illinois. Certiorari denied.

No. 471, Misc. MACOMBER *v.* OREGON. Supreme Court of Oregon. Certiorari denied.

No. 473, Misc. STRAUB *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 479, Misc. KREUTER *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 238 F. 2d 622.

No. 480, Misc. PILCHER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 482, Misc. KOENIG *v.* DONWORTH, JUDGE, ET AL. Supreme Court of Washington. Certiorari denied.

No. 484, Misc. LYNCH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 487, Misc. CULHANE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 488, Misc. ALVIN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 489, Misc. DALOIA *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 490, Misc. HALVERSON *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 491, Misc. TAYLOR *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 492, Misc. WHITCOMB *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 493, Misc. FITCH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 495, Misc. HOLLOWAY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 497, Misc. BARNES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 500, Misc. JACKSON *v.* MARTIN, WARDEN. Supreme Court of New York, Erie County. Certiorari denied.

No. 502, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 503, Misc. BARNETT *v.* COINER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 504, Misc. CAGE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 506, Misc. LYONS *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 508, Misc. HOWARD *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 509, Misc. ASH *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 296 S. W. 2d 41.

No. 510, Misc. ECKERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 511, Misc. SCHLETTE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 515, Misc. BROWN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 513, Misc. MILLER *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 516, Misc. VEGA *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 517, Misc. SHIVERS *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 612, 125 A. 2d 671.

No. 518, Misc. LIEVERS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 654, 127 A. 2d 136.

No. 526, Misc. DAVIS *v.* MICHIGAN. Recorder's Court of the City of Detroit, Michigan. Certiorari denied.

No. 529, Misc. ABRAMS *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *Jo M. Ferguson,* Attorney General of Kentucky, and *Robert F. Matthews, Jr.,* Assistant Attorney General, for respondent. Reported below: 296 S. W. 2d 210.

No. 474, Misc. MILLER *v.* THORN, EXECUTRIX. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles William Freeman* for petitioner.

No. 539, Misc. PRIESTER *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 543, Misc. FORSYTHE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 546, Misc. SAUNDERS ET AL. *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 381, Misc. COLEPAUGH *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Jacob A. Dickinson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 235 F. 2d 429.

No. 449, Misc. INGENITO *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. Reported below: 238 F. 2d 935.

No. 658. SHREVEPORT TELEVISION CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry B. Weaver, Jr.* and *Thomas M. Cooley, II,* for petitioner. *Solicitor General Rankin* for the Federal Communications Commission, and *W. Ervin James* for the Southland Television Co., respondents.

No. 338, Misc. NATVIG *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jean F. Dwyer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 98 U. S. App. D. C. 399, 236 F. 2d 694.

No. 659. HONGKONG & SHANGHAI BANKING CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Martin P. Detels, Ezra G. Benedict Fox* and *Abner H. Ferguson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 136 Ct. Cl. ——, 145 F. Supp. 199.

No. 614. STANLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Edgar L. Morris* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 238 F. 2d 427.

No. 624. SWIFT & CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 677. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Walter R. Mayne* and *Earl G. Spiker* for Swift & Co., petitioner in No. 624 and respondent in No. 677. *Joseph M. Jacobs, Mozart G. Ratner, Harry H. Craig* and *Thomas X. Dunn* for the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL, Local 88, petitioner in No. 677 and respondent in No. 624. *Solicitor General Rankin, Stephen Leonard* and *Dominick L. Manoli* for the National Labor Relations Board, respondent. Reported below: 99 U. S. App. D. C. 24, 237 F. 2d 20.

No. 662. PRICE *v.* UNITED STATES. Court of Claims. Certiorari denied. *Stanley Worth, Edward S. Smith* and *D. Newton Farnell, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Grant W. Wiprud* for the United States. Reported below: 136 Ct. Cl. ——, 142 F. Supp. 455.

No. 664. UNITED STATES STEEL CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *A. Chauncey Newlin* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Stull* and *A. F. Prescott* for the United States. Reported below: 136 Ct. Cl. ——, 142 F. Supp. 948.

No. 648. YUCHI (EUCHEE) TRIBE OF INDIANS ET AL. *v.* UNITED STATES ET AL. Court of Claims. Certiorari denied. *J. T. Smith* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the United States, *Paul M. Niebell* for the Creek Nation of Oklahoma, and *Claude Pepper* and *Charles Bragman* for the Creek Nation East, respondents. Reported below: 136 Ct. Cl. —, 145 F. Supp. 206.

No. 667. NATIONAL TRUCK RENTAL CO., INC., *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leonard Weinberg* and *Harry J. Green* for petitioner. *Solicitor General Rankin, Stephen Leonard* and *Dominick L. Manoli* for respondent. Reported below: 99 U. S. App. D. C. 259, 239 F. 2d 422.

No. 679. AETNA INSURANCE CO. ET AL. *v.* HART-BARTLETT-STURTEVANT GRAIN CO. Supreme Court of Missouri. Certiorari denied. *Donald N. Clausen, Herbert W. Hirsh* and *William S. Hogsett* for petitioners. *Ralph M. Jones* and *Charles B. Blackmar* for respondent. Reported below: 365 Mo. 1134, 293 S. W. 2d 913.

No. 681. AYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert W. Fraser* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 240 F. 2d 802.

No. 716. STOVER *v.* CENTRAL BROADCASTING CO. Supreme Court of Iowa. Certiorari denied. *George Cosson* for petitioner. *James J. Lamb* and *Paul F. Ahlers* for respondent. Reported below: 247 Iowa 1325, 78 N. W. 2d 1.

No. 695. Di Paglia *v.* Iowa. Supreme Court of Iowa. Certiorari denied. *Don Hise* for petitioner. *Norman A. Erbe,* Attorney General of Iowa, *Raphael R. R. Dvorak,* First Assistant Attorney General, and *Don C. Swanson,* Assistant Attorney General, for respondent. Reported below: 248 Iowa 97, 78 N. W. 2d 472.

No. 722. Landell, Executor, et al. *v.* Northern Pacific Railway Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert W. Lishman* for petitioners. *Porter R. Chandler, M. L. Countryman, Jr.* and *Bernard G. Ostmann* for respondent. Reported below: 99 U. S. App. D. C. 169, 238 F. 2d 30.

No. 660. Mannerfrid *v.* Brownell, Attorney General. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Jack Wasserman* and *George A. Spiegelberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for respondent. Reported below: 99 U. S. App. D. C. 171, 238 F. 2d 32.

No. 415, Misc. Spencer *v.* United States. United States District Court for the Eastern District of Michigan. Certiorari denied.

No. 427, Misc. Ballard *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrov-*

sky for the United States. Reported below: 99 U. S. App. D. C. 101, 237 F. 2d 582.

No. 434, Misc. ABRAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Curtis P. Mitchell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 99 U. S. App. D. C. 46, 237 F. 2d 42.

No. 435, Misc. TOURVILLE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 295 S. W. 2d 1.

No. 451, Misc. ZACHARY *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 135 Ct. Cl. 620, 142 F. Supp. 882.

No. 455, Misc. BRADLEY *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 462, Misc. JOHNS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 472, Misc. HUNTER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 486, Misc. WHEELER *v.* TERRELL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *A. Lillian C. Kennedy* and *Eugene A. Chase* for petitioner. Reported below: 99 U. S. App. D. C. 168, 238 F. 2d 29.

No. 561, Misc. CARITATIVO *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *George T. Davis* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Assistant Attorney General, for respondents. Reported below: 47 Cal. 2d 304, 303 P. 2d 339.

Rehearing Denied. (*See also Nos. 363 and 562, ante, p. 998.*)

No. 26. LEITER MINERALS, INC., *v.* UNITED STATES ET AL., *ante,* p. 220;

No. 27. LA BUY, U. S. DISTRICT JUDGE, *v.* HOWES LEATHER CO., INC., ET AL., *ante,* p. 249;

No. 53. FIKES *v.* ALABAMA, *ante,* p. 191;

No. 480. GULF COAST SHRIMPERS & OYSTERMANS ASSOCIATION ET AL. *v.* UNITED STATES, *ante,* p. 927;

No. 560. BALANOVSKI ET AL. *v.* UNITED STATES, *ante,* p. 968;

No. 573. JOHNSON ET AL. *v.* UNION PACIFIC RAILROAD CO., *ante,* p. 957;

No. 588. SPIELVOGEL *v.* FORD, COMMISSIONER, DEPARTMENT OF WATER SUPPLY, GAS AND ELECTRICITY OF THE CITY OF NEW YORK, ET AL., *ante,* p. 957;

No. 601. LEWIS ET UX. *v.* CARVER, TRUSTEE, *ante,* p. 981;

No. 394, Misc. LEIGHT *v.* SCHECHTER, PERSONNEL DIRECTOR AND CHAIRMAN, MUNICIPAL CIVIL SERVICE COMMISSION, ET AL., *ante,* p. 957; and

No. 406, Misc. COOPER *v.* UNITED STATES, *ante,* p. 962. Petitions for rehearing denied.

No. 695, October Term, 1955. CONSOLIDATED EDISON CO. OF NEW YORK, INC., *v.* UNITED STATES, 351 U. S. 909. Motion for leave to file petition for rehearing denied. MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

FEBRUARY 28, 1957.

Decision Per Curiam.

No. 153. OLIN MATHIESON CHEMICAL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. Certiorari, 352 U. S. 819, to the United States Court of Appeals for the Fourth Circuit. Argued February 28, 1957. Decided February 28, 1957. *Per Curiam:* The judgment is affirmed. *Wm. A. Stuart* argued the cause for petitioner. With him on the brief was *H. W. Stull. Solicitor General Rankin, Stephen Leonard* and *Dominick L. Manoli* were on the brief for respondent. Reported below: 232 F. 2d 158.

MARCH 4, 1957.

Decisions Per Curiam.

No. 265. UNITED STATES *v.* AMERICAN FREIGHTWAYS CO. Appeal from the United States District Court for the Southern District of New York. (Probable jurisdiction noted, 352 U. S. 864.) Argued January 23, 1957. Decided March 4, 1957. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Ralph S. Spritzer* argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Judson W. Bowles. Samuel Masia* argued the cause for appellee. With him on the brief was *Martin Werner.*

No. 661. NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *James F. X. O'Brien, Jack R. Turney, Jr.* and *Eugene T. Liipfert* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Henry Newton Williams, Robert W. Ginnane* and *Isaac K. Hay* for the United States and the

Interstate Commerce Commission, *Harry A. Bowen* and *Jerrold Scoutt, Jr.* for the American Society of Travel Agents, Inc., *Robert S. Buttles* for Tauck Tours, Inc., and *S. Harrison Kahn* for Thos. Cook & Son, Inc., et al., appellees. Reported below: 143 F. Supp. 689.

No. 663. FLORIDA CITRUS COMMISSION ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Florida. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *M. W. Wells, Lewis W. Petteway, R. Y. Patterson, Jr., Karl D. Loos* and *Frank C. Brooks* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Robert W. Ginnane* and *Charlie H. Johns* for the United States and the Interstate Commerce Commission, *Roland J. Lehman, Robert H. Bierma, John H. Colgren, Alfred S. Knowlton, D. Fred McMullen, Russell L. Frink* and *Harold B. Wahl* for the Atlantic Coast Line Railroad Co. et al., *Warren H. Wagner* for George A. Hormel & Co. et al., and *Nuel D. Belnap* for Armour & Co. et al., appellees. Reported below: 144 F. Supp. 517.

Miscellaneous Orders.

Pursuant to the provisions of Title 28, U. S. C., § 42, It is ordered that MR. JUSTICE BURTON be, and he is hereby, temporarily assigned to the Sixth Circuit as Circuit Justice.

No. 762. WISNIEWSKI *v.* UNITED STATES. On certificate from the United States Court of Appeals for the Eighth Circuit. To enable this Court to consider the sufficiency of the certificate, the Court of Appeals for the Eighth Circuit is directed to forward to this Court a certified transcript of record.

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No. 101. AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 110. RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL. *v.* UNITED STATES ET AL. Appeals from the United States District Court for the District of Columbia Circuit. (Probable jurisdiction noted, 352 U. S. 816.) The motion for leave to file brief of National Industrial Traffic League, as *amicus curiae,* is granted. *John S. Burchmore* and *Robert N. Burchmore* for movant. Reported below: 144 F. Supp. 365.

No. 261. WATKINS *v.* UNITED STATES. Certiorari, 352 U. S. 822, to the United States Court of Appeals for the District of Columbia Circuit. The motion of Robert M. Metcalf, as *amicus curiae,* praying that the Court (1) request the Solicitor General to present argument on an issue not covered in the brief for the United States, and (2) allow *amicus curiae* 10 minutes for oral argument on that issue is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this motion. Reported below: 98 U. S. App. D. C. 190, 233 F. 2d 681.

No. 419. SCHAFFER TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of South Dakota. (Probable jurisdiction noted, 352 U. S. 923.) The motion for leave to file brief of National Industrial Traffic League, as *amicus curiae,* is granted. *John S. Burchmore* and *Robert N. Burchmore* for movant. Reported below: 139 F. Supp. 444.

No. 773. NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL. *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The motion of Idaho Power Company to correct and amend the title is

granted and the Idaho Power Company is designated as a party respondent. *Evelyn N. Cooper* and *Lucien Hilmer* for petitioners. *R. P. Parry* and *A. C. Inman* for movant. Reported below: 99 U. S. App. D. C. 149, 237 F. 2d 777.

No. 430. ACHILLI *v.* UNITED STATES. The order of November 19, 1956, 352 U. S. 916, denying the petition for writ of certiorari to the Court of Appeals for the Seventh Circuit is vacated and the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted limited to the question of whether petitioner could be prosecuted and sentenced as for a violation of § 145 (b) of the Internal Revenue Code of 1939 where the facts also showed a violation of § 3616 (a) of the Internal Revenue Code of 1939. The brief of counsel for the petitioner shall be filed by March 30, 1957, and that of the respondent by April 26, 1957. Reported below: 234 F. 2d 797.

Certiorari Granted. (*See also No. 430, supra, and Misc. No. 531, ante, p. 565.*)

No. 699. NASHVILLE MILK CO. *v.* CARNATION COMPANY. C. A. 7th Cir. Certiorari granted. *Karl Edwin Seyfarth, Sherwood Dixon* and *Edward M. Sullivan* for petitioner. *Frank F. Fowle, Jr.* and *Melville C. Williams* for respondent. Reported below: 238 F. 2d 86.

No. 707. SAFEWAY STORES, INC., *v.* VANCE, TRUSTEE IN BANKRUPTCY. C. A. 10th Cir. Certiorari granted. *Douglas Stripp* for petitioner. *Sam Dazzo* for respondent. Reported below: 239 F. 2d 144.

No. 710. TROP *v.* DULLES, SECRETARY OF STATE, ET AL. C. A. 2d Cir. Certiorari granted. The brief of counsel for the petitioner shall be filed by March 30, 1957, and

that of the respondent by April 26, 1957. *Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: 239 F. 2d 527.

No. 457, Misc. THOMAS *v.* ARIZONA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Petitioner *pro se*. *Robert Morrison,* Attorney General of Arizona, *James H. Green, Jr.,* First Assistant Attorney General, and *Wesley E. Polley* for respondent. Reported below: 235 F. 2d 775.

Certiorari Denied.

No. 669. BOWMAN ET AL. *v.* PENNSYLVANIA STATE CHAMBER OF COMMERCE ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Benjamin C. Sigal* for Bowman et al., and *M. H. Goldstein* and *Mr. Sigal* for the Pennsylvania CIO Council, petitioners. *Charles E. Kenworthey, Charles Denby* and *Nicholas Unkovic* for respondents. Reported below: 386 Pa. 306, 125 A. 2d 755.

No. 682. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 238 F. 2d 215.

No. 684. ESTATE OF SHEDD, FIRST NATIONAL BANK OF ARIZONA, PHOENIX, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Walter L. Nossaman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 237 F. 2d 345.

No. 687. FEDERIKA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *John W. Driskill* and *Sol Goodman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 237 F. 2d 916.

No. 701. POLIAFICO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Jacob W. Friedman* for Lazzaro et al., petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 237 F. 2d 97.

No. 703. LAKESHORE COMPANY *v.* CITY OF EUCLID; and

No. 704. ZEVIN ET AL. *v.* CITY OF EUCLID. Supreme Court of Ohio. Certiorari denied. *Charles W. Sellers* and *Frederick A. Ballard* for petitioners. *Paul H. Torbet* for respondent. Reported below: 165 Ohio St. 501, 137 N. E. 2d 750.

No. 706. KALWAJTYS ET AL., DOING BUSINESS AS GENERAL PRODUCTS, *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Mandel L. Anixter* and *Arthur Abraham* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 237 F. 2d 654.

No. 708. COLLINS ET AL., DOING BUSINESS AS COLLINS BROTHERS OIL CO., *v.* LACLEDE GAS CO. ET AL. C. A. 8th Cir. Certiorari denied. *Jesse Jerold Middleton* for petitioners. *John M. Dalton,* Attorney General of Missouri, *Guy A. Thompson* and *James M. Douglas* for respondents. Reported below: 237 F. 2d 633.

No. 711. FARR COMPANY *v.* GRATIOT ET AL. C. A. 9th Cir. Certiorari denied. *Leonard S. Lyon* and *Richard E. Lyon* for petitioner. *Ford W. Harris, Jr.* for respondents. Reported below: 237 F. 2d 940.

No. 712. PAHMER *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Chester T. Lane* for petitioner. *Solicitor General Rankin* for the United States, and *Harold Wm. Harrison* for Eva Pahmer, respondent. Reported below: 238 F. 2d 431.

No. 445, Misc. COX *v.* RANDOLPH, WARDEN. Circuit Court of Macon County, Illinois. Certiorari denied.

No. 640. TOMASIAN *v.* MANOUKIAN ET AL., EXECUTRICES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Rutherford Day* for petitioner. *Charles Orlando Pratt* for respondents. Reported below: 99 U. S. App. D. C. 57, 237 F. 2d 211.

No. 698. COOPER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Wade H. Cooper, pro se. Solicitor General Rankin, Assistant Attorney General Rice* and *Hilbert P. Zarky* for the United States. Reported below: 99 U. S. App. D. C. 179, 238 F. 2d 40.

No. 558, Misc. STONE *v.* WYOMING EX REL. GUY, ATTORNEY GENERAL, ET AL. Supreme Court of Wyoming. Certiorari denied. *J. Norman Stone, John J. Spriggs, Sr.* and *John J. Spriggs, Jr.* for petitioner. *George F. Guy,* Attorney General, *Bruce P. Badley,* Assistant Attorney General, and *Thurman Arnold* for the State of Wyoming, respondent. Reported below: —— Wyo. ——, 305 P. 2d 777.

MARCH 11, 1957.

Decisions Per Curiam.

No. 122. MITCHELL, SECRETARY OF LABOR, *v.* BEKINS VAN & STORAGE CO. Certiorari, 352 U. S. 819, to the United States Court of Appeals for the Ninth Circuit. Argued February 26–27, 1957. Decided March 11, 1957. *Per Curiam:* The judgment is reversed. Respondent's five physically separate warehouses do not constitute a single "retail establishment" within the meaning of the exemption provided by § 13 (a)(2) of the Fair Labor Standards Act, 52 Stat. 1067, as amended, 63 Stat. 917, 29 U. S. C. § 213 (a)(2). *Phillips, Inc.*, v. *Walling*, 324 U. S. 490; see 95 Cong. Rec. 12579. MR. JUSTICE BURTON and MR. JUSTICE HARLAN, believing that the decision of the Court of Appeals was based upon proper standards and sufficient evidence, would affirm the judgment. *Bessie Margolin* argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Stuart Rothman* and *Eugene R. Jackson. William French Smith* argued the cause for respondent. With him on the brief was *Homer D. Crotty*. Reported below: 231 F. 2d 25.

No. 371. LASKY ET VIR *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 352 U. S. 889, to the United States Court of Appeals for the Ninth Circuit. Argued March 7, 1957. Decided March 11, 1957. *Per Curiam:* The judgment is affirmed. *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225; *Helvering* v. *Northern Coal Co.*, 293 U. S. 191. MR. JUSTICE DOUGLAS dissents. *Robert Ash* argued the cause for petitioners. With him on the brief was *Carl F. Bauersfeld. Philip Elman* argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Leonard B. Sand* and *I. Henry Kutz*. Reported below: 235 F. 2d 97.

No. 125. ARKANSAS & LOUISIANA MISSOURI RAILWAY CO. ET AL. *v.* AMARILLO-BORGER EXPRESS, INC., ET AL.; and

No. 224. UNITED STATES ET AL. *v.* AMARILLO-BORGER EXPRESS, INC., ET AL. Appeals from the United States District Court for the Northern District of Texas. (Probable jurisdiction noted, 352 U. S. 817.) Argued December 4–5, 1957. Decided March 11, 1957. *Per Curiam:* The judgment is vacated and the cases are remanded to the District Court with directions to dismiss the cause as moot. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent. *William R. McDowell* argued the cause for appellants in No. 125. With him on the brief was *J. T. Suggs*. *Robert W. Ginnane* argued the cause for the United States and the Interstate Commerce Commission, appellants in No. 224. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *H. Neil Garson*. *Ralph W. Currie* argued the cause and filed a brief for appellees. Reported below: 138 F. Supp. 411.

No. ——. BINION *v.* UNITED STATES, on application for bail; and

No. 666. COSTELLO *v.* UNITED STATES. Certiorari, 352 U. S. 988, to the United States Court of Appeals for the Second Circuit.

Per Curiam: Petitioners in both the above cases have applied to individual Justices for bail under Rule 46 of the Federal Rules of Criminal Procedure. The relevant legal circumstances concerning bail are identical in both cases. Both were convicted of income tax evasion involving § 145 (b) of the Internal Revenue Code of 1939. Both were sentenced to imprisonment for five years on each of three counts, the sentences to run concurrently. Both contend that they should have been sentenced under § 3616 (a) of the Internal Revenue Code of 1939, which makes it a misdemeanor (punishable by a

maximum of one year's imprisonment) to file a false return with intent to evade tax, the offense for which each was convicted. The question petitioners raise was discussed but not decided in *Berra* v. *United States,* 351 U. S. 131. This question is presented in *Achilli* v. *United States,* No. 430, which the Court has set for hearing during the week of April 29. Pending final determination of this question, we think petitioners are entitled to bail, the Government having presented no adequate reason why bail should not be granted. Accordingly, petitioners are admitted to bail, pending the disposition of the *Achilli* case, by executing a good and sufficient bail bond in the sum of $25,000, the same to be approved by a district judge of the court in which petitioners were convicted. Following approval, the bond will be posted with the clerk of the district court.

Jacob Kossman for Binion. *Edward Bennett Williams* and *Morris Shilensky* for Costello. *Solicitor General Rankin* for the United States. Reported below: No. 666, 239 F. 2d 177.

No. 697. JENKINS *v.* UNITED STATES. Appeal from the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *John J. Bouhan* for appellant. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 238 F. 2d 83.

Miscellaneous Orders.

No. 595, Misc. JEFFERSON *v.* CALIFORNIA ET AL. Application for stay of execution denied. Petition for writ of certiorari to the Supreme Court of California denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. Reported below: 47 Cal. 2d 438, 303 P. 2d 1024.

No. 14, Original. SOUTH CAROLINA *v.* GEORGIA. The motion for leave to file bill of complaint is denied. *T. C. Callison,* Attorney General, for the State of South Carolina, plaintiff. *Eugene Cook,* Attorney General, *E. Freeman Leverett, Assistant Attorney General,* and *Thomas H. Gignilliat,* Deputy Assistant Attorney General, for the State of Georgia, defendant.

No. 597, Misc. REESE *v.* CALIFORNIA ET AL. Application for stay of execution denied. Petition for writ of certiorari to the Supreme Court of California denied.

No. 530, Misc. MULLINS *v.* BARKSDALE, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and for other relief denied.

Certiorari Granted.

No. 741. WEYERHAEUSER STEAMSHIP CO. *v.* NACIREMA OPERATING CO., INC. C. A. 2d Cir. Certiorari granted. *William Garth Symmers* and *Frederick Fish* for petitioner. *Oscar A. Thompson* for respondent. Reported below: 236 F. 2d 848.

Certiorari Denied. (*See also Misc. Nos. 595 and 597, supra.*)

No. 713. DELSEA CORPORATION *v.* FLICKSTEIN, TRUSTEE IN BANKRUPTCY, ET AL.; and

No. 717. VELORIC ET AL. *v.* COLLEGE HALL FASHIONS & SYNTHETIC SPECIALISTS, INC. C. A. 3d Cir. Certiorari denied. *Jerome L. Markovitz* for petitioner in No. 713. *Morris M. Wexler* for Veloric, and *William M. Keenan* and *James Alan Montgomery, Jr.* for Fidelity-Philadelphia Trust Co., petitioners in No. 717. *David Goldberg* for respondents in No. 717. Reported below: 238 F. 2d 155.

No. 331. MILLER *v.* GILLIECE ET AL. C. A. 6th Cir. Certiorari denied. *Meyer Fix* for petitioner. *Henry Kaiser, Eugene Gressman* and *Wayland K. Sullivan* for the Brotherhood of Railroad Trainmen, and *Richard N. Clattenburg* for the Pennsylvania Railroad Co., respondents. Reported below: 234 F. 2d 658.

No. 709. GOODING AMUSEMENT CO., INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *F. Cleveland Hedrick, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 236 F. 2d 159.

No. 714. WOOLFSON *v.* DOYLE, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* for the Securities and Exchange Commission, and *William J. O'Shea* for Doyle, respondents. Reported below: 238 F. 2d 665.

No. 5, Misc. DAVIS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 11, Misc. DOPKOWSKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 405, Misc. BURGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 237 F. 2d 247.

No. 441, Misc. BULLARD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 448, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 564, Misc. MORSE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 715. BROWN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Curtis P. Mitchell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 99 U. S. App. D. C. 255, 239 F. 2d 75.

ADDENDUM.

Miscellaneous Order.

No. 69. BREITHAUPT *v.* ABRAM, WARDEN. Certiorari, 351 U. S. 906, to the Supreme Court of New Mexico. December 12, 1956. It is ordered that *F. Gordon Shermack, Esquire,* of Santa Fe, New Mexico, a member of the Bar of this Court be, and he is hereby, appointed to serve as counsel for petitioner in this case.

INDEX

I. In General.

Right to speedy trial.—Sentence in circumstances here held not violative of right to speedy trial. Pollard v. United States, p. 354.

404165 O—57——60

I. In General.

1. *Federal courts—Injunction—Act of Congress.*—Grounds for injunction; injunction restraining enforcement of Act of Congress as unconstitutional requires 3-judge District Court. Federal Housing Administration v. Darlington, Inc., p. 977.

2. *Federal courts — Injunction — State court proceedings.*—28 U. S. C. § 2283, restricting federal court stays of state-court proceedings, inapplicable to stay sought by United States; propriety of stay; interpretation of state law. Leiter Minerals, Inc., v. United States, p. 220.

3. *Tucker Act—Railroad tariffs.*—Questions of construction and reasonableness of tariff were within exclusive primary jurisdiction of Interstate Commerce Commission; referral of questions to I. C. C. not barred by 2-year limitation of Interstate Commerce Act; defense of estoppel. United States v. Western Pacific R. Co., p. 59; United States v. Chesapeake & O. R. Co., p. 77.

4. *Question of mootness—Sentence in criminal case—Federal courts.*—Possible consequences of sentence made case justiciable, though petitioner was released from prison after this Court's grant of certiorari. Pollard v. United States, p. 354.

U. S. GOVERNMENT PRINTING OFFICE: 1957 O—404165