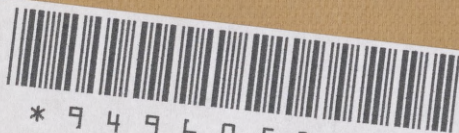


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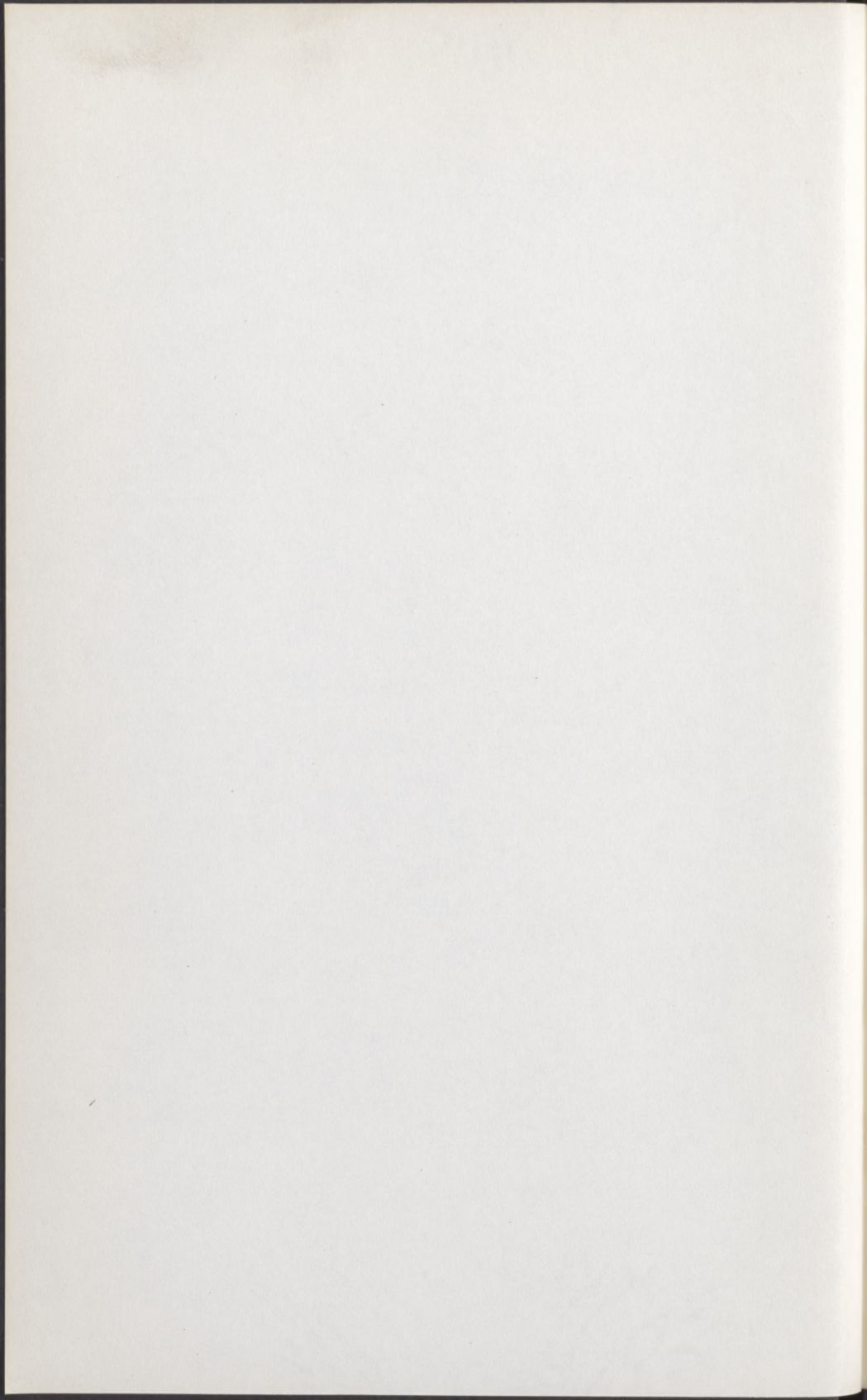


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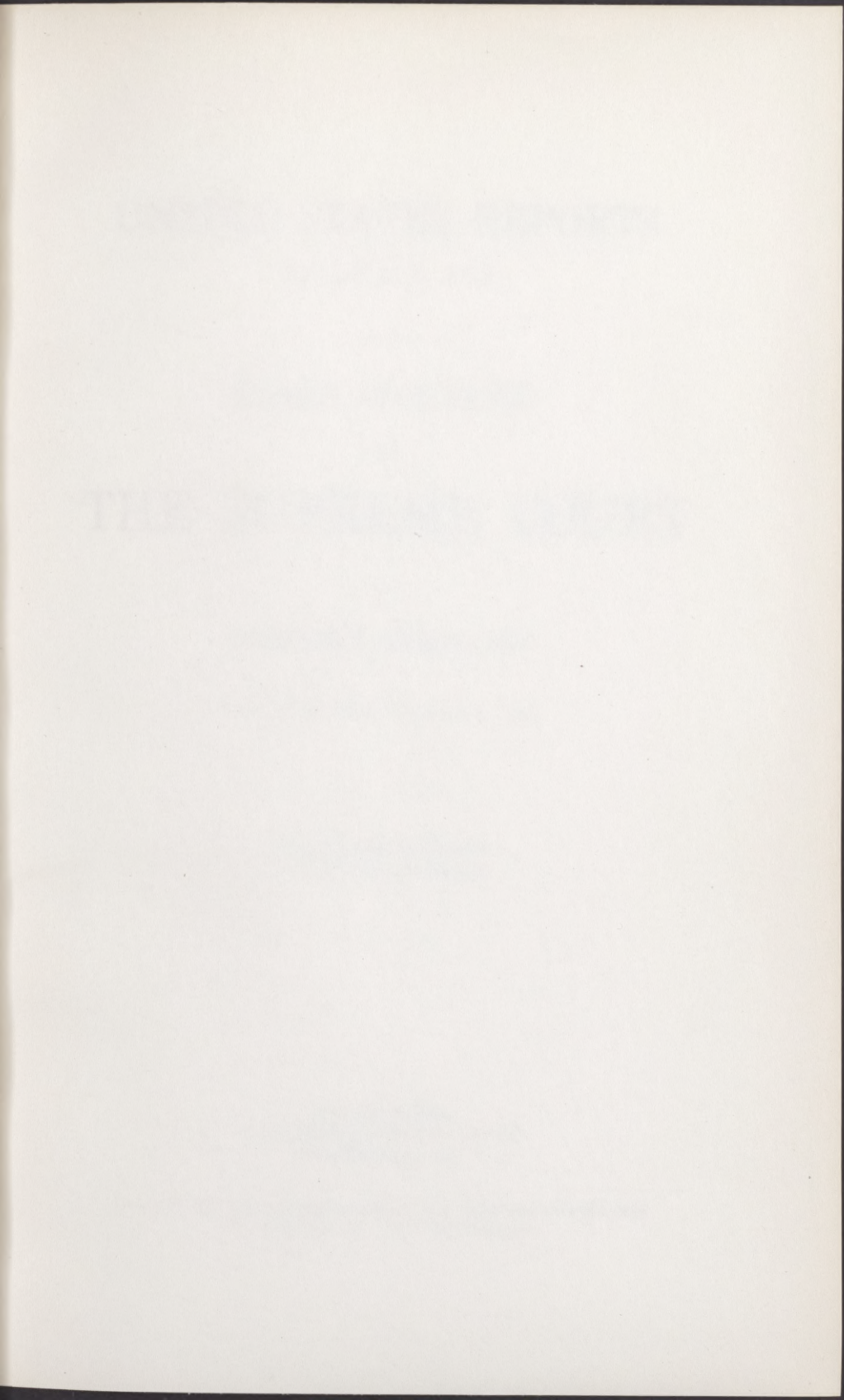


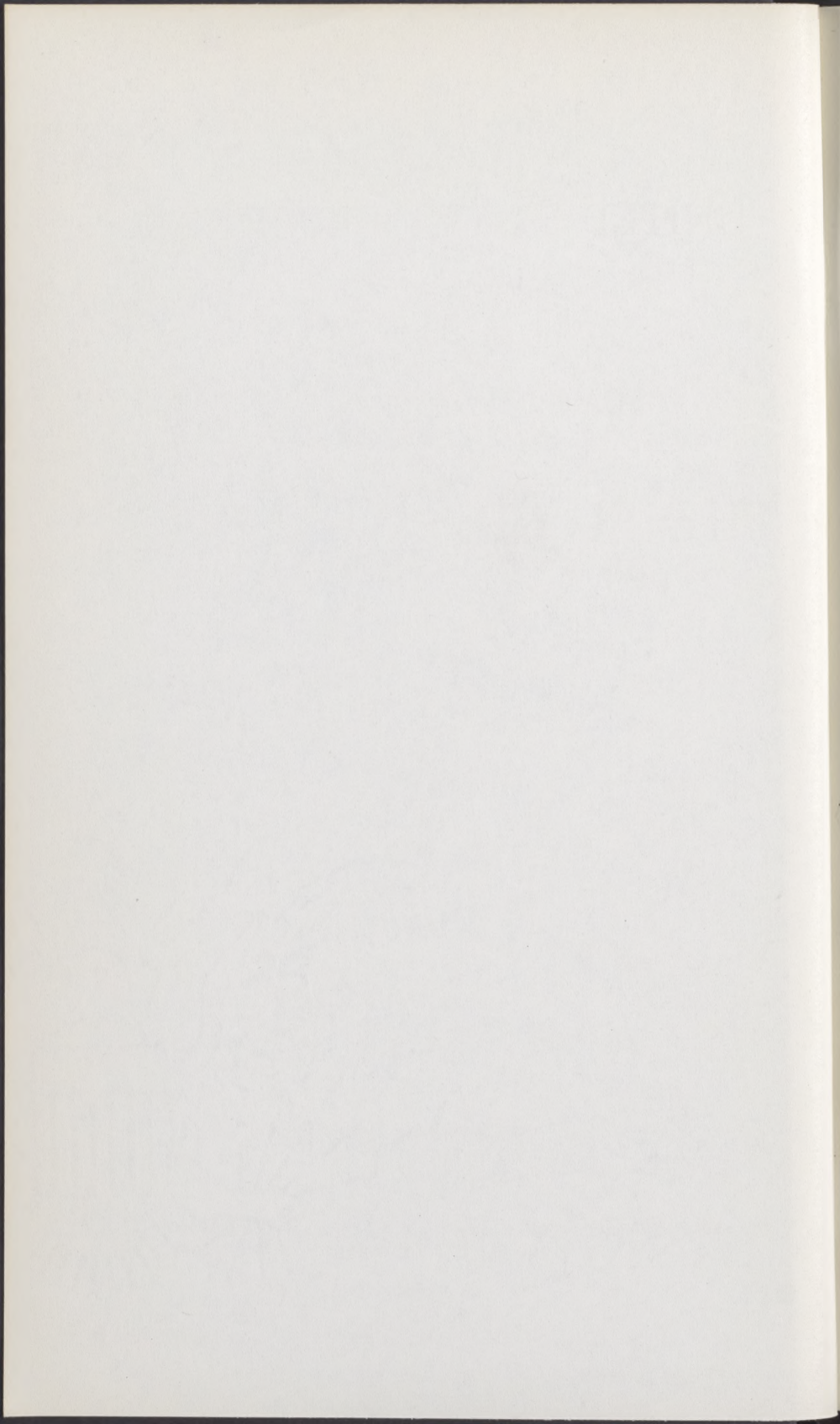














# UNITED STATES REPORTS

VOLUME 353

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1956

MARCH 25 THROUGH JUNE 3, 1957

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WALTER WYATT  
REPORTER OF DECISIONS

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UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1957

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UNITED STATES REPORTS

VOLUME 888

CASES ADJUDGED

THE SUPREME COURT

OCTOBER TERM 1923

WALTER WYATT  
EDITOR OF RECORDS

UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON, 1924



JUSTICES  
OF THE  
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

EARL WARREN, CHIEF JUSTICE.  
HUGO L. BLACK, ASSOCIATE JUSTICE.  
FELIX FRANKFURTER, ASSOCIATE JUSTICE.  
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.  
HAROLD H. BURTON, ASSOCIATE JUSTICE.  
TOM C. CLARK, ASSOCIATE JUSTICE.  
JOHN M. HARLAN, ASSOCIATE JUSTICE.  
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.<sup>1</sup>  
CHARLES E. WHITTAKER, ASSOCIATE JUSTICE.<sup>2</sup>

RETIRED

STANLEY REED, ASSOCIATE JUSTICE.  
SHERMAN MINTON, ASSOCIATE JUSTICE.

---

HERBERT BROWNELL, JR., ATTORNEY GENERAL.  
J. LEE RANKIN, SOLICITOR GENERAL.  
JOHN T. FEY, CLERK.  
WALTER WYATT, REPORTER OF DECISIONS.  
T. PERRY LIPPITT, MARSHAL.  
HELEN NEWMAN, LIBRARIAN.

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Notes on p. iv.

## NOTES.

<sup>1</sup> MR. JUSTICE BRENNAN, who had been serving as an Associate Justice under a recess appointment (see 352 U. S., pp. iv, n. 3; ix), 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 (see *post*, p. vii); and he again took the oaths on March 22, 1957.

<sup>2</sup> The Honorable Charles E. Whittaker, of Missouri, a Circuit Judge of the United States Court of Appeals for the Eighth Circuit, was nominated by President Eisenhower on March 2, 1957, to be an Associate Justice. He was confirmed by the Senate on March 19, 1957; commissioned on March 22, 1957; and took his oaths and his seat on March 25, 1957. See *post*, p. ix.



# 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, HAROLD H. BURTON, Associate Justice.

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

For the Eighth Circuit, CHARLES E. WHITTAKER, Associate Justice.

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

For the Tenth Circuit, CHARLES E. WHITTAKER, Associate Justice.

March 25, 1957.

---

(For next previous allotment, see 352 U. S., p. v.)

# SUPREME COURT OF THE UNITED STATES

## ASSIGNMENT OF JUSTICES

It is ordered that the following assignment be made of the Chief Justice and Associate Justices of the Court among the several Justices to the 25 United States Code Section 25, and that such assignment be entered of record this

For the Justice of Columbia Circuit, Chief Justice

For the First Circuit, Chief Justice

For the Second Circuit, Chief Justice

For the Third Circuit, Chief Justice

For the Fourth Circuit, Chief Justice

For the Fifth Circuit, Chief Justice

For the Sixth Circuit, Chief Justice

For the Seventh Circuit, Chief Justice

For the Eighth Circuit, Chief Justice

For the Ninth Circuit, Chief Justice

For the Tenth Circuit, Chief Justice

For the Eleventh Circuit, Chief Justice

For the Twelfth Circuit, Chief Justice

For the Thirteenth Circuit, Chief Justice

For the Fourteenth Circuit, Chief Justice

For the Fifteenth Circuit, Chief Justice

For the Sixteenth Circuit, Chief Justice

For the Seventeenth Circuit, Chief Justice

For the Eighteenth Circuit, Chief Justice

For the Nineteenth Circuit, Chief Justice

For the Twentieth Circuit, Chief Justice



# COMMISSION OF MR. JUSTICE BRENNAN.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 25, 1957.

*It is ordered* that the Commission of Mr. Justice BRENNAN be recorded and that his oaths be filed.

The commission of Mr. Justice BRENNAN is in the words and figures following, viz:

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 have nominated, and, by and with the advice and consent of the Senate, 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., during his good behavior.

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 twenty-first day of March, in the year of our Lord one thousand nine hundred and fifty-seven, and of the Independence of the United States of America the one hundred and eighty-first.

DWIGHT D. EISENHOWER

By the President:

HERBERT BROWNELL Jr.  
*Attorney General.*

COMMISSION OF MR. JUSTICE BRENNAN

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 23, 1887.

It is ordered that the Commission of Mr. Justice  
Brennan be recalled and that his office be filed.  
The commission of Mr. Justice Brennan is in the  
words and figures following:

Deputy to Justice Brennan

President of the United States of America

To all who shall see these presents: Greeting.

Know Ye, That residing at the Court and residing  
in the Western Hemisphere and a citizen of the United  
States of America, I have appointed  
and by and with the advice and consent of the Senate  
do appoint this 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 in the same by right  
appertaining unto him the said William Joseph Brennan  
in during his good behavior.

In testimony whereof, I have caused these letters  
to be made public and the seal of the Department of  
Justice to be hereunto affixed.

Done at the City of Washington this twenty-first day  
of March, in the year of our Lord one thousand eight  
hundred and eighty-seven, and of the Independence of the  
United States of America the one hundred and eighty-

Deputy to Justice Brennan

By the President  
William Howard Taft  
Attorney General



## APPOINTMENT OF MR. JUSTICE WHITTAKER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 25, 1957.

---

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

---

THE CHIEF JUSTICE said:

The President, with the advice and consent of the Senate, has appointed the Honorable Charles Evans Whittaker of Missouri, Circuit Judge of the Eighth Circuit, an Associate Justice of this Court to succeed Justice Reed. Justice Whittaker 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 Charles E. Whittaker of Missouri I have nominated, and, by and with the advice and consent of the Senate, 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 Charles E. Whittaker during his good behavior.

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 twenty-second day of March, in the year of our Lord one thousand nine hundred and fifty-seven, and of the Independence of the United States of America the one hundred and eighty-first.

DWIGHT D. EISENHOWER

By the President:

HERBERT BROWNELL Jr.

*Attorney General.*

---

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

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

I, Charles Evans Whittaker, 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.

CHARLES EVANS WHITTAKER

Subscribed and sworn to before me this 25th day of March A. D. 1957.

EARL WARREN,  
*Chief Justice of the United States.*

I, Charles Evans Whittaker, 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.

CHARLES EVANS WHITTAKER

Subscribed and sworn to before me this 25th day of March A. D. 1957.

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



purpose of evading and that I will well and faithfully discharge the duties of the office in which I am about to enter on my term of office. I have sworn to do so before the Court of the United States and before the people of the United States.

Subscribed and sworn to before me this 25th day of March A.D. 1957.

Chief Justice of the United States

I, Charles Evans Whittaker, do solemnly swear that I will administer justice without regard to persons and do equal rights 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, faithfully to the Constitution and laws of the United States.

So help me God.

Charles Evans Whittaker

Subscribed and sworn to before me this 25th day of March A.D. 1957.

Chief of the Supreme Court of the United States

So help me God.

I, Charles Evans Whittaker, do solemnly swear that I will administer justice without regard to persons and do equal rights 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, faithfully to the Constitution and laws of the United States.

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CASES ADJUDGED  
IN THE  
SUPREME COURT OF THE UNITED STATES  
AT  
OCTOBER TERM, 1956.

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GUSS, DOING BUSINESS AS PHOTO SOUND PRODUCTS MANUFACTURING CO., *v.* UTAH  
LABOR RELATIONS BOARD.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 280. Argued January 16, 1957.—Decided March 25, 1957.

By vesting in the National Labor Relations Board jurisdiction over labor relations matters affecting interstate commerce, Congress has completely displaced state power to deal with such matters where the Board has declined to exercise its jurisdiction but has not ceded jurisdiction to a state agency pursuant to the proviso to § 10 (a) of the National Labor Relations Act. Pp. 2-12.

(a) By the National Labor Relations Act, Congress meant to reach to the full extent of its power under the Commerce Clause. P. 3.

(b) An agreement ceding jurisdiction to a state agency under § 10 (a) of the National Labor Relations Act is the exclusive means whereby States may be enabled to act concerning matters which Congress has entrusted to the National Labor Relations Board. Pp. 6-10.

(c) Not only was there a general intent on the part of Congress to pre-empt the field of labor practices affecting interstate commerce, but also the proviso to § 10 (a) carries an inescapable implication of exclusiveness. P. 10.

(d) Since the power of Congress in the area of commerce among the States is plenary, its judgment in favor of uniformity must be respected, whatever policy objections there may be to the creation



of a no-man's-land in which labor disputes will not be regulated by any federal or state agency or court. Pp. 10-12.  
5 Utah 2d 68, 296 P. 2d 733, reversed.

*Peter W. Billings* argued the cause for appellant. With him on the brief was *Harold P. Fabian*.

*E. R. Callister*, Attorney General of Utah, argued the cause for appellee. With him on the brief was *Raymond W. Gee*, Assistant Attorney General.

*Solicitor General Rankin*, *Theophil C. Kammholz*, *Stephen Leonard* and *Dominick L. Manoli* filed a brief for the National Labor Relations Board, as *amicus curiae*, urging affirmance.

A brief of *amici curiae* was filed for the States of Florida, by *Richard W. Ervin*, Attorney General; Georgia, by *Eugene Cook*, Attorney General; Texas, by *John Ben Shepperd*, Attorney General; Vermont, by *Robert T. Stafford*, Attorney General; Virginia, by *J. Lindsay Almond, Jr.*, Attorney General; Wyoming, by *George F. Guy*, Attorney General; and the Wisconsin Employment Relations Board, by *Vernon W. Thomson*, Attorney General, and *Beatrice Lampert*, Assistant Attorney General.

Briefs of *amici curiae* were also filed by *Herbert B. Cohen*, Attorney General, and *Oscar Bortner*, Assistant Attorney General, for the Commonwealth of Pennsylvania, and *Philip Feldblum* for the New York State Labor Relations Board.

*Arthur J. Goldberg* and *David E. Feller* filed a brief for the United Steelworkers of America, as *amicus curiae*.

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

The question presented by this appeal and by No. 41, *post*, p. 20, and No. 50, *post*, p. 26, also decided this day, is whether Congress, by vesting in the National Labor

Relations Board jurisdiction over labor relations matters affecting interstate commerce, has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction pursuant to the proviso to § 10 (a) of the National Labor Relations Act.<sup>1</sup> It is a question we left open in *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

Some background is necessary for an understanding of this problem in federal-state relations and how it assumed its present importance. Since it was first enacted in 1935, the National Labor Relations Act<sup>2</sup> has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce."<sup>3</sup> By this language and by the definition of "affecting commerce" elsewhere in the Act,<sup>4</sup> Congress meant to reach to the full extent of its power under the Commerce Clause. *Labor Board v. Fainblatt*, 306 U. S. 601, 606-607. The Board, however, has never exercised the full measure of its jurisdiction. For a number of years, the Board decided case-by-case whether to take jurisdiction. In 1950, concluding that "experience warrants the establishment and announcement of certain standards" to govern the exercise of its jurisdiction, *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635, 636, the Board published standards, largely in terms

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<sup>1</sup> 61 Stat. 146, 29 U. S. C. § 160 (a).

<sup>2</sup> 49 Stat. 449, as amended, 61 Stat. 136, 29 U. S. C. § 151 *et seq.*

<sup>3</sup> § 10 (a), 49 Stat. 453, left unchanged in this particular by the Taft-Hartley amendments, 61 Stat. 146, 29 U. S. C. § 160 (a).

<sup>4</sup> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." § 2 (7), 49 Stat. 450, left unchanged by the Taft-Hartley amendments, 61 Stat. 138, 29 U. S. C. § 152 (7).

of yearly dollar amounts of interstate inflow and outflow.<sup>5</sup> In 1954, a sharply divided Board, see *Breeding Transfer Co.*, 110 N. L. R. B. 493, revised the jurisdictional standards upward.<sup>6</sup> This Court has never passed and we do not pass today upon the validity of any particular declination of jurisdiction by the Board or any set of jurisdictional standards.<sup>7</sup>

How many labor disputes the Board's 1954 standards leave in the "twilight zone" between exercised federal jurisdiction and unquestioned state jurisdiction is not known.<sup>8</sup> In any case, there has been recently a substantial volume of litigation raising the question stated at the beginning of this opinion, of which this case is an example.<sup>9</sup>

Appellant, doing business in Salt Lake City, Utah, manufactures specialized photographic equipment for the Air Force on a contract basis. To fulfill his government contracts he purchased materials from outside Utah in an amount "a little less than \$50,000." Finished prod-

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<sup>5</sup> The NLRB's press release of October 6, 1950, can be found at 26 LRR Man. 50.

<sup>6</sup> The NLRB's press release of July 15, 1954, can be found at 34 LRR Man. 75.

<sup>7</sup> But see *Labor Board v. Denver Building & Construction Trades Council*, 341 U. S. 675, 684.

<sup>8</sup> Members of the Board disagreed as to the impact of the revision. See *Breeding Transfer Co.*, 110 N. L. R. B. 493, 498-500, 506-508.

<sup>9</sup> Among the cases in which courts have sustained state jurisdiction where the Board declines or would decline jurisdiction are *Garmon v. San Diego Building Trades Council*, 45 Cal. 2d 657, 291 P. 2d 1; *Building Trades Council v. Bonito*, 71 Nev. 84, 280 P. 2d 295; *Hammer v. Local 211, United Textile Workers*, 34 N. J. Super. 34, 111 A. 2d 308; *Dallas General Drivers v. Jax Beer Co.*, 276 S. W. 2d 384 (Tex. Civ. App.). On the other side are *Retail Clerks v. Your Food Stores*, 225 F. 2d 659; *Universal Car & Service Co. v. International Assn. of Machinists*, 35 LRR Man. 2087 (Mich. Cir. Ct.); *New York Labor Board v. Wags Transportation System*, 130 N. Y. S. 2d 731, aff'd, 284 App. Div. 883, 134 N. Y. S. 2d 603.



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ucts were shipped to Air Force bases, one within Utah and the others outside. In 1953 the United Steelworkers of America filed with the National Labor Relations Board a petition for certification of that union as the bargaining representative of appellant's employees. A consent election was agreed to, the agreement reciting that appellant was "engaged in commerce within the meaning of Section 2 (6), (7) of the National Labor Relations Act." The union won the election and was certified by the National Board as bargaining representative. Shortly thereafter the union filed with the National Board charges that appellant had engaged in unfair labor practices proscribed by § 8 (a) (1), (3) and (5) of the Act.<sup>10</sup> Meanwhile, on July 15, 1954, the Board promulgated its revised jurisdictional standards. The Board's Acting Regional Director declined to issue a complaint. He wrote on July 21:

"Further proceedings are not warranted, inasmuch as the operations of the Company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction."

The union thereupon filed substantially the same charges with the Utah Labor Relations Board, pursuant to the Utah Labor Relations Act.<sup>11</sup> Appellant urged that the State Board was without jurisdiction of a matter within the jurisdiction of the National Board. The State Board, however, found it had jurisdiction and concluded on the merits that appellant had engaged in unfair labor practices as defined by the Utah Act. It granted relief through a remedial order. On a Writ of Review, the Utah Supreme Court affirmed the decision and order of

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<sup>10</sup> 61 Stat. 140, 141, 29 U. S. C. § 158 (a) (1), (3), (5).

<sup>11</sup> Utah Code Ann., 1953, 34-1-1 through 34-1-15.

the state administrative agency.<sup>12</sup> We noted probable jurisdiction. 352 U. S. 817.

On these facts we start from the following uncontroverted premises:

(1) Appellant's business affects commerce within the meaning of the National Labor Relations Act and the National Labor Relations Board had jurisdiction. *Labor Board v. Fainblatt*, *supra*.

(2) The National Act expressly deals with the conduct charged to appellant which was the basis of the state tribunals' actions. Therefore, if the National Board had not declined jurisdiction, state action would have been precluded by our decision in *Garner v. Teamsters Union*, 346 U. S. 485.

(3) The National Board has not entered into any cession agreement with the Utah Board pursuant to § 10 (a) of the National Act.

Section 10 (a) provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such*

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<sup>12</sup> 5 Utah 2d 68, 296 P. 2d 733.

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*agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."* (Emphasis added.)

The proviso to § 10 (a), italicized in the quotation above, was one of the Taft-Hartley amendments to the National Labor Relations Act. Timing and a reference in one of the committee reports indicate that it was drafted in response to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767.<sup>13</sup> In *Bethlehem* foremen in an enterprise affecting commerce petitioned the New York State Labor Relations Board for certification as a bargaining unit. At that time the National Board was declining, as a matter of policy, to certify bargaining units composed of foremen. The Court held that the federal policy against certifying foremen's units must prevail. However, it took occasion to discuss the efforts of the two boards to avoid conflicts of jurisdiction.

"The National and State Boards have made a commendable effort to avoid conflict in this overlapping state of the statutes. We find nothing in their negotiations, however, which affects either the construction of the federal statute or the question of constitutional power insofar as they are involved in this case, since the National Board made no concession or delegation of power to deal with this subject. The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons presents a different problem which we do not now decide." *Id.*, at 776.

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<sup>13</sup> The *Bethlehem* decision was handed down April 7, 1947. The proviso to § 10 (a) first appeared when S. 1126, which contained the substance of what was to become the Taft-Hartley Act, was reported out of committee April 17. See S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 38.



Three Justices were led to concur specially, because, as it was stated for the three:

"I read . . . [the Court's opinion] to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations." *Id.*, at 779.

Thus, if the opinion of the Court did not make manifest, the concurring opinion did, that after *Bethlehem* there was doubt whether a state board could act either after a formal cession by the National Board or upon a declination of jurisdiction "for budgetary or other reasons." When we read § 10 (a) against this background we find unconvincing the argument that Congress meant by the proviso only to meet the first problem, *i. e.*, cession of jurisdiction over cases the National Board would otherwise handle.

The proviso is directed at least equally to the type of cases which the Board might decline "for budgetary or other reasons" to hear as to the type of cases it might wish to cede to the States for policy reasons—if, indeed, there is any difference between the two classes. Cases in mining, manufacturing, communications and transportation can be ceded only where the "industry" is "predominantly local in character." In other industries, which Congress might have considered to be more or less typically local,

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it put no such limitation on the Board's power. The Senate Committee spelled the matter out:

"The proviso which has been added to this subsection [§ 10 (a)] permits the National Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (i. e., border line insofar as interstate commerce is concerned), provided the State statute conforms to national policy."<sup>14</sup>

The Committee minority agreed as to the purpose of the proviso and agreed "with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems."<sup>15</sup>

We hold that the proviso to § 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board. We find support for our holding in prior cases in this Court. In *Amalgamated Assn. of Employees v. Wisconsin Board*, 340 U. S. 383, 397-398, the Court said:

"The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the

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<sup>14</sup> S. Rep. No. 105, 80th Cong., 1st Sess. 26.

<sup>15</sup> S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 38. The minority members also said, "We think the clarification of relations between the Federal and State boards contemplated under section 10 (a) a wise solution to a complex problem." *Id.*, at 41. See also S. Rep. No. 986, 80th Cong., 2d Sess. 30-31.

act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." (Footnotes omitted.)

In a footnote to the first sentence quoted above the Court cited § 10 (a) and described its authorization to cede jurisdiction only where the state law is consistent with the national legislation as insuring "that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies." *Id.*, n. 23. See also *Algoma Plywood & Veneer Co. v. Wisconsin Board*, 336 U. S. 301, 313; *California v. Zook*, 336 U. S. 725, 732.

Our reading of § 10 (a) forecloses the argument based upon such cases as *Welch Co. v. New Hampshire*, 306 U. S. 79, and *Missouri Pacific R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, that "where federal power has been delegated but lies dormant and unexercised," *Bethlehem Steel Co. v. New York Labor Board*, *supra*, at 775, the States' power to act with respect to matters of local concern is not necessarily superseded. But in each case the question is one of congressional intent. Compare *Welch Co. v. New Hampshire*, *supra*, with *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605. And here we find not only a general intent to pre-empt the field but also the proviso to § 10 (a), with its inescapable implication of exclusiveness.

We are told by appellee that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has ex-



pressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land.

Congress is free to change the situation at will. In 1954 the Senate Committee on Labor and Public Welfare recognized the existence of a no-man's-land and proposed an amendment which would have empowered state courts and agencies to act upon the National Board's declination of jurisdiction.<sup>16</sup> The National Labor Relations Board can greatly reduce the area of the no-man's-land by reasserting its jurisdiction and, where States have brought their labor laws into conformity with federal policy, by ceding jurisdiction under § 10 (a).<sup>17</sup> The testimony given by the Chairman of the Board before the Appropriations Committees shortly before the 1954 revisions of the jurisdictional standards indicates that its reasons for making that change were not basically

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<sup>16</sup> "The effect . . . of the Board's policy of refusing to assert its jurisdiction has been to create a legal vacuum or no-man's land with respect to cases over which the Board, in its discretion, has refused to assert jurisdiction. In these cases the situation seems to be that the Board will not assert jurisdiction, the States are forbidden to do so, and the injured parties are deprived of any forum in which to seek relief." S. Rep. No. 1211, 83d Cong., 2d Sess. 18. The minority agreed that "When the Federal Board refuses to take a case within its jurisdiction, the State agencies or courts are nevertheless without power to take jurisdiction, since the dispute is covered by the Federal act, even though the Federal Board declines to apply the act. There is thus a hiatus—a no man's land—in which the Federal Board declines to exercise its jurisdiction and the State agencies and courts have no jurisdiction." *Id.*, Pt. 2, p. 14. The Committee's bill, S. 2650, was recommitted. 100 Cong. Rec. 6203.

<sup>17</sup> The National Labor Relations Board has informed us in its brief *amicus curiae* in these cases that it has been unable, because of the conditions prescribed by the proviso to § 10 (a), to consummate any cession agreements.

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budgetary. They had more to do with the Board's concept of the class of cases to which it should devote its attention.<sup>18</sup>

The judgment of the Supreme Court of Utah is

*Reversed.*

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

MR. JUSTICE BURTON, whom MR. JUSTICE CLARK joins, dissenting.\*

I believe the Court is mistaken in its interpretation of the proviso which Congress added to § 10 (a) of the National Labor Relations Act in 1947.<sup>1</sup> It is my view that the proviso was added merely to make it clear that

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<sup>18</sup> Hearings before Subcommittee of House Committee on Appropriations, Department of Labor and Related Independent Agencies, 83d Cong., 2d Sess. 309, 315, 323.

\*[NOTE: This dissenting opinion applies also to No. 41, *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, *post*, p. 20, and No. 50, *San Diego Building Trades Council v. Garmon*, *post*, p. 26.]

<sup>1</sup> Section 10 (a) of the National Labor Relations Act of 1935, 49 Stat. 453, was amended by the Labor Management Relations Act of 1947 by the addition of the proviso shown below:

"SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith." 61 Stat. 146, 29 U. S. C. § 160 (a).

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the National Labor Relations Board had the power, by making specific agreements, to cede jurisdiction to state or territorial agencies over certain labor disputes. Congress sought thereby to facilitate state cooperation in the supervision of labor practices affecting interstate commerce. The Court is not justified in interpreting this action as evidencing an unexpressed and sweeping termination of the States' pre-existing power to deal with labor matters over which the Board, for budgetary or other administrative reasons, has declined, or obviously would decline, to exercise its full jurisdiction.

The Labor Acts of 1935 and 1947 granted to the Board extensive jurisdiction over labor controversies affecting interstate commerce but neither Act required the Board to assert at all times the full measure of its jurisdiction. In each Act the first sentence of § 10 (a) "empowered," but did not direct, the Board to prevent unfair labor practices. Likewise, the first sentence of § 10 (b) granted the "power," instead of imposing the duty, to issue complaints upon receipt of appropriate charges.<sup>2</sup> The Board is not a court whose jurisdiction over violations of private rights must be exercised. It is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the Act. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261.

From the beginning, budgetary limitations and other administrative considerations have prevented the Board

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<sup>2</sup>"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint . . . ." 49 Stat. 453, 61 Stat. 146, 29 U. S. C. § 160 (b).



from exercising jurisdiction over all cases in which interstate commerce was affected. Congress knew this when, in 1947, it left unchanged the discretionary language of § 10 and added the proviso to § 10 (a). Congress has consistently refrained from appropriating funds sufficient to permit the Board to entertain all complaints within its jurisdiction. In recent years Congress has repeatedly recognized the Board's jurisdictional practice.<sup>3</sup> In *Labor Board v. Denver Bldg. Council*, 341 U. S. 675, 684, this Court said that "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." Courts of Appeals have approved the Board's practice<sup>4</sup> and none of the parties to the instant cases question it.

Unless restricted by the proviso added to § 10 (a), there is little doubt that the States have the necessary power to act in labor controversies within their borders, even when interstate commerce is affected, provided the Federal Government has not occupied the field and the National Board has not taken jurisdiction. Where the Board has

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<sup>3</sup> See Report of the Joint Committee on Labor-Management Relations, S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 11-15; S. Rep. No. 99, 81st Cong., 1st Sess. 40; H. R. Rep. No. 1852, 81st Cong., 2d Sess. 10; Hearings before Senate Committee on Labor and Public Welfare on S. 249, Pt. 1, 81st Cong., 1st Sess. 175-177; Hearings before Senate Committee on Expenditures in the Executive Departments on S. Res. 248, 81st Cong., 2d Sess. 40, 120.

<sup>4</sup> *E. g.*, *Optical Workers' Union v. Labor Board*, 227 F. 2d 687; *Local Union No. 12 v. Labor Board*, 189 F. 2d 1; *Haleston Drug Stores v. Labor Board*, 187 F. 2d 418. See *Labor Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18-19. The Board discusses its jurisdictional practice in *Breeding Transfer Co.*, 110 N. L. R. B. 493. See also, Note, Discretionary Administrative Jurisdiction of the NLRB Under the Taft-Hartley Act, 62 Yale L. J. 116 (1952).

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declined, or obviously would decline, to take jurisdiction, then federal power lies "dormant and unexercised." *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767, 775. Unless the proviso stands in their way, the States may then exercise jurisdiction since their action will not conflict with the Board's administration of the Act.<sup>5</sup> Substantive provisions of the Act may limit the action of the States. See *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 75. But the States are not deprived of all power to act.<sup>6</sup>

By this decision the Court restricts the power of the States to those labor disputes over which the National Board expressly cedes its jurisdiction to the appropriate state agencies. However, the proviso's requirements are so highly restrictive that not a single cession has been made under it.<sup>7</sup> The result of this decision is the crea-

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<sup>5</sup> ". . . The care we took in the *Garner* case [346 U. S. 485] to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 665. See also, *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 479-480.

<sup>6</sup> See *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U. S. 761; *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1; *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79; *Northwestern Bell Telephone Co. v. Nebraska Railway Commission*, 297 U. S. 471; *Missouri Pacific R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612.

<sup>7</sup> The National Labor Relations Board in its brief filed in these cases states that—

"It should be noted here that the Board has been unable, because of the prescribed conditions, to consummate any such agreements. Congress has been aware of this situation and considered the feasibility of deleting these conditions in order to reduce the tremendous volume of cases brought before the Board. S. Rep. No. 986, Joint Committee Report, 80th Cong., 2d Sess., 31 (1948). Congress, however, has taken no action in this regard. The advocates of federal pre-emption argue from this post-legislative history that Congress has

tion of an extensive no man's land within which no federal or state agency or court is empowered to deal with labor controversies. It is difficult to believe that Congress, *sub silentio*, intended to take such a step backward in the field of labor relations.

The immediate occasion that led to the enactment of the proviso throws light on its proper interpretation. That occasion was this Court's decision in the *Bethlehem* case, *supra*, where it was held that a State Board did not have jurisdiction to certify a union of foremen as a collective-bargaining agency because the National Board, by asserting general jurisdiction over foremen's unions, had occupied the field.<sup>8</sup> Although an agreement had been negotiated between the National Board and the State Board ceding jurisdiction over certain labor matters, this Court concluded that the agreement did not cede jurisdiction over foremen's unions. Three Justices decried certain overtones they found in the opinion of the Court to the effect that the National Board lacked authority to cede jurisdiction over predominantly local labor matters

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thereby manifested its intent to preclude State action in the absence of cession by the Board. Precisely what inference may be drawn from such Congressional inaction is, in our judgment, wholly speculative."

<sup>8</sup> ". . . It [the National Board] made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. *Maryland Drydock Co.*, 49 N. L. R. B. 733. We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.

" . . . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra* [330 U. S. 485], its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted." 330 U. S., at 775, 776.



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BURTON, J., dissenting.

by agreement with state agencies. It was to clarify the power of the National Board to make such a cession that the proviso was added to § 10 (a).

While the proviso thus evidenced a congressional purpose to encourage state action, there is no indication that it was intended to wipe out, by implication, the States' recognized power to act when the National Board declined to take jurisdiction. Neither the language of the proviso nor its legislative history discloses a conscious congressional intent to eliminate state authority when the National Board has declined to act. Unequivocal legislative history would be necessary to sustain a conclusion that Congress intended such a drastic result. In the *Bethlehem* case, *supra*, the Court did not question the authority of the States to act when the Board, for budgetary or other administrative reasons, declined to exercise its full jurisdiction. The Court expressly refrained from passing on that question<sup>9</sup> but three Justices said that they found in the opinion of the Court a "suggestion that the National Board's declination of jurisdiction 'in certain types of cases, for budgetary or other reasons' might leave room for the State in those situations . . . ." 330 U. S., at 778.

As a matter of fact, in 1947, nearly 40 States lacked labor agencies and comprehensive labor legislation.<sup>10</sup>

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<sup>9</sup> "The National and State Boards have made a commendable effort to avoid conflict in this overlapping state of the statutes. We find nothing in their negotiations, however, which affects either the construction of the federal statute or the question of constitutional power insofar as they are involved in this case, since the National Board made no concession or delegation of power to deal with this subject. The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons presents a different problem which we do not now decide." 330 U. S., at 776.

<sup>10</sup> In 1947 only 11 States had comprehensive labor statutes. Of those, eight had established an administrative procedure for the adjudication of unfair labor practices while three had left these matters

Obviously, those States were ineligible to take advantage of the proviso. It is hard to imagine that Congress meant to make the proviso the exclusive channel for state jurisdiction when so many States would be automatically excluded from using it. The full mission of the proviso was to supply the National Board with express authority to cede jurisdiction over labor disputes by agreement where, as a matter of deliberate judgment, it concluded that due regard for local interests made that course desirable. The Board's jurisdictional yardsticks always have reflected its need to distribute its limited resources so as best to effectuate the policies of the Act. The Board does not "cede" jurisdiction when it declines to exercise its full jurisdiction; it merely allows the States to exercise their pre-existing authority.<sup>11</sup>

The Court's interpretation of the proviso is contrary to the established practice of the States and of the National Board, as well as to the considered position taken by the Board as *amicus curiae*. Congress has demonstrated a continuing and deep interest in providing governmental machinery for handling labor controversies. The creation by it of a large, unsupervised no man's land flies in the face of that policy. Due regard for our federal system suggests that all doubts on this score should be resolved in favor of a conclusion that would not leave the States

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to conventional law-enforcement agencies—prosecuting attorneys and regular courts. See Killingsworth, *State Labor Relations Acts* (1948), 1-3, 111-112. Labor legislation in the other 37 States was fragmentary. Killingsworth said of these laws "that they are aimed exclusively at one or a few union practices, place few or no restrictions on employers, and do not attempt to establish a comprehensive labor relations policy." *Id.*, at 3.

<sup>11</sup> When in 1954 the Board revised upward its jurisdictional yardsticks, it stated that "a desire to establish broader State jurisdiction is in no wise a factor in our decision." *Breeding Transfer Co.*, 110 N. L. R. B. 493, 497.

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BURTON, J., dissenting.

powerless when the federal agency declines to exercise its jurisdiction. As three Justices said in the *Bethlehem* case, *supra*:

"Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." 330 U. S., at 780.

I would sustain the jurisdiction of the respective States in these cases.



AMALGAMATED MEAT CUTTERS & BUTCHER  
WORKMEN OF NORTH AMERICA, LOCAL  
NO. 427, AFL, ET AL. v. FAIRLAWN  
MEATS, INC.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 41. Argued January 16, 1957.—Decided March 25, 1957.

Fairlawn operates three meat markets in the vicinity of Akron, Ohio. All of its sales are intrastate. Of its purchases amounting to about \$900,000 in one year, about \$100,000 come from out of the State directly and as much or more indirectly. After a labor union had attempted unsuccessfully to organize Fairlawn's employees and Fairlawn had refused to recognize the union as the bargaining agent for its employees, the union picketed Fairlawn's stores and put some secondary pressure on its suppliers. Upon Fairlawn's complaint, an Ohio state court enjoined the union from picketing Fairlawn, from trespassing on its premises and from exerting secondary pressure on its suppliers. No effort was made to invoke the jurisdiction of the National Labor Relations Board; but it is assumed that the Board would have declined jurisdiction and that it had not ceded jurisdiction under § 10 (a) of the National Labor Relations Act. *Held*: The labor dispute was within the jurisdiction of the National Labor Relations Board; the state court was without jurisdiction over the labor dispute; and the judgment is vacated. Pp. 22-25.

(a) Fairlawn's interstate purchases were not so negligible that its business cannot be said to affect interstate commerce within the meaning of § 2 (7) of the National Labor Relations Act. P. 22.

(b) Since the proviso to § 10 (a) of the National Labor Relations Act operates to exclude state labor boards from disputes within the jurisdiction of the National Labor Relations Board in the absence of a cession agreement, *Guss v. Utah Labor Relations Board*, ante, p. 1, it must also exclude state courts. P. 23.

(c) Congress did not leave it to state labor agencies, to state courts or to this Court to decide how consistent with federal policy state law must be. The power to make that decision in the first instance was given to the National Labor Relations Board, guided by the language of the proviso to § 10 (a). Pp. 23-24.

(d) Since the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety, it is impossible to know whether its conclusion on the mere act of trespass would have been the same outside of the context of the union's other conduct. Pp. 24-25.  
164 Ohio St. 285, 130 N. E. 2d 237, judgment vacated and cause remanded.

*Mozart G. Ratner* argued the cause for petitioners. With him on the brief were *Joseph M. Jacobs* and *Mortimer Riemer*.

*Stanley Denlinger* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Rankin*, *Theophil C. Kammholz*, *Stephen Leonard* and *Dominick L. Manoli* for the National Labor Relations Board, and *Thomas E. Shroyer* and *Milton C. Denbo* for the American Retail Federation et al., and *Clarence D. Laylin* for the Ohio Chamber of Commerce.

A brief of *amici curiae* was filed for the States of Florida, by *Richard W. Ervin*, Attorney General; Georgia, by *Eugene Cook*, Attorney General; Texas, by *John Ben Shepperd*, Attorney General; Vermont, by *Robert T. Stafford*, Attorney General; Virginia, by *J. Lindsay Almond, Jr.*, Attorney General; Wyoming, by *George F. Guy*, Attorney General; and the Wisconsin Employment Relations Board, by *Vernon W. Thomson*, Attorney General, and *Beatrice Lampert*, Assistant Attorney General.

*Herbert B. Cohen*, Attorney General, and *Oscar Bortner*, Assistant Attorney General, filed a brief for the Commonwealth of Pennsylvania, as *amicus curiae*.

*J. Albert Woll* and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae*.

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

Respondent operates three meat markets in the vicinity of Akron, Ohio. All of its sales are intrastate, but of its purchases in one year totaling not quite \$900,000, slightly more than \$100,000 worth came from outside Ohio directly and as much or more indirectly. Petitioner union, after an unsuccessful attempt to organize respondent's employees, asked respondent for recognition as their bargaining agent and for a union shop contract. When respondent refused to enter into such a contract, the union picketed respondent's stores and put some secondary pressure on its suppliers. Upon respondent's complaint, the Court of Common Pleas enjoined the union from picketing respondent, from trespassing upon respondent's premises and from exerting secondary pressure on the suppliers. Petitioners objected throughout that the jurisdiction of the National Labor Relations Board was exclusive. On appeal, the Ohio Court of Appeals found that respondent's business was "purely of a local character" and interstate commerce, therefore, was not burdened or obstructed. The Court of Appeals held that the union's picketing was unlawful according to Ohio policy, and it continued in effect the injunction granted by the Court of Common Pleas.<sup>1</sup> The Ohio Supreme Court dismissed an appeal "for the reason that no debatable constitutional question is involved."<sup>2</sup> We granted certiorari. 351 U. S. 922.

We do not agree that respondent's interstate purchases were so negligible that its business cannot be said to affect interstate commerce within the meaning of § 2 (7) of the National Labor Relations Act.<sup>3</sup> Cf. *Labor Board v. Den-*

<sup>1</sup> 99 Ohio App. 517, 135 N. E. 2d 689.

<sup>2</sup> 164 Ohio St. 285, 130 N. E. 2d 237.

<sup>3</sup> 61 Stat. 138, 29 U. S. C. § 152 (7).



ver *Building & Construction Trades Council*, 341 U. S. 675, 683-685. In this case, unlike No. 280, *ante*, p. 1, and No. 50, *post*, p. 26, no effort was made to invoke the jurisdiction of the National Labor Relations Board. Although the extent of respondent's interstate activity seems greater even than that in *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933, we will assume that this is a case where it was obvious that the Board would decline jurisdiction.<sup>4</sup>

On this view of the case, our decision in *Guss v. Utah Labor Relations Board*, *ante*, p. 1, controls. If the proviso to § 10 (a) of the National Labor Relations Act operates to exclude state labor boards from disputes within the National Board's jurisdiction in the absence of a cession agreement, it must also exclude state courts. See *Garner v. Teamsters Union*, 346 U. S. 485, 491. The conduct here restrained—an effort by a union not representing a majority of his employees to compel an employer to agree to a union shop contract—is conduct of which the National Act has taken hold. § 8 (b)(2), 61 Stat. 141, 29 U. S. C. § 158 (b)(2). *Garner v. Teamsters Union*, *supra*, teaches that in such circumstances a State cannot afford a remedy parallel to that provided by the Act.

It is urged in this case and its companions, however, that state action should be permitted within the area of commerce which the National Board has elected not to enter when such action is consistent with the policy of the National Act. We stated our belief in *Guss v. Utah*

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<sup>4</sup> The Board's current standards for asserting jurisdiction over retail stores call for annual direct imports from out of state of \$1,000,000 or indirect imports of \$2,000,000. *Hogue & Knott Supermarkets*, 110 N. L. R. B. 543. We leave aside the question whether the presence of secondary pressure on respondent's suppliers would have affected the Board's decision whether to take jurisdiction.

*Labor Relations Board, ante*, at pp. 10-11, that "Congress has expressed its judgment in favor of uniformity." We add that Congress did not leave it to state labor agencies, to state courts or to this Court to decide how consistent with federal policy state law must be. The power to make that decision in the first instance was given to the National Labor Relations Board, guided by the language of the proviso to § 10 (a). This case is an excellent example of one of the reasons why, it may be, Congress was specific in its requirement of uniformity. Petitioners here contend that respondent was guilty of what would be unfair labor practices under the National Act and that the outcome of proceedings before the National Board would, for that reason, have been entirely different from the outcome of the proceedings in the state courts. Without expressing any opinion as to whether the record bears out its factual contention, we note that the opinion of the Ohio Court of Appeals takes no account of the alleged unfair labor practice activity of the employer. Thus, it cannot be said with certainty whether the state court's decree is consistent with the National Act.

One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact, and "trespassing upon plaintiff's property" is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside of the con-

text of petitioner's other conduct we cannot know. The judgment therefore is vacated and the case remanded for proceedings not inconsistent with this opinion.

*Vacated and remanded.*

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

[For dissenting opinion of MR. JUSTICE BURTON, joined by MR. JUSTICE CLARK, see *ante*, p. 12.]



SAN DIEGO BUILDING TRADES COUNCIL ET AL.  
v. GARMON ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 50. Argued January 16, 1957.—Decided March 25, 1957.

Respondents operate two retail lumber yards in California and annually buy from outside the State about \$250,000 worth of material for resale. Petitioner unions asked respondents to sign a labor contract including a union shop provision, though the unions had not been selected by a majority of respondents' employees as their bargaining agents. Respondents refused to sign and the unions commenced peaceful picketing and secondary pressure to enforce their demand. Respondents petitioned the National Labor Relations Board to settle the question of representation of their employees; but the Regional Director dismissed the petition. The Board had not entered into an agreement under § 10 (a) of the Act ceding jurisdiction to the State. On complaint of respondents, a state court enjoined the unions from picketing or exerting secondary pressure to enforce their demands and awarded damages to respondents. *Held*:

1. The National Labor Relations Board had exclusive jurisdiction of the labor dispute, and the state court was without jurisdiction to enjoin the picketing or the secondary pressure. *Guss v. Utah Labor Relations Board*, ante, p. 1; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, ante, p. 20. Pp. 27-28.

2. Since the state court, in awarding damages, may have felt that it was bound to apply federal law, which it was not, and it is impossible to know how it would have applied its own state law on this point, the case is remanded for further proceedings on that point. P. 29.

45 Cal. 2d 657, 291 P. 2d 1, judgment vacated and cause remanded.

*Charles P. Scully* argued the cause for petitioners. With him on the brief were *Walter Wencke*, *Mathew O. Tobriner* and *John C. Stevenson*.

*James W. Archer* argued the cause for respondents. With him on the brief was *J. Sterling Hutcheson*.

*Solicitor General Rankin, Theophil C. Kammholz, Stephen Leonard and Dominick L. Manoli* filed a brief for the National Labor Relations Board, as *amicus curiae*, urging affirmance.

*Herbert B. Cohen, Attorney General, and Oscar Bortner, Assistant Attorney General,* filed a brief for the Commonwealth of Pennsylvania, as *amicus curiae*.

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

Respondents are a partnership, operating two retail lumber yards in San Diego County, California. In the year before this proceeding began they purchased more than \$250,000 worth of material from outside of California for resale at retail. Petitioner unions asked them to sign a contract including a union shop provision. Respondents refused on the ground that it would be a violation of the National Labor Relations Act to sign such a contract before a majority of their employees had selected a union as their collective bargaining agent. The unions commenced peaceful picketing to enforce their demand. About a week later respondents filed suit in the Superior Court for an injunction and damages, alleging that they were in interstate commerce and that the contract sought by the unions would violate the Act.<sup>1</sup> On the same day respondents filed with the National Labor Relations Board's regional office a petition asking that the question of the representation of their employees be resolved. The Regional Director dismissed the petition. The unions nevertheless pressed their claim that the

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<sup>1</sup> Section 8 (a) (3) allows an employer to enter into a union security agreement of the type petitioners here were seeking only if the union is the bargaining representative of his employees. 61 Stat. 140, 29 U. S. C. § 158 (a) (3).

National Board had exclusive jurisdiction.<sup>2</sup> After a hearing the Superior Court entered an order enjoining the unions from picketing or exerting secondary pressure in support of their demand for a union shop agreement unless and until one or another of the unions had been designated as the collective bargaining representative of respondents' employees. It also awarded respondents \$1,000 damages. The California Supreme Court affirmed.<sup>3</sup> We granted certiorari. 351 U. S. 923. Recognizing that respondents' business affected interstate commerce, it concluded that the Board's declination, in pursuance of its announced jurisdictional policy, to handle respondents' representation petition left the state courts free to act.<sup>4</sup> On the merits the court said:

"The assertion of economic pressure to compel an employer to sign the type of agreement here involved is an unfair labor practice under section 8 (b) (2) of the [National Labor Relations] act. . . . Concerted labor activities for such a purpose thus were unlawful under the federal statute, and for that reason were not privileged under the California law."<sup>5</sup>

What we have said in *Guss v. Utah Labor Relations Board*, ante, p. 1, and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, ante, p. 20, is applicable here, and those cases control this one in its major aspects.

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<sup>2</sup> They also maintained that by not appealing the regional director's decision respondents had failed to exhaust their remedies under the National Act. On our view of the case, we need not consider this contention.

<sup>3</sup> 45 Cal. 2d 657, 291 P. 2d 1.

<sup>4</sup> Petitioners' interstate purchases fall below the standards for retail stores. See *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, ante, p. 23, n. 4. The Board draws no distinction in the application of its jurisdictional standards between representation and unfair labor practice cases. *C. A. Braukman*, 94 N. L. R. B. 1609, 1611.

<sup>5</sup> 45 Cal. 2d, at 666, 291 P. 2d, at 7.



Respondents, however, argue that the award of damages must be sustained under *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656. We do not reach this question. The California Supreme Court leaves us in doubt, but its opinion indicates that it felt bound to "apply" or in some sense follow federal law in this case. There is, of course, no such compulsion. *Laburnum* sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation. We therefore vacate the judgment and remand the case to the Supreme Court of California for proceedings not inconsistent with this opinion and the opinions in *Guss v. Utah Labor Relations Board*, *supra*, and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, *supra*.

*Vacated and remanded.*

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

[For dissenting opinion of MR. JUSTICE BURTON, joined by MR. JUSTICE CLARK, see *ante*, p. 12.]

BROTHERHOOD OF RAILROAD TRAINMEN ET AL.  
v. CHICAGO RIVER & INDIANA  
RAILROAD CO. ET AL.

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

No. 313. Argued February 26, 1957.—Decided March 25, 1957.

After negotiations had failed, a railroad which had a collective bargaining agreement with a labor union of its employees submitted several "minor disputes" arising under the agreement to the National Railroad Adjustment Board created by the Railway Labor Act. The union promptly issued a strike call. The railroad sought relief from the Federal District Court, which entered a permanent injunction against the strike. *Held*: A railway labor union cannot lawfully resort to a strike over such "minor disputes" pending before the National Railroad Adjustment Board; the District Court had jurisdiction to enjoin such a strike; and its judgment is sustained. Pp. 31-42.

(a) Section 3, First, of the Railway Labor Act authorizes either side to submit a "minor dispute" to the National Railroad Adjustment Board, whose decision shall be final and binding on both sides; and the Section should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress. Pp. 34-35.

(b) The legislative history of the provisions of the Railway Labor Act creating the National Railroad Adjustment Board shows that they were intended to provide for compulsory arbitration of such "minor disputes." Pp. 35-39.

(c) The federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the National Railroad Adjustment Board, and such injunctions are not barred by the Norris-LaGuardia Act. Pp. 39-42.

(d) The Norris-LaGuardia Act and the Railway Labor Act must be read together so that the obvious purpose in the enactment of each is preserved. Pp. 39-42.

(e) Cases in which it has been held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other statute are inapposite to this case. P. 42.

Affirmed.

*William C. Wines* argued the cause for petitioners. With him on the brief was *John J. Naughton*.

*Walter J. Cummings, Jr.* argued the cause for respondents. With him on the brief were *Kenneth F. Burgess*, *Marvin A. Jersild* and *Wayne M. Hoffman*.

*Clarence E. Weisell* and *Harold N. McLaughlin* filed a brief for the Brotherhood of Locomotive Engineers, as *amicus curiae*, urging reversal.

*Clarence M. Mulholland*, *Edward J. Hickey, Jr.* and *Richard R. Lyman* filed a brief for the Railway Labor Executives' Association, as *amicus curiae*, supporting petitioners.

*John H. Morse* and *William J. Hickey* filed a brief for the American Short Line Railroad Association, as *amicus curiae*, urging affirmance.

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

We are asked to interpret that provision of the Railway Labor Act<sup>1</sup> which created the National Railroad Adjustment Board for the resolution of minor grievances in the event that the parties were unable to settle them by negotiation. The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board.<sup>2</sup>

<sup>1</sup> 44 Stat. 577, as amended, 45 U. S. C. §§ 151-188.

<sup>2</sup> The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are



The Chicago River and Indiana Railroad Company operates the switching and yard facilities at the Chicago stockyards. A segment of the employees of the River Road were represented by the Brotherhood of Railroad Trainmen. A collective bargaining agreement between the Brotherhood and the River Road was in existence throughout the period covered by this case. The present disagreement arises from an accumulation of twenty-one grievances of members of the Brotherhood against the carrier. Nineteen of these were claims for additional compensation, one was a claim for reinstatement to a higher position, and one was for reinstatement in the employ of the carrier. When negotiations failed, the Brotherhood called a strike. Because of the serious nature of the impending work stoppage, the National Mediation Board proffered its services. The mediator was unsuccessful, and upon his withdrawal, the River Road submitted the controversy to the Adjustment Board. The Brotherhood promptly issued a strike call for four days later.

The River Road then sought relief from a District Court. Because of the threatened irreparable injury to the carrier, its employees and the 600 industries and 27 railroads served by it, the complaint prayed for a preliminary injunction, and ultimately a permanent injunction, against a strike by the Brotherhood over the grievances pending before the Adjustment Board. A temporary restraining order was issued, but that order was vacated and the complaint dismissed upon the finding by the district judge that the Norris-LaGuardia Act was applicable and that the court lacked jurisdiction to grant the relief requested. The Court of Appeals for the Seventh Circuit reversed. 229 F. 2d 926. A permanent injunc-

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not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* It is one of those differences which underlies the controversy in this case.

tion was accordingly entered by the District Court and affirmed by the Seventh Circuit. We granted certiorari in order to resolve an important question concerning interpretation and application of the Railway Labor Act.<sup>3</sup> 352 U. S. 865.

The grievances for which redress is sought by the Brotherhood are admittedly "minor disputes" as that phrase is known in the parlance of the Railway Labor Act. These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee. § 2, Sixth.<sup>4</sup> They may be contrasted with "major disputes" which result when there is disagreement in the bargaining process for a new contract. § 2, Seventh.<sup>5</sup> See *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-724.

The first step toward settlement of either kind of dispute is negotiation and conference between the parties. Section 3, First (i),<sup>6</sup> provides that—

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . . ."

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<sup>3</sup> In addition to the importance of the question, there was a conflict in the decisions of the Courts of Appeals. *Brotherhood of Railroad Trainmen v. Central of Georgia R. Co.*, 229 F. 2d 901, decided by the Fifth Circuit, came to a conclusion contrary to that of the Seventh Circuit in this case. Certiorari had been granted in both cases, 352 U. S. 865, but we dismissed the writ in the *Central of Georgia* controversy upon a suggestion of mootness. 352 U. S. 995.

<sup>4</sup> 45 U. S. C. § 152, Sixth.

<sup>5</sup> 45 U. S. C. § 152, Seventh.

<sup>6</sup> 45 U. S. C. § 153, First (i).

If the parties are unable to reach an agreement, the section continues—

“ . . . but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.”

Section 3, First (m),<sup>7</sup> declares that—

“The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute . . . .”

This language is unequivocal. Congress has set up a tribunal to handle minor disputes which have not been resolved by the parties themselves. Awards of this Board are “final and binding upon both parties.” And either side may submit the dispute to the Board. The Brotherhood suggests that we read the Act to mean only that an Adjustment Board has been organized and that the parties are free to make use of its procedures if they wish to; but that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable.<sup>8</sup> Such an interpretation would render meaningless those provisions in the Act which allow *one* side to submit a dispute to the Board, whose decision shall be final and binding on *both* sides. If the Brotherhood is

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<sup>7</sup> 45 U. S. C. § 153, First (m).

<sup>8</sup> The Brotherhood does not discuss this interpretation in the event that the union had referred the dispute to the Adjustment Board, as is normally the case in grievance disputes, and the carrier was recalcitrant. It is to be doubted that the Brotherhood would support allowing carriers the same right to defeat the jurisdiction of the Adjustment Board that it claims for itself. The statutory language, however, would support no distinction.



correct, the Adjustment Board could act only if the union and the carrier were amenable to its doing so. The language of § 3, First, reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress.

Legislative history of the provisions creating the National Railroad Adjustment Board reinforces the literal interpretation of the Act. The present law is a composite of two major pieces of legislation. Most of the basic framework was adopted in 1926.<sup>9</sup> In 1934, after eight years of experience, the statute was amended, and in that amendment the Adjustment Board was born.<sup>10</sup>

The distinction between "major disputes" and "minor disputes" was found in the 1926 statute. Above the level of negotiation and conference, each was to follow a separate procedure. Section 3, First,<sup>11</sup> of that Act called upon carriers or groups of carriers and their employees to agree to the formation of boards of adjustment, composed equally of representatives of labor and management, to resolve the "minor disputes." If this step were unsuccessful, these disputes along with the "major disputes" became a function of the Board of Mediation, predecessor of the National Mediation Board.

The obvious lack of any compulsion toward a settlement of disputes was a basic characteristic of the Act and proved to be a major weakness in the procedures for handling "minor disputes." As stated in the Report of the House of Representatives Committee on Interstate and Foreign Commerce, after hearings on the 1934 amendment: "In many instances . . . the carriers and the employees have been unable to reach agreements to establish such boards [of adjustment]." H. R. Rep. No. 1944, 73d Cong., 2d Sess. 3. This was not the only weak-

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<sup>9</sup> 44 Stat. 577.

<sup>10</sup> 48 Stat. 1185.

<sup>11</sup> 44 Stat. 578-579.

ness, however. "Many thousands of these [minor] disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked." *Ibid.*

This condition was in marked contrast to the declared purpose of the 1926 Act "... to settle all disputes, whether arising out of the application of ... agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." § 2, First.<sup>12</sup> The Report continued:

"These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service." *Ibid.*

The means chosen to correct this situation are the present provisions of § 3, First, concerning the National Railroad Adjustment Board. The Board was set up by Congress, making it unnecessary for the parties to agree to establish their own boards.<sup>13</sup> In case of a deadlock on the Adjustment Board, which continued the policy of equal representation of labor and management, the appro-

<sup>12</sup> 44 Stat. 577-578.

<sup>13</sup> Section 2, Second, authorizes carriers or groups of carriers and their employees to agree to the establishment of system, group or regional boards of adjustment similar to those in the 1926 Act. These boards can have jurisdiction co-extensive with that of the National Board, but the existence of the latter insures against accumulation of disputes through ineffectiveness of the local boards.

priate division is allowed to select a neutral referee to sit with them and break the tie. If the division cannot agree even on a referee, the Act provides that one shall be appointed by the National Mediation Board.<sup>14</sup> Thus was the machinery built for the disposition of minor grievances.

The change was made with the full concurrence of the national railway labor organizations. Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 bill, complimented the unions on conceding the right to strike over "minor disputes" in favor of the procedures of the Adjustment Board:

"The willingness of the employees to agree to such a provision is, in my judgment, a very important concession and one of which full advantage should be taken in the public interest. I regard it as, perhaps, the most important part of the bill."<sup>15</sup>

Asked if the Act made it a matter of discretion whether disputes would be submitted to the Adjustment Board, he replied in the negative. It was, he said, a matter of duty—

". . . and it is my understanding that the employees in the case of these minor grievances—and that is all

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<sup>14</sup> "Minor disputes" were eliminated from the functions of the Mediation Board by the 1934 amendment. However, that Board can still become involved in a "minor dispute" case if "any labor emergency is found by it to exist at any time." § 5, First, 45 U. S. C. § 155, First. Such was the fact in this case when the threatened strike presented an emergency situation. The Mediation Board enters these cases solely on its own motion, however. It cannot be called into the dispute by either or both of the parties or by an employee or group of employees as is true for disputes not within the jurisdiction of the Adjustment Board.

<sup>15</sup> Hearings before House of Representatives Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. 47.



that can be dealt with by the adjustment board—are entirely agreeable to those provisions of the law.

“I think that is a very important concession on their part. . . . [T]his law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.”<sup>16</sup>

The chief spokesman for the railway labor organizations was George M. Harrison. He appeared as chairman of the legislative committee of the Railway Labor Executives' Association before both the House of Representatives and the Senate Committees. This Association comprised the twenty-one standard railway labor groups, including the Brotherhood of Railroad Trainmen. He testified before the House Committee:

“So, out of all of that experience and recognizing the character of the services given to the people of this country by our industry and how essential it is to the welfare of the country, these organizations have come to the conclusion that in respect to these minor-grievance cases that grow out of the interpretation and/or application of the contracts already made that they can very well permit those disputes to be decided, . . . by an adjustment board.”<sup>17</sup>

Later, before the Senate Committee, he declared:

“Grievances are instituted against railroad officers' actions, and we are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies that arise on these railroads between the officers and the employees.

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<sup>16</sup> *Id.*, at 58, 60.

<sup>17</sup> *Id.*, at 81-82.

"These railway labor organizations have always opposed compulsory determination of their controversies. . . . [W]e are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make." <sup>18</sup>

The voice of labor was not unanimous in this concession. The representative of the International Brotherhood of Teamsters vehemently objected to the adoption of § 3, First.

"We are unalterably opposed to paragraph M, . . . [which] brings about compulsory arbitration and prevents the use of the only weapon in the hands of organized labor. We believe that a very dangerous precedent would be established with the passage of this paragraph, and to the best of our knowledge it is the first time that any such measure has been enacted by the Congress of the United States." <sup>19</sup>

This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history.

The only question which remains is whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. The Brotherhood contends that the Norris-LaGuardia Act <sup>20</sup>

<sup>18</sup> Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess. 33, 35.

<sup>19</sup> Hearings before House of Representatives Committee, *supra*, note 15, at 118.

<sup>20</sup> 47 Stat. 70, as amended, 29 U. S. C. §§ 101-115.

has withdrawn the power of federal courts to issue injunctions in labor disputes. That limitation, it is urged, applies with full force to all railway labor disputes as well as labor controversies in other industries.

We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

In adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between labor and management in this most important national industry. It found from the experience between 1926 and 1934 that the failure of voluntary machinery to resolve a large number of minor disputes called for a strengthening of the Act to provide an effective agency, in which both sides participated, for the final adjustment of such controversies. Accumulation of these disputes had resulted in the aggregate being serious enough to threaten disruption of transportation. Hence, with the full consent of the brotherhoods, the 1934 amendment became law.

The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction. In the latter cases, the courts employed principles of federal law frequently at variance with the concepts of labor law in the States where they sat. Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital. Rep. LaGuardia, during the



floor debates on the 1932 Act, recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them.<sup>21</sup> Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative.<sup>22</sup>

In prior cases involving railway labor disputes, this Court has authorized the use of injunctive relief to vindicate the processes of the Railway Labor Act. *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515, was an action by the union to enjoin compliance with the Act's provisions for certification of a bargaining representative. The question raised was whether a federal court could issue an injunction in a labor dispute. The Court held:

"It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." *Id.*, at 563.

In *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, and other similar cases,<sup>23</sup> the Court held that

<sup>21</sup> 75 Cong. Rec. 5499, 5503-5504.

<sup>22</sup> The Adjustment Board cannot entertain a case on its own motion. Its processes must be invoked by one or both of the parties. In this case, the River Road filed the grievances with the Board before seeking an injunction. Cf. the exhaustion of remedies provision in § 8 of the Norris-LaGuardia Act. 29 U. S. C. § 108.

<sup>23</sup> *Graham v. Brotherhood of L. F. & E.*, 338 U. S. 232; *Tunstall v. Brotherhood of L. F. & E.*, 323 U. S. 210; *Steele v. Louisville & N. R. Co.*, 323 U. S. 192. See also *Rolfes v. Dwellingham*, 198 F. 2d 591.

the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.

"Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." *Id.*, at 774.

This is a clear situation for the application of that principle.<sup>24</sup>

The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other statute.<sup>25</sup> We believe that these are inapposite to this case. None involved the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation.

The judgment of the Court of Appeals must be affirmed.

*It is so ordered.*

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

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<sup>24</sup> The Norris-LaGuardia Act has been held to prevent the issuance of an injunction in a railway labor case involving a "major dispute." *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50. In such a case, of course, the Railway Labor Act does not provide a process for a final decision like that of the Adjustment Board in a "minor dispute" case.

<sup>25</sup> *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U. S. 91; *East Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 163 F. 2d 10; cf. *W. L. Mead, Inc., v. International Brotherhood of Teamsters*, 217 F. 2d 6; *In re Third Avenue Transit Corp.*, 192 F. 2d 971; *Carter v. Herrin Motor Freight Lines, Inc.*, 131 F. 2d 557; *Wilson & Co. v. Birl*, 105 F. 2d 948.

## Syllabus.

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

No. 491. Argued February 28, 1957.—Decided March 25, 1957.

Petitioner brought suit in a Federal District Court in 1954 to recover the proceeds of a National Service Life Insurance policy on an insured who had been missing since his disappearance from the Army in 1943. The complaint alleged that, prior to the insured's disappearance, he was in frail health and had become totally and permanently disabled. The complaint alleged further that the insured had died in 1943, and that his total and permanent disability during the time the policy was in force entitled him to waiver of premiums on the policy. *Held*: Upon the allegations of the complaint, petitioner was entitled to take the case to a jury. Pp. 44-47.

(a) Where proof of an insured's death must rest primarily upon his unexplained absence, suit may not be maintained, as a practical matter, prior to the expiration of the statutory 7-year period; and it is from that date that the 6-year statute of limitations should be computed. P. 45.

(b) The provision of 38 U. S. C. § 810 that the death of the insured "as of the date of the expiration of such period . . . may . . . be considered as sufficiently proved" does not preclude the beneficiary from introducing further evidence from which the jury might conclude that the insured's presumed death occurred at an earlier date when the policy was still in force. Pp. 45-46.

(c) It is only where the beneficiary proves merely the fact of the insured's 7 years' unexplained absence that the statute establishes the presumption of death as of the end of that period. P. 46.

(d) The "contingency on which the claim is founded," as used in 38 U. S. C. § 445, means the end of the 7-year period when the presumption of death arose. P. 46.

(e) Since the claim was filed by petitioner within one year subsequent to the presumed date of death, it should be considered as including the lesser claim of premium waiver under 38 U. S. C. § 802 (n). Pp. 46-47.



(f) The alternative cause of action, based on allegations of permanent and total disability of the insured at the time of his disappearance, would not have accrued until 1950, so the 6-year statute of limitations had not run when this suit was brought. Pp. 46-47.

229 F. 2d 503, reversed and remanded.

*John S. Wrinkle* argued the cause and filed a brief for petitioner.

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

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner instituted this suit in the District Court in 1954 to recover the proceeds of a National Service Life Insurance policy. Petitioner's son, the insured, has been missing since disappearing from his army unit in 1943. The complaint alleges that, prior to the insured's disappearance, his condition was one of "general debility and weakness and despondency," and that he had become totally and permanently disabled as a result of certain "diseases, ailments and injuries." The complaint further avers that the insured had died in 1943, and that his total and permanent disability during the time the policy was in force entitled him to waiver of premiums on the policy.

The District Court dismissed the complaint, holding that the insured would, under the allegations of the complaint, be presumed to be dead as of 1950, and that the policy had lapsed in the interim. 138 F. Supp. 810. The Court of Appeals affirmed. 229 F. 2d 503. It held that the complaint contained no allegations which would entitle the trier of fact to conclude that the insured had died

at a time when the policy continued in force. *Id.*, at 504. We granted certiorari. 352 U. S. 822.

Respondent urges that the insured's death must be presumed to have occurred in 1950, at the end of seven years' unexplained absence, when this policy had long lapsed for failure to pay premiums. In the alternative, it is argued that, if the petitioner's claim is founded on the insured's death in 1943, it is barred by the six-year statute of limitations, 38 U. S. C. § 445. We hold that, under the allegations in this complaint, petitioner is entitled to take her case to a jury.

Congress has provided in 38 U. S. C. § 810 that a presumption of death shall arise upon the continued and unexplained absence of the insured for a period of seven years. Where proof of the insured's death must rest primarily upon his unexplained absence, suit may not be maintained, as a practical matter, prior to the expiration of the statutory seven-year period. Petitioner's cause of action, therefore, "accrued" at the time when, under § 810, she might have successfully maintained her suit, and that is the date from which the six-year statute of limitations should be computed.

Moreover, nothing in the provision of § 810 that the death of the insured "as of the date of the expiration of such period . . . may . . . be considered as sufficiently proved" precludes the beneficiary from introducing further evidence from which the jury might conclude that the insured's presumed death occurred at an earlier date when the policy was still in force. *United States v. White*, 219 F. 2d 343.\* The jury might so conclude here,

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\*That was the view even before the presumption of death at the end of seven years' absence was codified. In *Davie v. Briggs*, 97 U. S. 628, 634, the Court said, "If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending

if petitioner can prove the allegations of the complaint concerning the insured's frail health and disability or other relevant facts. The presumption leaves it open to prove the precise time of the death, as the statute does not purport to create a conclusive presumption that the insured died at the end of the seven-year period. To compute the six-year limitation period from the date which the trier of fact establishes as the date of death would be to say that the beneficiary's right to recover had expired before she could have successfully prosecuted a lawsuit to enforce that right. It is only where the beneficiary proves merely the fact of the insured's seven years' unexplained absence that the statute establishes the presumption of death as of the end of that period. The "contingency on which the claim is founded," as used in 38 U. S. C. § 445, must, therefore, mean the end of the seven-year period when the presumption of death arose.

That seems to us to be the common sense of the matter; and common sense often makes good law.

Furthermore the allegations of permanent and total disability at the time of disappearance of the insured, if proved, would bring the petitioner within the premium waiver provisions of 38 U. S. C. § 802 (n). Since the claim was filed by petitioner within one year subsequent to the presumed date of death, it should be considered as including the lesser claim of premium waiver. Hence, even though the jury found the actual date of death to be later than 1943, the coverage of the policy might continue. As we read the complaint, this alternative cause of action would also not have accrued until 1950; and

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or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years."



the six-year statute of limitations had not run when this suit was brought.

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

*Reversed.*

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

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

Petitioner sues to recover death benefits under a National Service Life Insurance Policy on the life of her son, a draftee in the United States Army. The case is before us only on the complaint, whose substantial allegations are these: The insured disappeared from his post in the Army on or about July 30, 1943, and has not been heard of since. At the time of his disappearance, for some time before, and continuously thereafter until his death, the insured suffered from "cholera, nervous trouble, mental trouble, St. Vitus Dance, generally debility and weakness and despondency," which prevented him from pursuing any gainful occupation and entitled him to a waiver of premiums on the policy, and "to have said policy continue in full force and effect until his death." It is then alleged that by reason of the insured's disappearance and ailments "the law presumes and [petitioner] avers that he died on or about July 30, 1943, and while the policy was in full force and effect and . . . that on or about July 30, 1950, at the expiration of said seven years" petitioner became entitled to the policy proceeds. Petitioner finally alleges that she made "due application" to the Veterans Administration for the policy

proceeds and "to have said insurance contract construed as being in full force and effect at the time of assured's death," but that her application was refused by the Administration on July 18, 1951.

Actions on life insurance policies issued under the National Service Life Insurance Act are governed by a six-year statute of limitations.<sup>1</sup> Section 610 of the Act, 38 U. S. C. § 810, abolishes all state law presumptions of death in connection with these policies, and substitutes a statutory presumption of death at the expiration of seven years' unexplained absence.<sup>2</sup> And § 602 (n) of the Act, 38 U. S. C. § 802 (n), provides for waiver of premiums under certain conditions, upon application of the beneficiary within one year after the insured's death.<sup>3</sup>

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<sup>1</sup> 38 U. S. C. § 445, so far as pertinent here, provides: "No suit . . . on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded . . . ."

<sup>2</sup> "No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Administrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may, for the purposes of this subchapter, be considered as sufficiently proved."

<sup>3</sup> "Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday . . . . *Provided further*, That in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure to submit

The Court of Appeals affirmed the dismissal of the complaint for insufficiency and also held the action barred by limitations.<sup>4</sup> This Court holds the complaint sufficient and the action not barred.

If petitioner can prove that the policy was still in force in 1950, the date when death is presumed under 38 U. S. C. § 810, her suit is clearly timely and she is entitled to recover. I agree with the Court that, liberally read, the complaint states facts which should allow her so to prove.

Assuming, however, that the policy was no longer in force in 1950, I think the suit is barred by limitations, and I must dissent from this aspect of the Court's holding. The insured disappeared in 1943. Petitioner alleges that death occurred in 1943, as indeed she must, since we now assume that the policy expired soon thereafter. But if death occurred in 1943, the cause of action accrued at that time, and is therefore barred after six years; and suit was not brought until 1954. Yet petitioner asks us to hold that for the purposes of the statute of limitations we use the presumption of § 810, that death occurs at the *expiration* of a continued seven-year period of absence, in order to postpone the accrual of a cause of action necessarily founded on a death allegedly occurring at the *beginning* of the seven years. I do not understand how we can accept any such theory. Congress has provided that the suit must be brought within six years after the cause of action accrued, and that the cause accrues on the

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satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond his control, the Administrator may grant waiver or continuance of waiver of premiums: *And provided further*, That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or August 1, 1946, whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence of the insured's right to waiver under this section. . . ."

<sup>4</sup> 229 F. 2d 503.



"happening of the contingency on which the claim is founded."<sup>5</sup> The contingency which here starts the running of the statute is clearly the death of the insured. *United States v. Tower*, 306 U. S. 324. If the insured died in 1943, as the petitioner avers, she should have brought suit within six years thereafter, before 1949. For petitioner is relying on actual death, not the presumed death provided for by Congress in cases of disappearances. She cannot rely on the latter, for Congress has unequivocally stated that the presumption created by seven years' unexplained absence is that the insured died at the end of that period, and the policy was then, by hypothesis, no longer in effect.<sup>6</sup>

The dilemma petitioner faces is clearly self-inflicted. Congress has provided a fair choice. If petitioner can prove death in 1943, as she must if the policy expired then, she has six years within which to bring suit to prove it. If, on the other hand, petitioner has no proof of actual death at all, she must merely keep the policy alive by payment of premiums or application for waiver until the end of seven years, and she then has six more years in which to sue on the basis of presumed death at the end of the seven-year period.

The Court says that "to compute the six-year limitation period from the date which the trier of fact establishes as the date of death would be to say that the beneficiary's right to recover had expired before she could have successfully prosecuted a lawsuit to enforce that right." I understand neither the logic nor the policy of

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<sup>5</sup> 38 U. S. C. § 445.

<sup>6</sup> At common law seven years' unexplained absence raised a presumption as to the *fact* of death but none as to the *time* of death. *Davie v. Briggs*, 97 U. S. 628, 634. Congress, however, in 38 U. S. C. § 810, did not adopt the common-law rule enunciated in *Davie v. Briggs*, the statute declaring that death is presumed to have occurred at the end of the period of absence.

this argument. Surely in every lawsuit on a life insurance policy the statute of limitations runs from the date of death and yet the date of death is something to be proved in the lawsuit itself. In fact I can think of no litigation in which the statute of limitations does not run from the time the cause of action accrues and the plaintiff need not prove at trial both that there is a cause of action and that it accrued within the period of limitations. Why is it unfair to say to a plaintiff who must prove a 1943 death that she must prove it within six years thereafter? Not only is it unlikely that plaintiff will be in a better position to prove a 1943 death in 1954 than she was in 1949, but the whole essence of the policy behind statutes of limitations runs counter to any such assumption.

It is argued that such a result would be harsh, in that a beneficiary should be left free to prove in the same action *either* actual or presumed death, and that proof of actual death may not turn up until after six years have passed; yet a beneficiary must wait seven before suing on the basis of presumed death.<sup>7</sup> But this is only another way of urging that the statute of limitations be waived every time a plaintiff has difficulty in collecting proof during the period given by the statute. And it has been the consistent opinion of this Court that limitations, particularly against the United States, may not be tolled, without statutory authorization, merely because a plaintiff might not be in a position to carry the burden of proof within the statutory period. *McIver v. Ragan*, 2 Wheat. 25; *McMahon v. United States*, 342 U. S. 25; *Pillsbury v.*

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<sup>7</sup> I see no reason why a beneficiary, uncertain as to whether he should rely on actual or presumed death, cannot protect himself by keeping the policy in force and filing his complaint within six years of the insured's disappearance. See Fed. Rules Civ. Proc., 8 (e) (2). I think it untenable to suggest that such a complaint would be demurrable as prematurely brought.

*United Engineering Co.*, 342 U. S. 197; *Unexcelled Chemical Corp. v. United States*, 345 U. S. 59.

Important considerations of policy buttress that opinion. Hereafter in every case of disappearance a beneficiary may, without keeping the policy alive, wait thirteen years before suing on the policy, and may allege and prove that death occurred thirteen years theretofore. Surely in the intervening years there will have been loss of evidence due to the death of some witnesses, clouding in the recollection of others, and loss of records. In fact in this very case the Government is now put to the task of meeting numerous allegations with respect to the insured's physical and mental condition, the circumstances of his disappearance, all in 1943, and his likely movements after disappearance. The whole purpose of the statute of limitations, it seems to me, is to save litigants the burdensome effort of having to collect and meet such stale evidence. The Court overrides that policy today in order to give one plaintiff, whose case has human appeal, a chance to recover. Thus is bad law made.



## Syllabus.

## ROVIARO v. UNITED STATES.

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

No. 58. Argued December 11, 1956.—Decided March 25, 1957.

Petitioner was convicted in a Federal District Court for violating 21 U. S. C. § 174, by knowingly possessing and transporting heroin imported unlawfully. In the face of repeated demands by petitioner for disclosure, the trial court sustained the Government's refusal to disclose the identity of an undercover informer who had taken a material part in bringing about petitioner's possession of the drugs, had been present with petitioner at the occurrence of the alleged crime, and might have been a material witness as to whether petitioner knowingly transported the drugs as charged. *Held*: In the circumstances of this case, failure of the court to require disclosure of the identity of the informer was reversible error. Pp. 54-66.

(a) Where disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair trial, the Government's privilege to withhold disclosure of the informer's identity must give way. Pp. 60-62.

(b) However, no fixed rule is justifiable. The public interest in protecting the flow of information to the Government must be balanced against the individual's right to prepare his defense. Whether nondisclosure is erroneous depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. P. 62.

(c) In this case, the informer was not expressly mentioned in the relevant charge of the indictment; but the charge, viewed in connection with the evidence introduced at his trial, is so closely related to the informer as to make his identity and testimony highly material. Pp. 62-63.

(d) The provision of the statute authorizing a conviction when the Government has proved that the accused possessed narcotics—unless he explains or justifies such possession—emphasizes petitioner's vital need for access to any material witness. P. 63.

(e) The circumstances of this case demonstrate that the informer's possible testimony was highly relevant and might have been helpful to the defense. Pp. 63-65.

(f) On the record in this case, it cannot be assumed that the informer was known to petitioner and available to him as a witness, nor that the informer had died before the trial. P. 60, n. 8.

(g) The trial court erred also in denying, prior to the trial, petitioner's motion for a bill of particulars, insofar as it requested the informer's identity and address, particularly because Count 1 of the indictment charged an unlawful sale of heroin to the informer. P. 65, n. 15.

229 F. 2d 812, reversed and remanded.

*Maurice J. Walsh* argued the cause and filed a brief for petitioner.

*James W. Knapp* argued the cause for the United States. On the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Julia P. Cooper*.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case concerns a conviction for violation of the Narcotic Drugs Import and Export Act, as amended.<sup>1</sup>

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<sup>1</sup>"(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. . . .

"Whenever on trial for a violation of this subdivision [§ 2 (c)] the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." 65 Stat. 767, 768, 21 U. S. C. § 174.

The principal issue is whether the United States District Court committed reversible error when it allowed the Government to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged. For the reasons hereafter stated, we hold that, under the circumstances here present, this was reversible error.

In 1955, in the Northern District of Illinois, petitioner, Albert Roviario, was indicted on two counts by a federal grand jury. The first count charged that on August 12, 1954, at Chicago, Illinois, he sold heroin to one "John Doe" in violation of 26 U. S. C. § 2554 (a). The second charged that on the same date and in the same city he "did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law; in violation of Section 174, Title 21, United States Code."

Before trial, petitioner moved for a bill of particulars requesting, among other things, the name, address and occupation of "John Doe." The Government objected on the ground that John Doe was an informer and that his identity was privileged. The motion was denied.

Petitioner, who was represented by counsel, waived a jury and was tried by the District Court. During the trial John Doe's part in the charged transaction was described by government witnesses, and counsel for petitioner, in cross-examining them, sought repeatedly to learn John Doe's identity. The court declined to permit this cross-examination and John Doe was not produced, identified, or otherwise made available. Petitioner was



found guilty on both counts and was sentenced to two years' imprisonment and a fine of \$5 on each count, the sentences to run concurrently.<sup>2</sup> The Court of Appeals sustained the conviction, holding that the concurrent sentence was supported by the conviction on Count 2 and that the trial court had not abused its discretion in denying petitioner's requests for disclosure of Doe's identity. 229 F. 2d 812. We granted certiorari, 351 U. S. 936, in order to pass upon the propriety of the nondisclosure of the informer's identity and to consider an alleged conflict with *Portomene v. United States*, 221 F. 2d 582; *United States v. Conforti*, 200 F. 2d 365; and *Sorrentino v. United States*, 163 F. 2d 627.

At the trial, the Government relied on the testimony of two federal narcotics agents, Durham and Fields, and two Chicago police officers, Bryson and Sims, each of whom knew petitioner by sight. On the night of August 12, 1954, these four officers met at 75th Street and Prairie Avenue in Chicago with an informer described only as John Doe.<sup>3</sup> Doe and his Cadillac car were searched and no narcotics were found. Bryson secreted himself in the trunk of Doe's Cadillac, taking with him a device with which to raise the trunk lid from the inside. Doe then drove the Cadillac to 70th Place and St. Lawrence Avenue, followed by Durham in one government car and Field and Sims in another. After an hour's wait, at about 11 o'clock, petitioner arrived in a Pontiac, accompanied by an un-

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<sup>2</sup> The judgment of conviction provided for a \$5 fine on "each" count, to "run concurrently." The Government stated, during the argument before this Court, that this judgment has been construed administratively as imposing only one \$5 fine. We therefore assume, without so deciding, that the judgment imposed a fully concurrent sentence.

<sup>3</sup> Durham, Bryson and Sims, among them, testified that Doe was an "informer" and a "special employee" who had been known to the federal agents for several years.

identified man. Petitioner immediately entered Doe's Cadillac, taking a front seat beside Doe. They then proceeded by a circuitous route to 74th Street near Champlain Avenue. Both government cars trailed the Cadillac but only the one driven by Durham managed to follow it to 74th Street. When the Cadillac came to a stop on 74th Street, Durham stepped out of his car onto the sidewalk and saw petitioner alight from the Cadillac about 100 feet away. Durham saw petitioner walk a few feet to a nearby tree, pick up a small package, return to the open right front door of the Cadillac, make a motion as if depositing the package in the car, and then wave to Doe and walk away. Durham went immediately to the Cadillac and recovered a package from the floor. He signaled to Bryson to come out of the trunk and then walked down the street in time to see petitioner re-enter the Pontiac, parked nearby, and ride away.

Meanwhile, Bryson, concealed in the trunk of the Cadillac, had heard a conversation between John Doe and petitioner after the latter had entered the car. He heard petitioner greet John Doe and direct him where to drive. At one point, petitioner admonished him to pull over to the curb, cut the motor, and turn out the lights so as to lose a "tail." He then told him to continue "further down." Petitioner asked about money Doe owed him. He advised Doe that he had brought him "three pieces this time." When Bryson heard Doe being ordered to stop the car, he raised the lid of the trunk slightly. After the car stopped, he saw petitioner walk to a tree, pick up a package, and return toward the car. He heard petitioner say, "Here it is," and "I'll call you in a couple of days." Shortly thereafter he heard Durham's signal to come out and emerged from the trunk to find Durham holding a small package found to contain three glassine envelopes containing a white powder.

A field test of the powder having indicated that it contained an opium derivative, the officers, at about 12:30 a. m., arrested petitioner at his home and took him, along with Doe, to Chicago police headquarters. There petitioner was confronted with Doe, who denied that he knew or had ever seen petitioner.<sup>4</sup> Subsequent chemical analysis revealed that the powder contained heroin.

### I.

Petitioner contends that the trial court erred in upholding the right of the Government to withhold the identity of John Doe. He argues that Doe was an active participant in the illegal activity charged and that, therefore, the Government could not withhold his identity, his whereabouts, and whether he was alive or dead at the time of trial.<sup>5</sup> The Government does not defend the nondisclosure of Doe's identity with respect to Count 1, which charged a sale of heroin to John Doe, but it attempts to sustain the judgment on the basis of the con-

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<sup>4</sup> Police Officer Bryson testified as follows:

"Q. Well, did he [John Doe] say anything with reference to an acquaintanceship or any prior association with this man [petitioner] or any transaction with this man?

"A. Well, he said he didn't know the Defendant here. He said he had never seen him before."

<sup>5</sup> The following colloquy occurred between Chester E. Emanuelson, the government counsel, and Maurice J. Walsh, petitioner's counsel:

"Mr. Emanuelson: . . .

"The reason we do not want to reveal his [Doe's] name is that there are other matters that are pending, I have been told—I know of one myself—and the cases hold that we do not have to reveal the informer's name. Now, if there is some reason—

"Mr. Walsh: Well, is there any activity of the informer which will



viction on Count 2, charging illegal transportation of narcotics.<sup>6</sup> It argues that the conviction on Count 2 may properly be upheld since the identity of the informer, in the circumstances of this case, has no real bearing on that charge and is therefore privileged.

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher v. United States*, 305 U. S. 251, 254; *In re Quarles and Butler*, 158 U. S. 532; *Vogel v. Gruaz*, 110 U. S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

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be curtailed by reason of the disclosure of his name? Would you answer that?

"Mr. Emanuelson: Any activities?

"Mr. Walsh: Yes.

"Mr. Emanuelson: From this point forward, no.

"Mr. Walsh: Is there any occasion upon which he will be called to testify?

"Mr. Emanuelson: No."

In a later colloquy Mr. Emanuelson stated: "[A]s I understand it, the reason his [Doe's] name has not been disclosed is because he is acting as a Government employee in other cases and it would help other persons in other matters that are pending."

<sup>6</sup> Since the concurrent sentence did not exceed that which lawfully might be imposed under a single count, the judgment may be affirmed if the conviction on either count is valid. *Pinkerton v. United States*, 328 U. S. 640, 641-642, n. 1; *Hirabayashi v. United States*, 320 U. S. 81, 85; *Abrams v. United States*, 250 U. S. 616, 619; *Claassen v. United States*, 142 U. S. 140, 146-147.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.<sup>7</sup> Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.<sup>8</sup>

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful

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<sup>7</sup> *Foltz v. Moore McCormack Lines*, 189 F. 2d 537, 539-540; VIII Wigmore, Evidence (3d ed. 1940), § 2374 (1); A. L. I., Model Code of Evidence (1942), Rule 230. But cf. *In re Quarles and Butler*, 158 U. S. 532; *Vogel v. Gruaz*, 110 U. S. 311, 316.

<sup>8</sup> *Sorrentino v. United States*, 163 F. 2d 627, 629; *Pihl v. Morris*, 319 Mass. 577, 578-580, 66 N. E. 2d 804, 805-806; *Commonwealth v. Congdon*, 265 Mass. 166, 174-175, 165 N. E. 467, 470; *Regina v. Candy*, cited 15 M. & W. 175; VIII Wigmore, Evidence (3d ed. 1940), § 2374 (2).

The record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to the trial. In either situation, whatever privilege the Government might have had would have ceased to exist, since the purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct. The Government suggests that if petitioner knew John Doe's identity, the court's failure to require disclosure would not be prejudicial even if erroneous. See *Sorrentino v. United States*, 163 F. 2d 627. However, any indications that petitioner, at the time of the trial, was aware of John Doe's identity are contradicted by the testimony of Officer Bryson that John Doe at police headquarters denied knowing, or ever having seen, petitioner. The trial court made no factual finding that petitioner knew Doe's identity. On this record we cannot assume that John Doe was known to petitioner, and, if alive, available to him as a witness. Nor can we conclude that John Doe died before the trial.

to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.<sup>9</sup> In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.<sup>10</sup> Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.<sup>11</sup>

Three recent cases in the Courts of Appeals have involved the identical problem raised here—the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence. *Portomene v. United States*, 221 F. 2d 582; *United States v. Conforti*, 200 F. 2d 365; *Sorrentino v. United States*, 163 F. 2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testi-

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<sup>9</sup> See, e. g., *Scher v. United States*, 305 U. S. 251; *Wilson v. United States*, 59 F. 2d 390; *Centoamore v. Nebraska*, 105 Neb. 452, 181 N. W. 182. Early decisions established that the scope of the privilege was in the discretion of the trial judge. Disclosure was compelled when he found it "material to the ends of justice . . . ." *Regina v. Richardson*, 3 F. & F. 693, 694 (1863). See also, *Marks v. Beyfus*, L. R. 25 Q. B. D. 494, 498 (1890). In the *Scher* case, *supra*, at 254, this Court said that "public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith."

<sup>10</sup> See *United States v. Coplon*, 185 F. 2d 629, 638; *United States v. Andolschek*, 142 F. 2d 503, 506.

<sup>11</sup> E. g., *Scher v. United States*, *supra*; *United States v. Li Fat Tong*, 152 F. 2d 650; *Wilson v. United States*, *supra*; *United States v. Keown*, 19 F. Supp. 639.



mony may be relevant and helpful to the accused's defense.<sup>12</sup>

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

## II.

The materiality of John Doe's possible testimony must be determined by reference to the offense charged in Count 2 and the evidence relating to that count. The

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<sup>12</sup> In the *Portomene* case, *supra*, the accused was charged with two sales of narcotics to an informer. The accused took the stand, denied selling narcotics, and testified that the person he believed to be the informer had a grudge against him. The Fifth Circuit held that disclosure was essential to the defense.

In the *Conforti* case, *supra*, the accused was charged with possession of counterfeit notes. Agents overheard the informer make arrangements with the accused, saw the informer meet the accused and a package transferred, and then received from the informer a package containing counterfeit money. The Seventh Circuit stated that the accused would have been entitled to disclosure of the informer's identity if a proper demand had been made at the trial.

In the *Sorrentino* case, *supra*, the accused was charged with both sale and possession of narcotics. Government agents saw the accused go into a house with the informer after arrangements for a sale had been overheard, and the informer later turned over narcotics to the agents. The Ninth Circuit stated that the accused was entitled to disclosure under these circumstances, but the conviction was affirmed on the ground that the record demonstrated that the accused knew the identity of the informer.

See also, *Crosby v. Georgia*, 90 Ga. App. 63, 82 S. E. 2d 38.

charge is in the language of the statute. It does not charge mere possession; it charges that petitioner did "fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law . . . ." While John Doe is not expressly mentioned, this charge, when viewed in connection with the evidence introduced at the trial, is so closely related to John Doe as to make his identity and testimony highly material.

It is true that the last sentence of subdivision (c) of § 2 authorizes a conviction when the Government has proved that the accused possessed narcotics, unless the accused explains or justifies such possession.<sup>13</sup> But this statutory presumption does not reduce the offense to one of mere possession or shift the burden of proof; it merely places on the accused, at a certain point, the burden of going forward with his defense.<sup>14</sup> The fact that petitioner here was faced with the burden of explaining or justifying his alleged possession of the heroin emphasizes his vital need for access to any material witness. Otherwise, the burden of going forward might become unduly heavy.

The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might

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<sup>13</sup> See n. 1, *supra*, where the material part of the statutory provision is quoted in full.

<sup>14</sup> *Casey v. United States*, 276 U. S. 413, 418; *United States v. Chiarelli*, 192 F. 2d 528, 531; *Stoppelli v. United States*, 183 F. 2d 391; *Landsborough v. United States*, 168 F. 2d 486.

Petitioner contends that the Government in all cases must make a further affirmative showing that the accused knew that he possessed narcotics. He argues that its failure to do so here entitles him to an acquittal. That contention, however, has been decided against petitioner in the cases cited above.

have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported" from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment.

This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever hav-



ing seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.<sup>15</sup>

Petitioner also presents a claim of error arising out of a controversy over the correctness of an entry, made on the envelope containing the heroin, to the effect that the heroin had been found by Bryson. The undisputed testimony of the officers was that the heroin had been found by Durham and handed by him to Bryson who, in turn, handed it to Fields who made the erroneous entry. On the basis of this discrepancy, petitioner sought to obtain Durham's written report to the Federal Narcotics Bureau concerning the case. Although this discrepancy dealt with the relatively minor matter of who had first found the package, it also reflected upon the credibility of Durham and Fields, two of the Government's principal witnesses. However, in view of the decision we have reached on other grounds, we deem it unnecessary to determine whether the denial of this request, even if erroneous, was prejudicial to petitioner.

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<sup>15</sup> Thus far we have dealt largely with the trial court's refusal, at the trial, to require disclosure of the informer's identity. In view of the Government's exclusive reliance here upon Count 2, we have considered this question only with respect to that count. However, we think that the court erred also in denying, prior to the trial, petitioner's motion for a bill of particulars, insofar as it requested John Doe's identity and address. Since Count 1 was then before the court and expressly charged petitioner with a sale of heroin to John Doe, it was evident from the face of the indictment that Doe was a participant in and a material witness to that sale. Accordingly, when his name and address were thus requested, the Government should have been required to supply that information or suffer dismissal of that count.

CLARK, J., dissenting.

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The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE BLACK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

MR. JUSTICE CLARK, dissenting.

It is with regret that I dissent from the opinion of the Court, not because I am alone, but for the reason that I have been unable to convince the majority of the unsoundness of its conclusion on the facts here and the destructive effect which that conclusion will have on the enforcement of the narcotic laws. The short of it is that the conviction of a self-confessed dope peddler is reversed because the Government refused to furnish the name of its informant whose identity the undisputed evidence indicated was well known to the peddler. Yet the Court reverses on the ground of "unfairness" because of the Government's failure to perform this fruitless gesture. In my view this does violence to the common understanding of what is fair and just.

First, it is well to remember that the illegal traffic in narcotic drugs poses a most serious social problem. One need only read the newspapers to gauge its enormity. No crime leads more directly to the commission of other offenses. Moreover, it is a most difficult crime to detect and prove. Because drugs come in small pills or powder and are readily packaged in capsules or glassine containers, they may be easily concealed. They can be carried on the person or even in the body crevasses where detection is almost impossible. Enforcement is, therefore, most difficult without the use of "stool pigeons" or informants.

Their use has long had the approval of the courts. To give them protection governments have always followed a policy of nondisclosure of their identities. Experience teaches that once this policy is relaxed—even though the informant be dead—its effectiveness is destroyed. Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removal, once visited upon the informer Larunda, has been found obsolete.

Of course where enforcement of a nondisclosure policy deprives an accused of a fair trial it must either be relaxed or the prosecution must be foregone. The Government is fully aware of this dilemma and solves it every day by foregoing prosecutions in many cases where evidence essential to the defense would require disclosure. But this is not such a case.

In note 8 of the majority opinion, *ante*, p. 60, the Court makes much of testimony of a police officer that the informant, while at the police station, “denied knowing, or ever having seen, petitioner.” I submit that this testimony is taken out of its proper setting. The informant was in custody when petitioner was arrested and the two were taken to the police station where each was kept in custody overnight. There, while in custody, they were interrogated together about the occurrences leading up to the arrests. The federal officer present at the time was questioned at the trial in regard to informant’s answers at the station:

“Q. As a matter of fact, [the informant] said he did not have a transaction with him, didn’t he, in Roviario’s presence?

“A. Do you want the entire conversation?

“Q. Isn’t what I asked you a fact?

“A. No, sir. He didn’t deny it.



CLARK, J., dissenting.

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"Q. Didn't [the informant] say he didn't even know him?

"A. Yes, sir; at first he did."<sup>1</sup>

In proper context this merely shows that the informant was carrying out a pretense that he too was arrested, was involved, and was not "squealing." In fact, officer Bryson attempted in his testimony to explain the "purpose" of the informant in so answering but was prevented by petitioner's counsel.

Moreover, the uncontradicted evidence is that the petitioner knew the informant and had associated with him for some time. Two officers testified that they had seen petitioner on June 22, 1954, enter the informant's car on Michigan Avenue in Chicago. Another saw informant and petitioner enter the latter's home together on June 28, only six weeks prior to the events in question here. Further testimony shows that the informant was indebted to the petitioner, that the petitioner had telephoned several times to informant's home and "at the place," that petitioner was going to call again in a couple of days after the date of his arrest, and that he entered informant's car on the night of the arrest and drove around with him for several miles. The Court asserts that the conversation between the informant and petitioner while on this ride "emphasizes the unfairness of the nondisclosure in this case." But if we limit the officer's testimony to the statements of petitioner alone, the testimony would prove the intimacy of the acquaintance between petitioner and the informant. It would show that petitioner directed the informant to the cache and admonished him to turn out the car lights because of a "tail"; that petitioner knew

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<sup>1</sup> On petitioner's objection this testimony was subsequently stricken. However, police officer Bryson during cross-examination provided substantially this same testimony and the inadvertence of the Government in failing to object permitted it to stand.

how to reach informant by telephone and had tried to phone him; that he had brought him "three pieces *this time*," indicating prior sales; that informant was indebted to him; that when they approached the cache he directed the informant to stop the car; and that finally when he returned with the narcotics, petitioner said "Here it is, I'll call you in a couple of days." All of this testimony was admissible against petitioner whether the informant was available or not or whether he was dead or alive. It proves beyond question that the two were closely acquainted. For the Court to conclude in the face of such a record that petitioner did not know the informant is to me fantastic.

But this is not all. The petitioner has not mentioned a single substantial ground essential to his defense which would make it necessary for the Government to name the informer. The Court mentions that there might have been entrapment. Petitioner not only failed to claim entrapment but his counsel appears to have rejected any suggestion of it in open court. I submit the Court should not raise it for him here. It should be noted that petitioner's counsel stated in open court that petitioner knew the informant and believed he was dead.<sup>2</sup> Were there

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<sup>2</sup> The record discloses the following colloquy between petitioner's counsel, Mr. Walsh, and the court:

"Mr. Walsh: Your Honor, this is the point, actually: He has testified that John Doe [the informant] was present at 11th and State Street with the Defendant. We know that person, We know that person. That person is dead, as I understand it.

"By Mr. Walsh: [Cross-examination of Agent Durham].

"Q. I will ask him if the person as a matter of fact was not Tebbil Holmes?

"Q. Isn't the informer's name, or the person you contend is an informer, who has been mentioned by the prosecutor as an informer—isn't his name Tebbil Holmes?"

necessity to establish informant's identity or, if dead, his death, petitioner could easily have done so.<sup>3</sup>

In truth, it appears that petitioner hoped that the Government would not furnish the name for, if the informant was dead as he believed, petitioner's ground was cut from under him. If the informant was living he knew that even though his testimony was favorable it would not be sufficient to overcome the presumption of the statute. In fact, a casual reading of the record paints a picture of one vainly engaging in trial tactics rather than searching for real defenses—shadowboxing with the prosecution in a baseless attempt to get a name that he already had but in reality hoping to get a reversible error that was nowhere else in sight. We should not encourage such tactics.

In light of these facts the rule announced by the Court in note 8 of the opinion should be applied, *i. e.*, that the trial "court's failure to require disclosure would not be prejudicial even if erroneous. See *Sorrentino v. United States*, 163 F. 2d 627."

The position of the Court is that since the trial judge made no finding that petitioner knew the informant, the Government cannot successfully assert harmless error. It is true that the Court made no finding other than that of guilt. But this general finding is entitled to the support of every reasonable presumption. It would be reasonable to assume that the trial judge declined to order the disclosure because petitioner's counsel had said in open court that he knew the identity of the informant. Furthermore, petitioner has made no showing of how he

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<sup>3</sup> A death certificate, State File No. 1665, Dist. No. 16.10, on file at the Bureau of Vital Statistics, Cook County Clerk's Office, 130 N. Wells St., Chicago, Illinois, indicates that a Tevell Holmes, Sr., died in Chicago on January 17, 1955.



was harmed by the nondisclosure—indeed he introduced no evidence of anything.

I come now to the necessary proof required for a finding of guilt under Count 2. All that is necessary here is proof of possession of unstamped narcotics, such as heroin. The direct, uncontroverted evidence of possession, as well as transportation, is in the record. Two officers, one a local policeman and the other a regular federal narcotics agent, saw petitioner when he had in his hand a package containing heroin. The package was unstamped. A third officer saw petitioner leave the scene of his crime, get into his car, and ride away. The identification by each of the three is positive and stands uncontradicted. Under the Narcotic Drugs Act, 65 Stat. 767, 21 U. S. C. § 174, this alone is *prima facie* evidence of guilt. Petitioner did not rebut it. In this connection it is well to point out petitioner's statement soon after his arrest. The officers asked him: "Are you going to take this [rap] by yourself or are you going to name your connection?" Petitioner replied that they were wasting their time—"There's no use asking me about anybody else. . . . I don't want to get anybody else in trouble. *You got me. I've stood up twice before and I can stand up again.* Besides that, you've got to convict me anyhow." (Emphasis added.) In view of this, I submit that there is no question of guilt involved here.

Feeling as I do that the opinion of the Court seriously jeopardizes the privilege of the Government in cases involving informers, that their use in narcotic cases is an absolute necessity in the proper administration of the narcotic laws, and that the disclosure required here today is not only unessential to the petitioner's defense but on the other hand undermines a long-standing policy necessary to the successful enforcement of the narcotic laws, I respectfully dissent.

UNITED STATES EX REL. HINTOPOULOS ET UX. *v.*  
SHAUGHNESSY, DISTRICT DIRECTOR,  
IMMIGRATION AND NATURALIZA-  
TION SERVICE.

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

No. 205. Argued March 4, 1957.—Decided March 25, 1957.

Petitioners, husband and wife, entered the United States in 1951 as alien seamen, and remained unlawfully after expiration of their limited lawful stay. In November 1951 a child was born to them—an American citizen by birth. In January 1952 petitioners applied for suspension of deportation under § 19 (c) of the Immigration Act of 1917, which conditionally authorizes suspension of a deportation which “would result in serious economic detriment to a citizen . . . who is the . . . minor child of such deportable alien.” The Board of Immigration Appeals found that petitioners were eligible for relief but, as a matter of administrative discretion, denied suspension of deportation, relying mainly on the fact that petitioners had established no roots or ties in this country. *Held*: There was no error in the decision of the Board. Pp. 73–79.

(a) The Board applied the correct legal standards in deciding whether petitioners met the statutory prerequisites for suspension of deportation. P. 77.

(b) Suspension of deportation under the statute is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met. P. 77.

(c) It was not an abuse of discretion to withhold relief in this case, since the reasons relied on by the Hearing Officer and the Board were neither capricious nor arbitrary. P. 77.

(d) It was not improper or arbitrary for the Board, in exercising its discretion, to take into account the congressional policy underlying the Immigration and Nationality Act of 1952, though that Act was inapplicable to this case. P. 78.

(e) The conclusion that the Board in exercising its discretion may take into account the current policies of Congress is fortified by the fact that § 19 (c) provides for close congressional supervision over suspensions of deportation. Pp. 78–79.

233 F. 2d 705, affirmed.

*Jay Nicholas Long* argued the cause and filed a brief for petitioners.

*Maurice A. Roberts* argued the cause for respondent. On the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney*, *John F. Davis* and *Isabelle Cappello*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a habeas corpus proceeding to test the validity of an order of the Board of Immigration Appeals denying petitioners' request for suspension of deportation.

Petitioners are husband and wife, both aliens. Prior to 1951 both worked as seamen on foreign vessels. In July 1951 the wife lawfully entered the United States as a crew member of a ship in a United States port. Being pregnant, she sought medical advice; subsequently she decided in the interest of her health to stay ashore. A month later, on the next occasion his ship arrived in the United States, her husband joined her; he also failed to leave on the expiration of his limited lawful stay.<sup>1</sup> In November 1951 their child was born; the child is, of course, an American citizen by birth. In January 1952 petitioners voluntarily disclosed their illegal presence to the Immigration Service and applied for suspension of deportation under § 19 (c) of the Immigration Act of 1917, which provides, in 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 . . . suspend

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<sup>1</sup> Under certain conditions alien crewmen are permitted to enter the United States for periods not exceeding 29 days. See 8 U. S. C. §§ 1281-1287.



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 or legally resident alien who is the spouse, parent, or minor child of such deportable alien . . . .”<sup>2</sup>

Deportation proceedings were instituted in May 1952 and a hearing was held. On the undisputed facts both aliens were found deportable. As to the issue of suspension of deportation, the Hearing Officer, while finding petitioners eligible for such relief, denied the request, stating as follows:

“Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. . . . Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs . . . . Their joint assets consist of savings in the sum of about \$500 and their furniture and other personal property which they value at \$1500. While it would seem that their son . . . would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents’ applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the accident of birth in the United States of their son

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<sup>2</sup> 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

would be to deprive others, who are patiently awaiting visas under their already oversubscribed quotas. It is noted also that neither respondent reported his and her presence in the United States at any time until January, 1952 when they filed applications for suspension of deportation just two months after the birth of their child. . . ."

The Board of Immigration Appeals heard petitioners' appeal, and on March 18, 1954, upheld the Hearing Officer's recommendation and denied suspension of deportation. The Board stated:

"It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups.

"As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about \$85 monthly.

"Notwithstanding the fact that . . . the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of adminis-

trative discretion. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. . . ."

Petitioners thereupon moved for reconsideration. On May 5, 1954, the Board denied the motion, stating:

"Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244 (a) of the Immigration and Nationality Act [of 1952] as well as the Congressional comment at the time this provision was enacted.<sup>3</sup> We indicated in our previous order that the deportation of the respondents would result in

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<sup>3</sup> Section 244 of the 1952 Act, 8 U. S. C. § 1254 (a), provides, in pertinent part: "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation . . . in the case of an alien who—

"(5) . . . has been physically present in the United States for a continuous period of not less than ten years . . . and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation . . . and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

A report of the Senate Judiciary Committee on this provision states: "The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. . . ." S. Rep. No. 1137, 82d Cong., 2d Sess. 25. (Footnote not in original.)



a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation . . . .

“Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion . . . .”

Taken into custody for deportation, petitioners instituted the present habeas corpus proceeding, alleging that the Board abused its discretion in denying their application for suspension of deportation. The District Court dismissed the writ, 133 F. Supp. 433, and the Court of Appeals, one judge dissenting, affirmed, 233 F. 2d 705. We granted certiorari. 352 U. S. 819.

We do not think that there was error in these proceedings. It is clear from the record that the Board applied the correct legal standards in deciding whether petitioners met the statutory prerequisites for suspension of deportation. The Board found that petitioners met these standards and were eligible for relief. But the statute does not contemplate that all aliens who meet the minimum legal standards will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met.<sup>4</sup>

Nor can we say that it was abuse of discretion to withhold relief in this case. The reasons relied on by the Hearing Officer and the Board—mainly the fact that petitioners had established no roots or ties in this country—were neither capricious nor arbitrary.

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<sup>4</sup> *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489; *United States ex rel. Adel v. Shaughnessy*, 183 F. 2d 371. Cf. *Jay v. Boyd*, 351 U. S. 345.

Petitioners urge that the Board applied an improper standard in exercising its discretion when, in its opinion on rehearing, it took into account the congressional policy underlying the Immigration and Nationality Act of 1952, the latter being concededly inapplicable to this case. We cannot agree with this contention. The second opinion makes clear that the Board still considered petitioners eligible for suspension under the 1917 Act<sup>5</sup> and denied relief solely as a matter of discretion. And we cannot say that it was improper or arbitrary for the Board to be influenced, in exercising that discretion, by its views as to congressional policy as manifested by the 1952 Act. Section 19 (c) does not state what standards are to guide the Attorney General in the exercise of his discretion. Surely it is not unreasonable for him to take cognizance of present-day conditions and congressional attitudes, any more than it would be arbitrary for a judge, in sentencing a criminal, to refuse to suspend sentence because contemporary opinion, as exemplified in recent statutes, has increased in rigour as to the offense involved. This conclusion is fortified by the fact that § 19 (c) provides for close congressional supervision over suspensions of deportation. In every case where suspension for more than six months is granted a report must be submitted to Congress, and if thereafter Congress does not pass a concurrent resolution approving the suspension of deportation, the alien must then be deported.<sup>6</sup> In other words, every such

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<sup>5</sup> Petitioners would clearly be ineligible for suspension under the 1952 Act. See n. 3, *supra*.

<sup>6</sup> The statute provides: "If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or

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suspension must be approved by Congress, and yet petitioners would have us hold that the Attorney General may not take into account the current policies of Congress in exercising his discretion. This we cannot do.

There being no error, the judgment is affirmed.

*Affirmed.*

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

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

This case, on its face, seems to be an instance of a deportation which would "result in serious economic detriment to a citizen," as those words are used in § 19 (c) of the Immigration Act of 1917.

The citizen is a five-year-old boy who was born here and who, therefore, is entitled to all the rights, privileges, and immunities which the Fourteenth Amendment bestows on every citizen. A five-year-old boy cannot enjoy the educational, spiritual, and economic benefits which our society affords unless he is with his parents. His parents are law-abiding and self-supporting. From this record it appears that they are good members of the community. They do not seem to have done anything illegal or antisocial that should penalize their American son.

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prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. . . ." 8 U. S. C. (1946 ed., Supp. V) § 155 (c).



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It would seem, therefore, that the maintenance of this young American citizen in a home in America is the way to effectuate the policy of the 1917 Act.

The Board did not treat the case that way. Instead it imported into the 1917 Act the standard prescribed by the 1952 Act, which concededly is inapplicable here. That was the error which led Judge Frank to dissent below. 233 F. 2d 705, 709, 710. I think Judge Frank was right. Prevailing congressional policy on the approval or disapproval of suspension orders in nowise affects the standards prescribed for administrative action under the 1917 Act.

The Board erroneously followed irrelevant standards instead of exercising its discretion under the applicable statute, *viz.* § 19 (c) of the 1917 Act.

## Syllabus.

HAYNES *ET UX.* *v.* UNITED STATES.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT.

No. 257. Argued March 5, 1957.—Decided April 1, 1957.

Pursuant to a comprehensive "Plan for Employees' Pensions, Disability Benefits and Death Benefits," which a corporation had had in force for many years and copies of which were furnished to each employee, the corporation paid one of its employees \$2,100 in sickness disability benefits, which was equivalent to his salary for a year, during which time the employee had been sick and unable to work. *Held*: Under § 22 (b) (5) of the Internal Revenue Code of 1939, such income of the employee was exempt from income tax as an amount received through "health insurance." Pp. 82-86.

(a) Broadly speaking, "health insurance" is an undertaking by one person for reasons satisfactory to him to indemnify another for losses caused by illness, and the plan here involved comes within this meaning. P. 83.

(b) A different result is not required by the facts that, under the corporation's plan, the employees paid no fixed periodic premiums, there was no definite fund created to assure payment of disability benefits, and the amount and duration of the benefits varied with the length of service. Pp. 83-84.

(c) There is nothing in the language or legislative history of § 22 (b) (5) which limits the term "health insurance" to particular forms of insurance conventionally made available by commercial companies, nor does there appear to be any other reason for so limiting it. Pp. 84-85.

233 F. 2d 413, reversed.

*John H. Hudson* argued the cause for petitioners. With him on the brief was *William R. Hudson*.

*Hilbert P. Zarky* argued the cause for the United States. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Rice* and *Marvin W. Weinstein*.

*Brady O. Bryson* and *Thomas V. Lefevre* filed a brief for *Oliva*, as *amicus curiae*, urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1949, the petitioner, Gordon P. Haynes, became sick and unable to work while employed by the Southern Bell Telephone and Telegraph Company. At that time the company had in effect a comprehensive "Plan for Employees' Pensions, Disability Benefits and Death Benefits." This plan had been in force since 1913 when it was adopted by Southern Bell and other companies in the American Telephone and Telegraph Company system. A written copy of the plan, which was prepared much like an insurance policy, was given every person upon his initial employment by the company. Among other things, the plan provided that Southern Bell "undertakes in accordance with these Regulations, to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness." Under the plan every employee was entitled, after two years' service with Southern Bell, to receive "sickness disability benefits" when he missed work because of illness. These payments began on the eighth calendar day of absence due to illness. The amount and duration of payments were set out with specificity and varied with the length of service. For example, employees who had worked for Southern Bell from two to five years were entitled to full pay for four weeks and one-half pay for nine additional weeks; employees who had been with the company for more than twenty-five years were entitled to full pay for fifty-two weeks. The company reserved the right to change or terminate the plan but agreed that no changes would be made which affected "the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder."

Under the plan petitioner was paid \$2,100 in sickness disability benefits during 1949. Since he had been an employee of the company for more than twenty-five years



this was the full equivalent of what he would have received had he been working. The Government collected \$318.44 income tax on petitioner's sickness benefits. He brought this action for a refund contending that these receipts were not taxable because of § 22 (b)(5) of the 1939 Internal Revenue Code which exempted from taxable income "amounts received, through accident or health insurance . . . as compensation for personal injuries or sickness."<sup>1</sup> The District Court held that the payments received by petitioner on account of sickness were not taxable and directed a refund. The Court of Appeals reversed, accepting the Government's contention that Southern Bell's plan was not "health insurance" but a "wage continuation plan." 233 F. 2d 413. In *Epmeier v. United States*, 199 F. 2d 508, the Seventh Circuit held that disability payments under a plan similar to Southern Bell's were not taxable. Because of this conflict we granted certiorari, 352 U. S. 820.

The crucial question is whether the Southern Bell plan should be treated as "health insurance" within the meaning of § 22 (b)(5). Broadly speaking, health insurance is an undertaking by one person for reasons satisfactory to him to indemnify another for losses caused by illness. We believe that the Southern Bell disability plan comes within this meaning of health insurance.

If Southern Bell had purchased from a commercial insurance company health insurance that provided its employees with precisely the same kind of protection promised under its own plan, the Government concedes that the payments received by ailing employees from the commercial company would not have been taxable. Nevertheless it argues that Southern Bell's plan should not be treated as "health insurance" because the employ-

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<sup>1</sup> 26 U. S. C. (1952 ed.) § 22 (b)(5).

ees paid no fixed periodic premiums, there was no definite fund created to assure payment of the disability benefits, and the amount and duration of the benefits varied with the length of service.<sup>2</sup> We do not believe that these facts remove the plan from the general category of health insurance. The payment of premiums in a fixed amount at regular intervals is not a necessary element of insurance. Similarly there is no necessity for a definite fund set aside to meet the insurer's obligations. And the fact that the amount and duration of benefits increased with the length of time that an employee worked for Southern Bell reflected the added value to the company of extra years of experience and service. Apparently the Government relies on these facts primarily to show that Southern Bell's plan did not contain features which would be present in the normal commercial insurance contract. The Government, however, offers no persuasive reason why the term "health insurance" in § 22 (b) (5) should be limited to the particular forms of insurance conventionally made available by commercial companies. Certainly there is nothing in the language of § 22 (b) (5) which compels this limitation.

There is no support in the legislative history for the Government's argument that Congress intended to restrict the exemption provided in § 22 (b) (5) to "conventional modes of insurance" and not to include employer disability plans. For reasons deemed satisfactory, Congress, since 1918, has chosen not to tax receipts from health and accident insurance contracts.<sup>3</sup> The language

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<sup>2</sup> The Government points to several other aspects of the Southern Bell plan as demonstrating that it is not "health insurance." After consideration of the Government's contentions in this respect we find they are without merit.

<sup>3</sup> In *Epmeier v. United States*, 199 F. 2d 508, 511, the Seventh Circuit was of the opinion that: "The provisions of Section 22 (b) (5)

of § 22 (b) (5) appeared in the Revenue Act of 1918 and has reappeared without relevant change in all succeeding revenue acts up to 1954.<sup>4</sup> The term "health insurance" was not defined in any of these acts or in any of the committee reports. There has been no uniform administrative practice which can be drawn upon to support the narrow meaning of § 22 (b) (5) now urged by the Government. Administrative rulings since 1918 appear to have regularly vacillated between holding receipts under company disability plans taxable and holding that they are not taxable.<sup>5</sup> Under these circumstances we see no reason why the term "health insurance" in § 22 (b) (5) should not be given its broad general meaning. See *Helvering v. Le Gierse*, 312 U. S. 531.

undoubtedly were intended to relieve a taxpayer who has the misfortune to become ill or injured, of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident."

<sup>4</sup> Section 22 (b) (5) can be traced to § 213 (b) (6) of the Revenue Act of 1918, 40 Stat. 1066. In §§ 104, 105 and 106 of the 1954 Internal Revenue Code, 26 U. S. C. (Supp. III) §§ 104-106, Congress again exempted amounts received through health insurance. However these new provisions limited the exclusion for receipts similar to those involved here to a maximum of \$100 per week. We do not accept the Government's contention that the enactment of §§ 104-106 shows that Congress in 1918, and in succeeding revenue measures, intended to distinguish between conventional commercial insurance and an employer's plan like that of Southern Bell's.

<sup>5</sup> T. D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918); G. C. M. 23511, Cum. Bull. 86 (1943); I. T. 4000, 1 Cum. Bull. 21 (1950); I. T. 4015, 1 Cum. Bull. 23 (1950); I. T. 4107, 2 Cum. Bull. 73 (1952); Rev. Rul. 208, 1953-2 Cum. Bull. 102. For a discussion of the difficulties of the American Telephone and Telegraph Company's system because of the shifting administrative practice see Hearings before House Committee on Ways and Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code, 83d Cong., 1st Sess. 363.



Opinion of the Court.

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The judgment of the Court of Appeals is reversed and the judgment of the District Court which held that petitioner was entitled to a refund is affirmed.

*It is so ordered.*

MR. JUSTICE BURTON and MR. JUSTICE HARLAN dissent for the reasons stated in the opinion of the Court of Appeals, 233 F. 2d 413. See also, *Moholy v. United States*, 235 F. 2d 562; I. R. C., 1954, §§ 104-106, and the accompanying report, H. R. Rep. No. 1337, 83d Cong., 2d Sess. 15, A32-A35.

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

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* TRUCK  
DRIVERS LOCAL UNION NO. 449, INTERNA-  
TIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND  
HELPERS OF AMERICA, A. F. L.

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

No. 103. Argued January 17, 22, 1957.—Decided April 1, 1957.

A group of employers had formed a multi-employer association to bargain jointly with a single union which represented their employees. During contract negotiations between the union and the association, the union struck and picketed the plant of one of the employers belonging to the association. Thereupon the other members of the employers' association, as a defense to the strike against one of their members which imperiled the employers' common interest in bargaining on a group basis, closed their plants and locked out their employees until the strike was terminated. *Held*: In the circumstances of this case, the National Labor Relations Board properly found that such action by the non-struck members of the employers' association did not constitute an unfair labor practice within the meaning of §§ 8 (a) (1) and (3) of the National Labor Relations Act, as amended. Pp. 89-97.

(a) Although there is no express provision of the Act either prohibiting or authorizing a lockout, the Act does not make a lockout unlawful *per se*; and the legislative history of the Wagner Act indicates that there was no intent to prohibit lockouts as such. P. 92.

(b) The unqualified use of the term "lock-out" in several sections of the Taft-Hartley Act is a statutory recognition that there are circumstances in which employers may lawfully resort to a lockout as an economic weapon, and this conclusion is supported by the legislative history of the Act. Pp. 92-93.

(c) A temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis. Pp. 93-96.

(d) The history of the Taft-Hartley Act compels the conclusion that Congress intended that the National Labor Relations Board

should continue its established administrative practice of certifying multi-employer groups and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future. Pp. 94-96.

(e) Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. P. 96.

(f) The function of balancing conflicting legitimate interests so as to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. P. 96.

(g) The exercise of discretion by the Board in permitting lock-outs is not to be narrowly confined to cases of economic hardship. P. 97.

(h) In the circumstances of this case, the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the union's strike action was lawful. P. 97.

231 F. 2d 110, reversed.

*Dominick L. Manoli* argued the cause for petitioner. With him on the brief were *Solicitor General Rankin*, *Theophil C. Kammholz* and *Stephen Leonard*.

*Thomas P. McMahon* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *Peter T. Beardsley* and *Helen F. Humphrey* for the American Trucking Associations, Inc., and *Kenneth C. Royall* and *Frank C. Fisher* for the Linen & Credit Exchange et al.

Briefs of *amici curiae* supporting petitioner were filed by *George O. Bahrs*, *J. Paul St. Sure*, *Robert Littler* and *J. Hart Clinton* for the Bay Area Council of Bakery Operators et al., and *Gerard D. Reilly* for the Union Employers Section, Printing Industry of America, Inc.



MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the non-struck members of a multi-employer bargaining association committed an unfair labor practice when, during contract negotiations, they temporarily locked out their employees as a defense to a union strike against one of their members which imperiled the employers' common interest in bargaining on a group basis.

The National Labor Relations Board determined that resort to the temporary lockout was not an unfair labor practice in the circumstances.<sup>1</sup> The Court of Appeals for the Second Circuit reversed.<sup>2</sup> This Court granted certiorari<sup>3</sup> to consider this important question of the construction of the amended National Labor Relations Act,<sup>4</sup> and also to consider an alleged conflict with decisions of Courts of Appeals of other circuits.<sup>5</sup>

Eight employers in the linen supply business in and around Buffalo, New York, comprise the membership of the Linen and Credit Exchange. For approximately 13 years, the Exchange and the respondent Union, representing the truck drivers employed by the members, bargained on a multi-employer basis and negotiated successive collective bargaining agreements signed by the Union and by the eight employers. Sixty days before such an agreement was to expire on April 30, 1953, the

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<sup>1</sup> 109 N. L. R. B. 447.

<sup>2</sup> 231 F. 2d 110.

<sup>3</sup> 352 U. S. 818.

<sup>4</sup> 61 Stat. 136, 29 U. S. C. § 141 *et seq.*

<sup>5</sup> *Labor Board v. Continental Baking Co.*, 221 F. 2d 427 (C. A. 8th Cir.); *Labor Board v. Spalding Avery Lumber Co.*, 220 F. 2d 673 (C. A. 8th Cir.); *Leonard v. Labor Board*, 197 F. 2d 435, 205 F. 2d 355 (C. A. 9th Cir.); *Morand Bros. Beverage Co. v. Labor Board*, 190 F. 2d 576 (C. A. 7th Cir.).

Union gave notice of its desire to open negotiations for changes.<sup>6</sup>

The Exchange and the Union began negotiations some time before April 30, but the negotiations carried past that date and were continuing on May 26, 1953, when the Union put into effect a "whipsawing" plan<sup>7</sup> by striking and picketing the plant of one of the Exchange members, Frontier Linen Supply, Inc. The next day, May 27, the remaining seven Exchange members laid off their truck drivers after notifying the Union that the layoff action was taken because of the Frontier strike, advising the Union that the laid-off drivers would be recalled if the Union withdrew its picket line and ended the strike. Negotiations continued without interruption, however, until a week later when agreement was reached upon a new contract which the Exchange members and the Union approved and signed. Thereupon the Frontier strike was ended, the laid-off drivers were recalled, and normal operations were resumed at the plants of all Exchange members.

The Union filed with the National Labor Relations Board an unfair labor practice charge against the seven employers, alleging that the temporary lockout interfered with its rights guaranteed by § 7, thereby violating §§ 8 (a)(1) and (3) of the Act.<sup>8</sup> A complaint issued, and, after hearing, a trial examiner found the employers guilty of the unfair labor practice charged. The Board overruled the trial examiner, finding that "the more

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<sup>6</sup> The contract contained an automatic renewal clause requiring notice of a desire to change the contract to be given 60 days before the expiration date. The notice was also in conformity with § 8 (d) of the Act. 61 Stat. 140, 29 U. S. C. § 158.

<sup>7</sup> "Whipsawing" is the process of striking one at a time the employer members of a multi-employer association.

<sup>8</sup> Section 7 provides in pertinent part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

reasonable inference is that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association," with the "calculated purpose" of causing "successive and individual employer capitulations."<sup>9</sup> The Board therefore found that "in the absence of any independent evidence of antiunion motivation, . . . the Respondent's [*sic*] action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful."<sup>10</sup> The Board, citing *Leonard v. Labor Board*, 205 F. 2d 355, concluded "that a strike by employees against one employer-member of a multiemployer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the nonstruck employers which legally justifies their resort to a temporary lockout of employees."<sup>11</sup>

activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 61 Stat. 140, 29 U. S. C. § 157.

Section 8 provides in pertinent part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 61 Stat. 140, 29 U. S. C. § 158.

<sup>9</sup> 109 N. L. R. B., at 448.

<sup>10</sup> 109 N. L. R. B., at 448. The Board relied upon the decision of the Court of Appeals for the Ninth Circuit in *Leonard v. Labor Board*, 205 F. 2d 355, 357-358, wherein the court stated: ". . . the right of the employers to lock out temporarily all the employees is no more than equal to the right of the union of all the employees to call out the employees of one after another of the . . . [employers] in the whipsawing manner . . . ."

<sup>11</sup> 109 N. L. R. B., at 448-449.



The Court of Appeals agreed "that the Board reasonably inferred" a threat of strike action against the seven employers because there were "no peculiar facts concerning the Union's relations with that single member."<sup>12</sup> The Court of Appeals thus implicitly found that the only reason for the strike against Frontier was the refusal of the Exchange to meet the Union's demands. But the court held that a temporary lockout of employees on a "mere threat of, or in anticipation of, a strike"<sup>13</sup> could be justified only if there were unusual economic hardship, and because "the stipulated facts show no economic justification for the lockout, . . . the lockout of non-striking employees constituted an interference with their statutory right to engage in concerted activity in violation of § 8 (a)(1) of the Act, and also constituted discrimination in the hire and tenure of employment of the employees because of the Union's action, thereby discouraging membership in the Union in violation of § 8 (a)(3) of the Act."<sup>14</sup>

Although, as the Court of Appeals correctly noted, there is no express provision in the law either prohibiting or authorizing the lockout, the Act does not make the lockout unlawful *per se*. Legislative history of the Wagner Act, 49 Stat. 449, indicates that there was no intent to prohibit strikes or lockouts as such.<sup>15</sup> The unqualified use of the term "lock-out" in several sections of the Taft-Hartley Act<sup>16</sup> is statutory recognition that there are circumstances

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<sup>12</sup> 231 F. 2d, at 112.

<sup>13</sup> *Id.*, at 113.

<sup>14</sup> *Id.*, at 118.

<sup>15</sup> See, *e. g.*, explanation of the bill by Senator Walsh, Chairman of the Senate Committee on Education and Labor, 79 Cong. Rec. 7673.

<sup>16</sup> 61 Stat. 140, 29 U. S. C. § 158 (d)(4) (no resort to "strike or lock-out" during 60-day notice period); 61 Stat. 153, 29 U. S. C. § 173 (c) (Director of Mediation Service to seek to induce parties to settle dispute peacefully "without resort to strike, lock-out, or other

in which employers may lawfully resort to the lockout as an economic weapon. This conclusion is supported by the legislative history of the Act.<sup>17</sup>

We are not concerned here with the cases in which the lockout has been held unlawful because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.<sup>18</sup> Nor are we called upon to define the limits of the legitimate use of the lockout.<sup>19</sup> The narrow question to be decided is whether a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis.

The Court of Appeals rejected the preservation of the integrity of the multi-employer bargaining unit as a justification for an employer lockout.<sup>20</sup> The court founded this conclusion upon its interpretation of the Taft-Hartley Act and its legislative history. After stating that "[m]ulti-employer bargaining has never received the express sanction of Congress," the court reasoned that

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coercion"); 61 Stat. 155, 29 U. S. C. § 176 (appointment of board of inquiry by President when "threatened or actual strike or lock-out" creates a national emergency); 61 Stat. 155, 29 U. S. C. § 178 (power to enjoin "strike or lock-out" in case of national emergency).

<sup>17</sup> H. R. Rep. No. 245, 80th Cong., 1st Sess. 21-22, 70, 82; S. Rep. No. 105, 80th Cong., 1st Sess. 24; S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 21; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34-35. See also, *e. g.*, 93 Cong. Rec. 1827-1828, 3835.

<sup>18</sup> *E. g.*, *Labor Board v. Wallick*, 198 F. 2d 477; *Labor Board v. Somerset Classics*, 193 F. 2d 613; *Olin Industries v. Labor Board*, 191 F. 2d 613; cf. *Associated Press v. Labor Board*, 301 U. S. 103.

<sup>19</sup> We thus find it unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike.

<sup>20</sup> As previously noted, the Board decision is based in part on a finding that the preservation of employer solidarity justifies a lockout as a defense to a whipsaw strike.

because at the time of the enactment of the Taft-Hartley Act the Board had never "gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the employer unit,' " Congress cannot be said to have given legislative approval to the present Board action.<sup>21</sup> The court concluded that "Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under § 402 of the Act to study, among other things, 'the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy.' " <sup>22</sup>

We cannot subscribe to this interpretation. Multi-employer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers from day to day or week to week. This basis of bargaining has had its greatest expansion since enactment of the Wagner Act because employers have sought through group bargaining to

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<sup>21</sup> 231 F. 2d, at 117-118.

<sup>22</sup> *Id.*, at 118.

The opinion of the Court of Appeals may be interpreted as rejecting employer solidarity as a justification for a lockout on the ground that the Union strike constituted a withdrawal by the Union from the multi-employer bargaining unit. The Court of Appeals vigorously argued that a union should be accorded the same freedom of voluntary withdrawal from a multi-employer bargaining unit as the Board has accorded to individual employers. But that question is not presented by this case, and we expressly reserve decision until it is properly before us. The facts here clearly show that the Union strike was not an attempt to withdraw from the multi-employer bargaining unit. On the contrary, the Union continued to carry on negotiations with the Exchange until an agreement was reached and signed.



match increased union strength.<sup>23</sup> Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations.<sup>24</sup> At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.<sup>25</sup>

The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer

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<sup>23</sup> Bahrs, *The San Francisco Employers' Council*; Chamberlain, *Collective Bargaining*, 178-179, 180, 182; Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining*, 4-5; Garrett and Tripp, *Management Problems Implicit In Multi-Employer Bargaining*, 2-3; Kerr and Randall, *Collective Bargaining in the Pacific Coast Pulp and Paper Industry*, 3-4; Pierson, *Multi-Employer Bargaining*, 35-36; Wolman, *Industry-Wide Bargaining*.

<sup>24</sup> 79 *Monthly Labor Review* 805 (1956).

Based on collective bargaining agreements on file with the Bureau of Labor Statistics in 1951, approximately 80% of the unionized employees in the laundry industry were represented under multi-employer bargaining. B. L. S. Rep. No. 1 (1953), *Collective Bargaining Structures: The Employer Bargaining Unit*, 10.

<sup>25</sup> Hearings before Senate Committee on Labor and Public Welfare on S. 55 *et al.*, 80th Cong., 1st Sess. 427-428, 1012-1017, 1032-1037, 1055-1057, 1162-1165, 2018-2019, 2370-2371; S. Rep. No. 105, pt. 2, 80th Cong., 1st Sess. 6-8; Hearings before House Committee on Education and Labor on H. R. 8 *et al.*, 80th Cong., 1st Sess. 552-553, 1552-1554, 3024-3026; 93 Cong. Rec. 1834-1844, 4030-4031, 4443-4444, 4581-4587, 4674-4676.

bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation. Rather, the compelling conclusion is that Congress intended "that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future."<sup>26</sup>

Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide.<sup>27</sup> Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.<sup>28</sup>

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<sup>26</sup> 231 F. 2d, at 121 (dissenting opinion).

<sup>27</sup> *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Labor Board v. Continental Baking Co.*, 221 F. 2d 427; *Labor Board v. Spalding Avery Lumber Co.*, 220 F. 2d 673; *Leonard v. Labor Board*, 197 F. 2d 435, 205 F. 2d 355; *Morand Bros. Beverage Co. v. Labor Board*, 190 F. 2d 576; *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268; *International Shoe Co.*, 93 N. L. R. B. 907; *Duluth Bottling Association*, 48 N. L. R. B. 1335.

<sup>28</sup> *Labor Board v. Babcock & Wilcox Co.*, 351 U. S. 105; *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177.

In *Phelps Dodge*, the Court said:

"... There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things

The Court of Appeals recognized that the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown.<sup>29</sup> The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship. We hold that in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful.

*Reversed.*

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

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Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.” 313 U. S., at 194.

<sup>29</sup> *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268; *International Shoe Co.*, 93 N. L. R. B. 907; *Duluth Bottling Association*, 48 N. L. R. B. 1335.



UNITED STATES *v.* OHIO POWER CO.

## ON PETITION FOR REHEARING.

No. 312, October Term, 1955. Certiorari denied October 17, 1955.—Rehearing denied December 5, 1955.—Rehearing again denied May 26, 1956.—Order denying rehearing vacated June 11, 1956.—Rehearing and certiorari granted and case decided April 1, 1957.

1. The petition for rehearing is granted; the order entered October 17, 1955, denying certiorari is vacated; the petition for certiorari is granted; and the judgment of the Court of Claims is reversed on the authority of *United States v. Allen-Bradley Co.*, 352 U. S. 306, and *National Lead Co. v. Commissioner*, 352 U. S. 313. Pp. 98–99.
2. The interest in finality of litigation must yield when the interests of justice would make unfair the strict application of the Rules of this Court. P. 99.

131 Ct. Cl. 95, 129 F. Supp. 215, reversed.

*Solicitor General Rankin, Assistant Attorney General Rice, Philip Elman and Hilbert P. Zarky for the United States.*

*J. Marvin Haynes, N. Barr Miller and Oscar L. Tyree for respondent.*

## PER CURIAM.

On June 11, 1956, we unanimously vacated *sua sponte* our order of December 5, 1955 (350 U. S. 919), denying the timely petition for rehearing in this case (351 U. S. 980), so that this case might be disposed of consistently with the companion cases of *United States v. Allen-Bradley Co.*, 352 U. S. 306, and *National Lead Co. v. Commissioner*, 352 U. S. 313, in which we had granted certiorari the same day, *viz.* June 11, 1956. 351 U. S. 981. If there is to be uniformity in the application of the principles announced in those two companion cases, the judgment below in the instant case cannot stand. Accordingly we now grant the petition for rehearing, vacate the

order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Claims on the authority of *United States v. Allen-Bradley Co.*, *supra*, and *National Lead Co. v. Commissioner*, *supra*.

We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases. *Clark v. Manufacturers Trust Co.*, 337 U. S. 953; *Goldbaum v. United States*, 347 U. S. 1007; *Banks v. United States*, 347 U. S. 1007; *McFee v. United States*, 347 U. S. 1007; *Remmer v. United States*, 348 U. S. 904; *Florida ex rel. Hawkins v. Board of Control*, 350 U. S. 413; *Boudoin v. Lykes Bros. S. S. Co.*, 350 U. S. 811; *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183; *Achilli v. United States*, 352 U. S. 1023.

*Reversed.*

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

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

The Court's action in overturning the judgment of the Court of Claims in this case, nearly a year and a half after we denied certiorari, and despite the subsequent denial of two successive petitions for rehearing, is so disturbing a departure from what I conceive to be sound procedure that I am constrained to dissent.

This is a tax case involving the right of the War Production Board to certify that only part of the actual cost of wartime facilities, constructed by a taxpayer at the instance of the Government, was necessary in the national defense and hence subject to accelerated amortization

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under § 124 (f) of the Internal Revenue Code of 1939.<sup>1</sup> Claiming that the War Production Board had no power to certify less than the full cost of such facilities, the Ohio Power Company sued the Government in the Court of Claims to recover an alleged overpayment of taxes, asserting that it was entitled to accelerated amortization of the full cost of wartime facilities which it had constructed, and not merely of that part of the cost which the War Production Board had certified as necessary in the interest of national defense. The Court of Claims, sustaining this contention, entered judgment in favor of the taxpayer on March 1, 1955.<sup>2</sup>

On August 12, 1955, the Government petitioned for certiorari, its time for filing having been duly extended. We denied the petition on October 17, 1955. 350 U. S. 862. On November 10, 1955, the Government filed a timely petition for rehearing, requesting that its consideration be deferred until the case of *Commissioner v. National Lead Co.*,<sup>3</sup> involving this same tax question, had been decided by the Court of Appeals for the Second Circuit. We denied this petition on December 5, 1955. 350 U. S. 919. On February 14, 1956, the Court of Appeals decided *National Lead* in favor of the Government,<sup>4</sup> and on April 3, 1956, the Court of Claims, in *Allen-Bradley Co. v. United States*,<sup>5</sup> decided the same tax question favorably to the taxpayer, as it had already done in the *Ohio Power* case. This, then, provided the Government with the "conflict" which had been lacking at the time when the Court denied its petition for certiorari in the present case. On this basis the Government, on

<sup>1</sup> 54 Stat. 998-1003, as amended, 26 U. S. C. §§ 23 (t), 124.

<sup>2</sup> 131 Ct. Cl. 95, 129 F. Supp. 215.

<sup>3</sup> 230 F. 2d 161.

<sup>4</sup> *Ibid.*

<sup>5</sup> 134 Ct. Cl. 800.



May 3, 1956, petitioned for certiorari in *Allen-Bradley*,<sup>6</sup> and at the same time petitioned for leave to file a second petition for rehearing in the *Ohio Power* case. On May 28, 1956, the Court denied that petition because it was both long out of time and "consecutive,"<sup>7</sup> 351 U. S. 958, and thus for the third time refused to take the case. Nevertheless, two weeks thereafter, on June 11, 1956, the Court, incident to its grants of certiorari in the *Allen-Bradley* and *National Lead* cases, vacated *sua sponte* its order of December 5, 1955 denying the Government's original timely petition for rehearing in the *Ohio Power* case. 351 U. S. 980. And today the Court grants that petition, some 16 months after it had originally been denied, and reverses the Court of Claims' judgment in favor of the taxpayer.

# I.

In my opinion, today's order reversing the Court of Claims violates our own Rules. That order is based upon the Court's order of June 11, 1956, which vacated the order of December 5, 1955 denying the Government's first petition for rehearing of the denial of certiorari.

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<sup>6</sup> On May 29, 1956, National Lead Company likewise filed its petition for certiorari to the Court of Appeals for the Second Circuit in the case which it had lost.

<sup>7</sup> Rule 58, par. 2, of this Court's Revised Rules provides: "A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk . . . subject to the requirements respecting time . . . as provided in paragraph 1 of this rule." Paragraph 1 of Rule 58 provides: "A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk . . . within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof." There was, of course, no enlargement of the time here. Paragraph 4 of Rule 58 provides: "Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received."

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This June 11 order thus purported to continue consideration of the original petition for rehearing, which is now granted. Under our Rules, I think the order of June 11 was improvidently issued.<sup>8</sup> Had the Government, just prior to June 11, 1956, petitioned to vacate the order of December 5, 1955, the petition would have violated Rule 58 of our Revised Rules, whether considered as, in effect, a petition for rehearing of that order, in which case it would have been out of time, or as a petition for rehearing of the original denial of certiorari, in which case it would have been both out of time and "consecutive."<sup>9</sup> To say that the order of June 11 could escape Rule 58 because it was made on the Court's initiative seems to me to involve the most hypertechnical sort of reasoning.

If we are to follow our Rules the order of June 11, and with it today's order, must fall, for this litigation must be considered to have been closed on December 5, 1955, when the Court denied the Government's first petition for rehearing.

## II.

Rule 58, by marking the end of a case in this Court, is intended to further the law's deep-rooted policy that adjudication must at some time become final. I think we should follow it. Prior to 1948, the outside limit of rules of finality in the federal courts was the end of the term, because, except for the extraordinary writs, federal courts were considered to have no power to deal with their

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<sup>8</sup> The writer of this opinion, and those who join him, share in the responsibility for the issuance of the order of June 11.

<sup>9</sup> Under the old Rules, it was not thought possible to petition for rehearing of a denial of rehearing. Such petitions were treated as miscaptioned untimely petitions for rehearing of the original order. Presumably the same practice obtains under the Revised Rules. Otherwise, an endless procession of "timely" petitions for rehearing could be filed, one every 25 days *ad infinitum*.

judgments after the end of the term at which they were rendered. *Bronson v. Schulten*, 104 U. S. 410, 415. In 1948 Congress abolished the "end of term" rule by a statute, 28 U. S. C. § 452,<sup>10</sup> which was expressly made applicable to this Court. 28 U. S. C. § 451. The effect of § 452 was to leave the federal courts untrammelled in establishing their own rules of finality. But the history of § 452 indicates that the courts were to have no power to re-examine their judgments otherwise than in accordance with their established rules or statutes. Section 452 was modeled on Rule 6 (c) of the Federal Rules of Civil Procedure.<sup>11</sup> See the Reviser's Note to § 452, 28 U. S. C., p. 4142. As originally promulgated in 1938, Rule 6 (c) had referred only to the "expiration of a term" and not to its "continued existence." In 1944 this Court held that a District Court had inherent power to vacate a judgment and enter a new one, with the effect of extending a party's right to appeal, notwithstanding such action was not authorized by any rule of the District Court, because the term had not yet expired. *Hill v. Hawes*, 320 U. S. 520, 524. Thereafter, Rule 6 (c) was amended to provide that the "*continued existence or expiration*" of the term should not affect the power of a court. The purpose was "to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules." Advisory Committee on Rules of Civil

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<sup>10</sup> So far as pertinent, § 452 provides: "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

<sup>11</sup> "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."



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Procedure, Report of Proposed Amendments to Rules, H. R. Doc. No. 473, 80th Cong., 1st Sess. 50 (1946). The "continued existence or" language of amended Rule 6 (c) was taken bodily into § 452.

The history of § 452 thus casts grave doubt, to say the least, on the power of the Court to do what it has done in this case, for its action was certainly not taken "upon grounds . . . stated in [its] rules."<sup>12</sup> I recognize that § 452 does not prevent the Court from changing its Rules, but if the statute means what its history suggests, such changes should be made on a general and not *ad hoc* basis, lest cases which are alike be treated differently.<sup>13</sup>

This Court, however, has never faced the problems raised by § 452, but has proceeded on the assumption that the statute does not affect the Court's inherent power over its judgments; in other words, that by resorting to such power the Court may affect judgments by action which would otherwise be out of time under the Rules. If that view be correct, it follows that finality of adjudication in this Court ultimately depends on the Court's self-restraint. That, and the doubtful meaning of § 452,

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<sup>12</sup> Text writers have disagreed as to the effect of § 452. Compare Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 84-86 (1954), with Stern & Gressman, *Supreme Court Practice* (2d ed. 1954), 349, 355.

<sup>13</sup> It may be suggested that, because this Court has no rules comparable to Fed. Rules Civ. Proc., 60 (a) and (b), permitting applications for subsequent changes in judgments to be made on various grounds, it would be unfortunate to construe § 452 as prohibiting this Court from exercising inherent power to correct judgments out of time for such things as fraud, mistake, and clerical error. To my way of thinking, it would be preferable to meet this problem by adding to our Rules, rather than by making *ad hoc* exceptions to Rule 58. The latter course, I fear, is bound to lead to the sort of thing that has happened in this case, leaving litigants in uncertainty as to when they may safely consider their cases closed in this Court.

seem to me in any event to argue strongly against departures from Rule 58—the only Rule of finality in this Court—except in rare instances. I now turn to the question of whether this is such a case.

### III.

The past practice of the Court shows that its inherent powers have always been exercised most sparingly. Thus, prior to enactment of § 452 in 1948, the Court, so far as I can discover, had never in its history departed from the “end of term” rule by granting a petition for rehearing after the end of the term at which a judgment had been rendered.<sup>14</sup> Between 1948 and the effective date of Rule 58 (July 1, 1954), one of whose purposes was to tighten the rules ending litigation in this Court, I can find only four cases in which untimely relief was granted: *Clark v. Manufacturers Trust Co.*, 337 U. S. 953, vacated and remanded *sub nom. McGrath v. Manufacturers Trust Co.*, 338 U. S. 241; *Goldbaum v. United States*, 347 U. S. 1007, 348 U. S. 905; *Banks v. United States*, 347 U. S. 1007, 348 U. S. 905; *McFee v. United States*, 347 U. S. 1007, 348 U. S. 905.<sup>15</sup> Of these only *Clark* bears any similarity to this case.<sup>16</sup> *Goldbaum*, *Banks* and *McFee* were

<sup>14</sup> See Charles Elmore Copley, Report of Survey by the Clerk of Rules and Practice in Relation to Petitions for Rehearing, Prepared by Direction of the Chief Justice, with Suggestions and Supporting Data (January 7, 1947).

<sup>15</sup> See also *California v. Zook*, 337 U. S. 921, in which a motion for leave to file a petition for rehearing out of time was granted, apparently on grounds of excusable neglect, and the petition was simultaneously denied; and *Land v. Dollar*, 341 U. S. 737, 738, in which a belated “motion for leave to file a motion for reconsideration” of a denial of certiorari was continued on the docket. The motion was ultimately withdrawn. 344 U. S. 807.

<sup>16</sup> *Clark* involved questions under the Trading with the Enemy Act, an untimely petition for rehearing of the denial of certiorari being granted because of a subsequently arising conflict. Unlike the present

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criminal "net worth" tax cases in which the Court, *sua sponte*, restored the cases to the docket pending decision of *Holland v. United States*, 348 U. S. 121, the cases thereafter being remanded for reconsideration in light of *Holland*. I need hardly say that the granting of untimely relief in criminal cases presents considerations not found in civil cases.

Of particular significance here is what has happened since Rule 58 became effective. From then until today I have discovered but three cases in which the Court has granted rehearing out of time, all involving situations quite dissimilar to that presented here: *Remmer v. United States*, 348 U. S. 904; *McNally v. Teets*, 352 U. S. 886; *Achilli v. United States*, 352 U. S. 1023.<sup>17</sup> *Remmer* was a criminal case which had been remanded to the lower court for further proceedings, and where the petition for

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case, there was no other pending case through which the question could be settled by this Court for the future, because the "conflict" case was never appealed. See *McGrath v. E. J. Lavino & Co.*, 91 F. Supp. 786, 787. More recently the Court has consistently denied belated petitions for rehearing based upon claimed subsequent conflicts. See the cases cited at pp. 108-109, *infra*, and particularly *Montadokota Gas Co. v. Montana-Dakota Utilities Company*, 349 U. S. 969, where the Court denied leave to file an untimely petition for rehearing even though the decision below had been expressly disapproved by an intervening and controlling decision of this Court. See *Parissi v. Telechron, Inc.*, 349 U. S. 46, 47.

The *Clark* case is not a persuasive precedent on any of the legal questions involved in this case, because for all that appears neither side called the attention of the Court to the then recent enactment of § 452 and its possible restrictive effects on prior rules relating to rehearings.

<sup>17</sup> Cf. *Born v. Laube*, 348 U. S. 932; *Bernstein v. United States*, 352 U. S. 977; *Mekolichick v. United States*, 352 U. S. 977; *Cliett v. Scott*, 353 U. S. 918, in which the Court simultaneously granted motions for leave to file petitions for rehearing out of time, and denied the petitions for rehearing. See also *Smith v. United States*, 353 U. S. 921.



rehearing raised questions which could again be brought to this Court on certiorari; rehearing thus served to avoid the delay and expense of further intermediate proceedings below, and hardly could be claimed to conflict with the policy of finality. *McNally*, also a criminal case, simply involved clarification of the Court's earlier order denying certiorari, in order to make clear that it covered two judgments below against the petitioner instead of only one. For lack of such a clarification, the petitioner's application for habeas corpus had been denied by a federal district court on the ground that, having failed to petition for certiorari from one of the two state decisions against him, he had not fully exhausted his state remedies. *Achilli* presented the same features as *Remmer*, in that it was a criminal case presenting a question that could again be raised in proceedings below and then brought to this Court in due course on certiorari. Indeed, exactly that happened in the *Achilli* case: petitioner, not anticipating this Court's willingness to reconsider its original denial of certiorari, raised the same question a second time before the District Court, obtained a new decision, and petitioned successfully for certiorari. 353 U. S. 909. The net effect of the Court's untimely order, therefore, was to bring here more quickly a question that would arrive eventually in any case. Three other cases during this period, though not arising on petition for rehearing, may be considered to have involved out-of-time action by the Court: *Florida ex rel. Hawkins v. Board of Control*, 350 U. S. 413; *Boudoin v. Lykes Bros. S. S. Co.*, 350 U. S. 811, and *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183. All of them, however, involved the correction of errors in the Court's own mandates, and not, as here, the overturning of another court's decision that had long since been permitted to become final.

The other side of the coin is also illuminating. I find that since 1948 there have been some 191 untimely appli-

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cations for rehearing, or the equivalent,<sup>18</sup> as against only 10 instances of untimely action, 6 in response to applications and 4 on the Court's initiative. Since the adoption of Rule 58 in 1954, the Court has been asked on 40 occasions to grant rehearing out of time of orders denying certiorari,<sup>19</sup> and, with the exception of *McNally v. Teets* and *Achilli v. United States*, *supra*, cases that may fairly be described as unique, and that are certainly unlike this one, each time it has refused. In 13 of the 40 cases, relief was denied despite the claimed development of a conflict.

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<sup>18</sup> The count includes untimely petitions for rehearing, successive petitions for rehearing, motions for leave to file petitions for rehearing, motions for leave to file successive petitions for rehearing, and motions and petitions for reconsideration of denial of rehearing or of leave to file petitions for rehearing. See 335 U. S. 838 (two cases), 855, 864 (six cases), 888, 894 (two cases), 899, 900; 336 U. S. 911, 915 (four cases), 921, 929 (two cases), 932 (two cases), 941, 955, 963, 971; 337 U. S. 911, 920, 921 (two cases), 934, 950 (three cases), 953 (two cases), 961 (five cases); 338 U. S. 841 (four cases), 863, 882, 889, 939, 940, 953; 339 U. S. 906, 916, 926, 936, 950, 954, 972, 973 (three cases), 992 (two cases); 340 U. S. 846, 848, 898, 907, 918, 939, 940; 341 U. S. 917, 928, 933, 937, 956 (four cases); 342 U. S. 842, 844, 856, 874, 880, 895, 899 (two cases), 907 (two cases), 915; 343 U. S. 917 (two cases), 931, 932, 952, 959 (two cases), 989 (three cases); 344 U. S. 848, 849, 850 (two cases), 882, 905; 345 U. S. 914, 931 (two cases), 937 (two cases), 945, 960, 961, 971, 1003, 1004; 346 U. S. 841, 843 (two cases, total of three petitions), 880 (three cases), 881, 904, 905 (two cases), 917, 918; 347 U. S. 908 (two cases), 911 (two cases), 924 (three cases), 940, 1007 (three cases), 1021; 348 U. S. 851 (two cases), 853 (two cases), 889, 904, 932, 939 (three cases), 940, 960 (two cases); 349 U. S. 917, 925, 948, 969 (two cases); 350 U. S. 413, 811, 854, 856, 919, 920, 955, 960, 976; 351 U. S. 183, 915 (two cases), 928, 929, 958, 990; 352 U. S. 860, 861 (four cases), 886, 913, 950, 977 (two cases), 1019, 1023; 353 U. S. 918, 921.

<sup>19</sup> See 348 U. S. 851 (two cases), 853 (two cases), 889, 932, 939 (three cases), 940, 960 (two cases); 349 U. S. 917, 925, 948, 969 (two cases); 350 U. S. 854, 920, 955, 960, 976; 351 U. S. 915 (two cases), 928, 929, 958, 990; 352 U. S. 860, 861 (three cases), 886, 913, 977 (two cases), 1019, 1023; 353 U. S. 918, 921.

See *Fraver v. Studebaker Corp.*, 348 U. S. 939; *Powell v. United States*, 348 U. S. 939; *Cowles Pub. Co. v. Labor Board*, 348 U. S. 960; *Jones v. Lykes Bros. S. S. Co.*, 348 U. S. 960; *Lopiparo v. United States*, 349 U. S. 969; *Montana Gas Co. v. Montana-Dakota Utilities Co.*, 349 U. S. 969; *Zientek v. Reading Co.*, 350 U. S. 960; *Preferred Ins. Co. v. United States*, 351 U. S. 990; *International Molders & Foundry Workers v. Western Foundry Co.*, 352 U. S. 860; *Fairmont Aluminum Co. v. Commissioner*, 352 U. S. 913; *Bernstein v. United States*, 352 U. S. 977; *Mekolichick v. United States*, 352 U. S. 977; *Consolidated Edison Co. of N.Y., Inc. v. United States*, 352 U. S. 1019.<sup>20</sup>

This history of past practice justifies the assertion that the Court has exercised its inherent power with a sharp eye to the "principle that litigation must at some definite point be brought to an end," *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 213, and, in recent years at least, has acted only where it felt that the interests of justice plainly outweighed considerations of finality.

What about this case? There is nothing to distinguish it from any other suit for a money judgment in which a conflict turns up long after certiorari and rehearing have been denied. The most that can be said in justification of the Court's action is that otherwise Ohio Power would not have to pay taxes which Allen-Bradley and National Lead must pay as a result of the much later decisions in their cases. Yet the Court twice faced and rejected that very possibility many months ago, (1) when it denied the Government's timely petition for rehearing, despite the request that consideration of it be deferred until the Court of Appeals had decided the *National Lead* case, and (2) when it denied the Government's second, and

<sup>20</sup> As to *Bernstein* and *Mekolichick*, see note 17, *supra*.



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untimely, petition for rehearing in the face of the conflict with *National Lead*. And in any event, this is surely not the kind of injustice that warrants overriding the policy of finality of adjudication. What has happened here is commonplace; indeed it arises in every instance where the Court grants certiorari to settle any but the most recent conflict. Perhaps out-of-time action may be justified in some instances where the time interval between a finally decided case and a subsequent contrary decision of this Court is short. But we do not have that situation here, where more than 15 months elapsed between the denial of certiorari in *Ohio Power* (October 17, 1955) and our decisions in *Allen-Bradley* and *National Lead* (January 22, 1957), and where in the interval the Court had twice denied rehearing, with the very factors before it which are now said to justify its present action. If the rules of finality are to have real significance in this Court, I submit that by every token the taxpayer here was entitled to believe that its case had been irrevocably closed.

There is an additional reason why this case should not now be reopened. Had this case come to us from the Tax Court, our Court would have had no power to do what it has done, it being well established that when certiorari has been denied the power of this Court to affect decisions of the Tax Court ends with the denial of a petition for rehearing, or, where no such petition has been filed, with the running of the 25-day period within which rehearing may be sought. Internal Revenue Code of 1939, § 1140, now Internal Revenue Code of 1954, § 7481 (2)(B); *R. Simpson & Co. v. Commissioner*, 321 U. S. 225; and see *Helvering v. Northern Coal Co.*, 293 U. S. 191. It is an odd circumstance that the Court should have reaffirmed this rule only a few weeks ago. *Lasky v. Commissioner*, 352 U. S. 1027. The undesirability of according different treatment to tax cases arising from different

sources scarcely requires comment. For me, this consideration alone is a sufficient reason for denying relief in this case.

For the reasons given I must dissent. I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed in this Court.

UNITED STATES *v.* UNION PACIFIC  
RAILROAD CO.

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

No. 97. Argued January 23, 1957.—Decided April 8, 1957.

By § 2 of the Act of July 1, 1862, 12 Stat. 489, the United States granted to a railroad company "the right of way through the public lands . . . for the construction of said railroad and telegraph line." By § 3 it granted to the railroad company every alternate section of "public land" on each side of the railroad; and provided that "all mineral lands shall be excepted from the operation of this act." *Held*: The grant by § 2 of the "right of way" through the public lands did not convey to the railroad company the title to oil and gas deposits underlying the right of way, and the railroad company may not remove or dispose of such deposits. Pp. 113–120.

(a) On the face of the Act, it would seem that the use of the words "right of way" describes a lesser interest than the grant of "public land." P. 114.

(b) The right of way was granted "for the construction of said railroad and telegraph line," and that purpose is not fulfilled when the right of way is used for other purposes. P. 114.

(c) Whatever rights may have been included in the grant of a "right of way," mineral rights were excepted by reason of the proviso in § 3 excepting "mineral lands," which extends to the entire Act. Pp. 114–115.

(d) The reservation of the mineral resources of these public lands for the United States was in keeping with the policy of the times. Pp. 115–116.

(e) To hold that, when Congress granted only a "right of way" and reserved "all mineral lands," it nonetheless endowed the railroad company with untold riches underlying the railroad, would run counter to the established rules that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that any doubts are resolved in favor of the Government, not against it. P. 116.

(f) That the administrative system by which the exception of "mineral lands" was administered in relation to the lands granted by § 3 is inappropriate to the right of way granted by § 2 does not



make the exception of "mineral lands" in § 3 inapplicable to the right of way granted by § 2. Pp. 116-118.

(g) *Northern Pacific R. Co. v. Townsend*, 190 U. S. 267; *Clairmont v. United States*, 225 U. S. 551; and *Great Northern R. Co. v. United States*, 315 U. S. 262, distinguished. Pp. 118-119. 230 F. 2d 690, reversed.

*Solicitor General Rankin* argued the cause for the United States. With him on the brief were *Assistant Attorney General Morton*, *Roger P. Marquis* and *Fred W. Smith*.

*William W. Clary* argued the cause for respondent. With him on the brief were *Louis W. Myers*, *Warren M. Christopher*, *John U. Loomis*, *W. R. Rouse* and *J. H. Anderson*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an action brought in the District Court by the United States to enjoin the Union Pacific Railroad Company from drilling for oil and gas on "the right of way" granted it by § 2 of the Act of July 1, 1862, 12 Stat. 489, 491, for the construction of a railroad and telegraph line. The claim of the United States is that "the right of way" granted by the Act is not a grant that includes mineral rights. The District Court's decision was adverse to the United States. 126 F. Supp. 646. The Court of Appeals affirmed. 230 F. 2d 690. The case is here on a petition for a writ of certiorari which we granted in view of the public importance of the question presented. 352 U. S. 818.

The "right of way" which was granted by § 2 of the Act was "for the construction of said railroad and telegraph line." As an aid to the construction of the railroad, "every alternate section of public land" on each side of the road was also granted. § 3. Section 3 further provided "That

all mineral lands shall be excepted from the operation of *this act* . . . ." (Italics added.)

On the face of the Act it would seem that the use of the words "the right of way" describes a lesser interest than the grant of "public land." Moreover, this right of way was granted Union Pacific "for the construction of said railroad and telegraph line." § 2. That purpose is not fulfilled when the right of way is used for other purposes. See *Northern Pacific R. Co. v. Townsend*, 190 U. S. 267, 271. It would seem that, whatever may be the nature of Union Pacific's interest in the right of way, drilling for oil on or under it is not a railroad purpose within the meaning of § 2 of the Act.<sup>1</sup>

It would also seem from the words of the Act that, whatever rights may have been included in "the right of way," mineral rights were excepted by reason of the proviso in § 3 excepting "mineral lands." The exception of "mineral lands," as applied to the right of way, may have been an inept way of reserving mineral rights. The right of way certainly could not be expected to take all the detours that might be necessary were it to avoid all lands containing minerals. But that the proviso applies to § 2 as well as to § 3 is plain. While the grant of "the right of way" is made by § 2 and the exception of "mineral lands" is contained in § 3, the exception extends not merely to § 3 but to the entire Act.

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<sup>1</sup> To that effect are administrative decisions, by officers of the Interior Department dealing with comparable statutes, that a congressional grant of land "for railroad purposes" does not carry the right to drill for oil or to remove solid minerals. *Missouri, Kansas & Texas R. Co.*, 33 L. D. 470 (Act of July 26, 1866, 14 Stat. 289); *Missouri, Kansas & Texas R. Co.*, 34 L. D. 504 (Act of February 28, 1902, 32 Stat. 43); *Use of Railroad Right of Way for Extracting Oil*, 56 I. D. 206 (Act of March 3, 1875, 18 Stat. 482); *Northern Pacific R. Co.*, 58 I. D. 160 (Act of July 2, 1864, 13 Stat. 365).

It is said that the exception in § 3 was in terms made applicable to the entire Act merely to leave no doubt that land grants to other railroads, contained in §§ 9, 13 and 14 of the Act, were not to include "mineral lands." But the exception in § 3 is not limited merely to a few enumerated sections any more than it is limited to § 3. The proviso makes sense if it is read to reserve all mineral rights under the right of way, as well as to reserve mineral lands in the alternate sections of public land granted in aid of the construction of the road. Indeed, we can see no other way to construe it if it is to apply, as it does, not merely to § 3, but to the entire Act, including § 2 which grants the right of way.

The reservation of the mineral resources of these public lands for the United States was in keeping with the policy of the times. The gold strike in California in 1848 made the entire country conscious of the potential riches underlying the western part of the public domain. The method of asserting federal control over mineral lands was not finally settled until the Act of July 26, 1866, 14 Stat. 251, prescribed the procedure by which mineral lands could be acquired. But meanwhile—from 1849 to 1866—the federal policy was clear. As the Court said in *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, the federal policy during this interim period was to reserve mineral lands, not to grant them. The policy was found to be so "uniform" in this interim period (*id.*, at 175) that the Court, in construing an 1853 Act governing public lands in California, held that a grant to California did not include mineral lands, although they were not specifically excepted.

The case is much stronger here, for "mineral lands" are specifically reserved. It is, therefore, wholly in keeping with the federal policy that prevailed in 1862, when the present right of way was granted, to construe "mineral



lands" to include mineral resources under the right of way. For it was the mineral riches in the public domain that Congress sedulously sought to preserve until it formulated the special procedure by which all mineral resources were to be administered. In *United States v. Sweet*, 245 U. S. 563, Mr. Justice Van Devanter, our foremost expert on public land law, discussed this policy at length and cited in support of this federal policy the very Act we have under consideration in the present case. *Id.*, p. 569, n. 1. And see *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, 317-318. We would have to forget history and read legislation with a jaundiced eye to hold that when Congress granted only a right of way and reserved all "mineral lands" it nonetheless endowed the railroad with the untold riches underlying the right of way. Such a construction would run counter to the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it. *Caldwell v. United States*, 250 U. S. 14, 20-21. These are the reasons we construe "mineral lands" as used in § 3 of the Act to include mineral rights in the right of way granted by § 2.

The system which Congress set up to effectuate its policy of reserving mineral resources in the alternate sections of public land granted by § 3 was by way of an administrative determination, prior to issuance of a patent, of the mineral or nonmineral character of the lands. Patents were not issued to land administratively determined to constitute mineral lands. And, the administrative determination was final. *Burke v. Southern Pacific R. Co.*, 234 U. S. 669. Such an administrative system was obviously inappropriate to the right of way granted by § 2. The land needed for the right of way was

not acquired through the issuance of a patent, but by the filing of a map showing the definite location of the road, followed by its actual construction. *Northern Pacific R. Co. v. Townsend*, *supra*, at 270.

A provision for prior administrative determination of which land in the path of the right of way constituted mineral lands would have been inappropriate for another reason. As already noted, the route of the railroad had to be determined by engineering considerations which could not allow for the extensive detours that the avoidance of land containing minerals would make necessary.

Because the administrative system, by which the exception of "mineral lands" was administered in relation to the lands granted by § 3, is inappropriate to the right of way granted by § 2, we are urged to conclude that the exception of "mineral lands" in § 3 was not intended to apply to § 2. But, construing the grant in § 2 favorably to the Government, as we must, we cannot conclude that Congress meant the policy it expressed, by excepting "mineral lands" in § 3, to be inapplicable to § 2 in the face of its admonition that the exception is applicable to the entire Act. Nor can we conclude that, because the administrative system, by which mineral resources in the grant of land under § 3 were reserved, was inappropriate to § 2, Congress did not intend appropriate measures to reserve minerals under the right of way granted by § 2. We cannot assume that the Thirty-seventh Congress was profligate in the face of its express purpose to reserve mineral lands.

To be sure, Congress later on designed a more precise and articulated system for the separation of subsoil rights from the other rights in the western lands. See, for example, the Act of March 3, 1909, 35 Stat. 844. It would have been better draftsmanship, if, in referring to § 2, Congress had used the words "mineral rights" instead of

"mineral lands." Yet it will not do for us to tell the Congress "We see what you were driving at but you did not use choice words to describe your purpose."

Some reliance is placed on a line of decisions of the Court which describe the rights of way under early railroad land grants as limited fees. These cases were, for the most part, controversies between the railroad and third persons and involved problems so remote from the present one as to be inapt as citations. For example, the leading case raised the question whether third parties could establish valid homesteads on the railroad right of way after the right of way had been located and the tracks laid. *Northern Pacific R. Co. v. Townsend*, *supra*. An answer in favor of the railroad on the ground that it had a limited fee could hardly be an adjudication concerning the ownership of mineral resources underlying the right of way in a contest between the United States and the railroad. In only one of the cases cited was the United States a party; and in that case the question did not involve mineral rights but jurisdiction over a person transporting liquor. If the right of way was Indian Country when it crossed an Indian reservation, then a violation of the liquor laws had occurred. The Court held that the right of way was not Indian Country and said in passing that the right of way constituted the fee in the land. *Clairmont v. United States*, 225 U. S. 551, 556. We do not stop to examine the other cases<sup>2</sup> using

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<sup>2</sup> *Railroad Co. v. Baldwin*, 103 U. S. 426 (a contest between the owner of the right of way and a settler who took possession before the line was definitely located); *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114 (a contest between the owner of the right of way and one who claimed the land under a grant from the State); *New Mexico v. United States Trust Co.*, 172 U. S. 171 (an effort by the State to tax the right of way and structures on it in face of an exemption granted by Congress); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190 (whether the grant of the right of way was qualified by



like language to describe the railroad's right of way, because in none of them was there a contest between the United States and the railroad-grantee over any mineral rights underlying the right of way. The most that the "limited fee" cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes.

Great reliance is placed on *Great Northern R. Co. v. United States*, 315 U. S. 262, for the view that the grant of a right of way in the year 1862 was the grant of a fee interest. In that case we noted that a great shift in congressional policy occurred in 1871: that after that period only an easement for railroad purposes was granted, while prior thereto a right of way with alternate sections of public land along the right of way had been granted. In the latter connection we said, "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." *Id.*, at 278. But we had no occasion to consider in the *Great Northern* case the grant of a right of way with the reservation of "mineral lands." The suggestion that a right of way may at times be more than an easement was made in an effort to distinguish the earlier "limited fee" cases. To complete the distinction, Mr. Justice Murphy with his usual discernment added, "None of the cases involved the problem of rights to subsurface oil and minerals." *Id.*, at 278.

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a later Act of Congress); *Rio Grande W. R. Co. v. Stringham*, 239 U. S. 44 (a contest between the owner of the right of way and the owner of a placer patent); *Choctaw, O. & G. R. Co. v. Mackey*, 256 U. S. 531 (an effort of the owner of the right of way to get an exemption from local taxation for a street improvement that enhanced the value of the railroad use); *Missouri, K. & T. R. Co. v. Oklahoma*, 271 U. S. 303 (the right of the owner of the right of way to compensation for damage suffered by the construction of crossings).

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The latter statement goes to the heart of the matter. There are no precedents which give the mineral rights to the owner of the right of way as against the United States. We would make a violent break with history if we construed the Act of 1862 to give such a bounty. We would, indeed, violate the language of the Act itself. To repeat, we cannot read "mineral lands" in § 3 as inapplicable to the right of way granted by § 2 and still be faithful to the standard which governs the construction of a statute that grants a part of the public domain to private interests.

*Reversed.*

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

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

This is a suit by the United States to restrain respondent railroad company from removing oil and gas from the land forming respondent's right of way and to quiet title to those mineral deposits in the United States. The controversy arises out of the Act of July 1, 1862, 12 Stat. 489, the purpose of which is described by its title "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military, and Other Purposes." The Government claimed that § 2 of that Act, in granting respondent's predecessor in title "the right of way through the public lands" for the construction of a railroad, did not vest the railroad with any interest in the underlying minerals. The District Court for the District of Wyoming granted judgment for respondent. It held that the Act of 1862 "granted to Union Pacific a fee simple determinable, sometimes called a base, qualified or limited fee,

of the lands contained within the right of way, subject only to an implied condition of reverter in the event that Union Pacific ceases to use the right of way," and that this gave Union Pacific sole right to the underlying minerals, which had not been reserved by the United States. 126 F. Supp. 646. The Court of Appeals for the Tenth Circuit affirmed this judgment. 230 F. 2d 690.

Section 2 of the Act of 1862 provides:

*"And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

As additional aid toward construction of the line, § 3 granted the railroad five alternate sections of public land per mile on each side of the road, with the qualification that "all mineral lands shall be excepted from the operation of this act." And §§ 5 and 11 provided for the issuance to the company, upon its completion of a prescribed number of miles of track, of United States bonds of an aggregate value of not less than \$16,000 nor more than \$48,000 per mile, depending on the difficulty of the ter-



rain. Two years later, Congress amended the Act to double the number of alternate sections of land granted in aid of construction, 13 Stat. 356.

This Act of 1862 was one of a series of statutes providing assistance to individually named railroads to promote their construction. The Act of July 2, 1864, 13 Stat. 365, gave an even greater amount of land to the Northern Pacific Railroad Company, and in 1866 other Acts were passed for the benefit of the St. Joseph and Denver City Railroad Company, 14 Stat. 210; the Kansas and Neosho Valley Railroad Company, 14 Stat. 236; the California and Oregon Railroad Company, 14 Stat. 239; the southern branch of the Union Pacific Company, 14 Stat. 289; and the Atlantic and Pacific Railroad Company, 14 Stat. 292. Each of these statutes contained a grant substantially identical with that made by § 2 of the Act of 1862, the object of our immediate concern.

Section 2 was, on the face of it, a specific grant contained in a specific statute designed to achieve a specific, contemporaneous goal—construction of a railroad. Unlike constitutional provisions such as the Due Process Clause or enactments such as the Sherman Law that embody a felt rather than defined purpose and necessarily look to the future for the unfolding of their content, making of their judicial application an evolutionary process nourished by relevant changing circumstances, a specific grant like § 2 does not gain meaning from time. Its scope today is what it was in 1862, and the judicial task is to ascertain what content was conveyed by that section in 1862. Did the Thirty-seventh Congress grant the entire present interest, the fee, in the land forming the right of way, or did it convey merely a right of passage, an easement, retaining for the United States all other rights in the land, including the right to its minerals?

In a line of decisions going back to *Railroad Co. v. Baldwin*, 103 U. S. 426, this Court has consistently recog-

nized that the Act of 1862 and its companion Acts gave to the railroads the entire present interest in the public lands allocated to them for a right of way. In the *Baldwin* case, the Court dealt with the grant of the right of way to the St. Joseph & Denver Railroad under one of the 1866 statutes, 14 Stat. 210. It stated that

“ . . . the grant of the right of way . . . contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms.” *Id.*, at 429-430.

A similar grant of the right of way, in an 1866 grant to the southern branch of the Union Pacific Company, 14 Stat. 289, was repeatedly characterized in *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, as being “absolute in terms, covering both the fee and possession.” *Id.*, at 117. In *New Mexico v. United States Trust Co.*, 172 U. S. 171, 181-182, the Court acknowledged that the term “right of way” had two distinct meanings: (1) a “mere right of passage”; and (2) “*that strip of land which railroad companies take upon which to construct their roadbed.*” That is, the land itself—not a right of passage over it.” The Court held that the right of way granted to the Atlantic & Pacific Railroad by another of the 1866 Acts, 14 Stat. 292, was of the latter class, relying on the *Roberts* case.

*Northern Pacific R. Co. v. Townsend*, 190 U. S. 267, made even more plain the Court’s view that when Congress in the 1860’s granted a railroad right of way it conveyed the entire present interest in the strip of land. This was a suit by the railroad against one whose predecessors in title had, after the road was constructed, begun

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adverse possession of part of the right of way and had subsequently obtained homestead patents to the section of land over which the road passed. Mr. Justice White began the Court's opinion by stating:

"At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preëmption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions." *Id.*, at 270.

The Court then went on to hold that the right of way granted by the Act of 1864 gave the railroad "a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" and that to allow private parties to acquire part of this land by adverse possession would defeat Congress' plainly manifested desire that the entire right of way continue to be the grantee's so long as the railroad was maintained.

All later opinions of the Court concerning the railroad statutes of the '60's express an undeviating adherence to the scope given to this grant as announced by the *Baldwin* case, *supra*, in 1881. *E. g.*, *Northern Pacific R. Co. v. Ely*, 197 U. S. 1, 6; *Clairmont v. United States*, 225 U. S. 551, 556; *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 198; *Missouri, K. & T. R. Co. v. Oklahoma*, 271 U. S. 303, 308.



This consistent course of construction is bound to give the impression that Congress was rather free-handed in its disposition of the public domain ninety years and more ago. And so it was. We said in *Great Northern R. Co. v. United States*, 315 U. S. 262, 273:

"Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. Typical were the Illinois Central Grant, Act of September 20, 1850, c. 61, 9 Stat. 466; Union Pacific Grant of July 1, 1862, c. 120, 12 Stat. 489; Amended Union Pacific Grant, Act of July 2, 1864, c. 216, 13 Stat. 356; and Northern Pacific Grant, Act of July 2, 1864, c. 217, 13 Stat. 365. This last grant was the largest, involving an estimated 40,000,000 acres. In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267. Cf. *Missouri, K. & T. Ry. Co. v. Roberts*, 152 U. S. 114." <sup>1</sup>

During this period "there passed into the hands of western railroad promoters and builders a total of 158,293,000 acres, an area almost equaling that of the New England states, New York and Pennsylvania combined." "Land Grants," 9 *Encyclopedia of the Social Sciences* (1935) 32, 35. The powerful Thaddeus Stevens, himself the proponent of the Northern Pacific bill, spoke with authoritative truthfulness when he said of the House Committee that approved it: "the committee was willing to give to the company almost any amount [of land] that it thought it could make use of . . . ." in order to induce

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<sup>1</sup> The last three sentences quoted were a footnote to the first sentence.

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construction of the railroad. Cong. Globe, 38th Cong., 1st Sess. 1698.<sup>2</sup>

This "lavish" congressional policy brought results, for in 1869 the much desired transcontinental route was completed. With realization of the goal, however, the mood

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<sup>2</sup> When striving to understand the basis for this bountiful congressional policy, it is helpful to recall what this Court said in *United States v. Union Pacific R. Co.*, 91 U. S. 72, 79-80:

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. . . . It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. . . .

". . . Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable."

These compelling considerations led Congress to offer the Union Pacific Company what Mr. Chief Justice Waite called "extraordinary inducements." *Sinking-Fund Cases*, 99 U. S. 700, 723.

of uncritical enthusiasm toward railroad enterprises began to veer. The Court summarized the consequences of this shift in popular feeling in the *Great Northern* case:

"This policy [of "lavish grants from the public domain"] incurred great public disfavor, which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:

"*Resolved*, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.' Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. But, to encourage development of the Western vastnesses, Congress had to grant rights to lay track across the public domain, rights which could not be secured against the sovereign by eminent domain proceedings or adverse user. For a time special acts were passed granting to designated railroads simply 'the right of way' through the public lands of the United States. That those acts were not intended to convey any land is inferable from remarks in Congress by those sponsoring the measures. . . .

"The burden of this special legislation moved Congress to adopt the general right of way statute now before this Court. . . ." 315 U. S., at 273-275 (footnotes omitted).

The General Right of Way Statute of 1875, 18 Stat. 482, was significantly different from the Act of 1862 and its companions. It granted the railroads neither alter-



nate sections of public land nor direct financial subsidy. The right of way provided for was half the width of that given by the 1862 and 1864 laws. And § 2 of the Act stated that any railroad whose right of way ran through a canyon, pass or defile "shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located . . . ." Moreover, § 4 required the recipient of each right of way to note its location on the plats in the local land office, and provided that "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way . . . ."

Detailed study of the history of federal right of way legislation led us to conclude in the *Great Northern* case that a right of way granted by the 1875 Act was an easement and not a limited fee.<sup>3</sup> From this it followed that the railroad had no right to the underlying minerals. Basic to the Court's characterization of the right of way as an easement was the recognition that "Since it [the General Right of Way Statute] was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches." *Id.*, at 275. The change in congressional policy was found to be reflected in the language of the statute, which strongly suggested the grant of a right of use and occupancy only. Especially persuasive was the provision of § 4 that "lands over which such right of way

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<sup>3</sup> The *Great Northern* decision departed from the Court's earlier construction of the General Right of Way Statute in *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44. The *Stringham* case, written by Mr. Justice Van Devanter, held, on the basis of the cases dealing with pre-1871 legislation, that right of way granted by the 1875 Act "is . . . a limited fee, . . . and carries with it the incidents and remedies usually attending the fee." *Id.*, at 47.

shall pass shall be disposed of subject to such right of way." *Id.*, at 271, 278. Legislative history and substantially contemporaneous administrative construction confirmed this view.<sup>4</sup> These strong differentiating factors led the Court to conclude that the line of cases interpreting the lavish pre-1871 grants was not controlling. But no doubt was cast upon the scope to be attributed to those decisions with respect to the Act of 1862 and its associated measures: "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act. And, in none of those acts

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<sup>4</sup> In explaining why the House Public Lands Committee had inserted a clause similar to § 4 of the 1875 Act in a special right of way bill considered in 1872, Congressman Slater stated:

"The point is simply this: the land over which this right of way passes is to be sold subject to the right of way. It simply provides that this right of way shall be an incumbrance upon the land for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.

"Mr. Speer, of Pennsylvania. It grants no land to any railroad company?

"Mr. Slater. No, sir." Cong. Globe, 42d Cong., 2d Sess. 2137.

And in the House debate on the 1875 Act itself, Congressman Hawley said:

"It simply and only gives the right of way. It merely grants to such railroad companies as may be chartered the right to lay their tracks and run their trains over the public lands; it does nothing more." 3 Cong. Rec. 407.

The earliest administrative construction of the 1875 Act plainly stated that the railroad received an easement rather than a fee. The Land Department Circular of January 13, 1888, said:

"The act of March, 3, 1875, [*sic*] is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States." 12 L. D. 423, 428.

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was there any provision comparable to that of § 4 of the 1875 Act . . . ." *Id.*, at 278.

The significance of the imposing body of opinions culminating in the *Townsend* case is not diminished if one acknowledges, as was done in *Great Northern*, that they did not explicitly decide the rights to minerals. As we have seen, in case after case this Court determined the railroad's interest in the right of way granted by the pre-1871 laws to be a limited fee. This term has a settled meaning—it denotes present ownership of the entire interest in land, an ownership that will continue so long as a stated contingency, leading to a reverter, does not occur. The Court's repeated use of this highly technical term was not inadvertent. In the *United States Trust Co.* case, for example, in reply to the contention that the *Roberts* case was not controlling because the distinction between an easement and a fee had not been presented there, the Court said:

" . . . The difference between an easement and the fee would not have escaped his [Mr. Justice Field's] attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference." 172 U. S., at 182.

The Court then went on to hold that one of the consequences of the railroad's fee interest in the right of way, *i. e.*, its ownership of "the land itself," was exemption from state taxation of improvements erected thereon. Another of those consequences, of course, is ownership of the minerals underlying the right of way. Certainly this was acknowledged in *Townsend* when the Court held that the land forming the right of way was no longer public land and that, consequently, the Land Department was "without authority to convey rights therein" and those claiming under government patents "acquired no interest



in the land within the right of way." See *supra*, p. 124. If mineral rights had not been included in the fee, the patents issued by the United States would have conveyed those rights. The legal consequence that mineral rights are embraced in a grant that conveys a limited fee governed the judgment of two federal courts that were called upon to construe a similar grant made to the Illinois Central by the Act of 1850. *United States v. Illinois Central R. Co.*, 89 F. Supp. 17; affirmed, 187 F. 2d 374.<sup>5</sup> To argue that the "limited fee" that the long, unbroken line of cases found in the right of way grant in these enactments of the '60's granted a fee merely in the surface is to palter with language and with our decisions. "Surface" could not, of course, mean merely the area that is seen by the eye. To say that it means the visual area and an indeterminate depth—x inches or x feet—necessary for support is to ask the Court to rewrite legislation and to cast upon it administrative tasks in order to accomplish a policy that seems desirable a hundred years after Congress acted on a different outlook. No wonder that this Court did not accept such an inadmissible retrospective reading of a statute when the Government pressed it on us in the *Great Northern* case. See Argument for the United States, 315 U. S., at 269.

The *Townsend* case also serves to refute the suggestion that the railroad in its use of the right of way is confined to what in 1957 is narrowly conceived to be "a railroad purpose." *Townsend* flatly reaffirmed what its predecessors stated—that the grant should be construed "as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad

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<sup>5</sup> Apparently this has always been respondent's understanding of the right of way grant, for the District Court found that "It has long been the practice of the defendant when entering into leases of portions of its right of way to reserve the right to retake possession for mineral operations."

right of way." 190 U. S., at 271. The Court recognized that the land could revert to the grantor only in the event that it was used in a manner inconsistent with the operation of the railroad, a situation contrary to that found by the District Court in this case. Had Congress desired to make a more restrictive grant of the right of way, there would have been no difficulty in making the contingency for the land's reversion its use for any purpose other than one appropriately specified. Cf. *Caldwell v. United States*, 250 U. S. 14; *Los Angeles & Salt Lake R. Co. v. United States*, 140 F. 2d 436. But, as we have seen, the congressional policy in 1862 was one of liberality, prodigality as it later came to appear, in order to encourage the construction of the railroad. It is inconceivable that the Congress that made generous loans to the Union Pacific and granted it enormous areas of land for resale at substantial gain would have balked at its profitable resort to the minerals underneath the right of way in a manner completely consistent with the satisfactory operation of the railroad. Further support for this view is provided by § 3 of the 1864 amendment to the Act before us. It gave the railroad power to take by eminent domain a two-hundred-foot right of way over privately owned land, and demonstrates that, in granting four-hundred-foot strips of public land to Union Pacific and Northern Pacific, Congress pursued a conscious policy of providing these railroads with more land than was necessary merely to provide a site for their construction. As the *Baldwin* case recognized, "The right of way for the whole distance of the proposed route was a very important part of the aid given." 103 U. S., at 430. Out of respect for the generous policy embodied in pre-1871 legislation, this Court has until today recognized the railroad's right to enjoy its fee interest in the right of way. See *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 275-276.

It is said that § 3's exception of "mineral lands" from its grant of alternate sections of public land may also have been an inept way of reserving the rights to the minerals underneath the right of way granted by § 2. This attributes to the 1862 Congress a desire to convey only the fee interest in the surface. Such attribution contradicts the scheme both of the Act itself and of subsequent public land legislation. The Act plainly contemplated, and was interpreted to provide, an administrative determination of the mineral character of the land granted by § 3 prior to the issuance of the patent. Land found to be "mineral" was not patented but was replaced by other land. If minerals were subsequently found on patented land, they were held to belong to the railroad, and not to the Government, *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, notwithstanding § 3's exception of "mineral lands." Since this exception did not reserve the right to minerals in land that passed under § 3 itself, it is difficult to understand how it could have reserved the right to minerals in land that passed as a right of way under § 2. The fact that the exception was made applicable to the entire Act may be explained without distorting § 2. Sections 9, 13, and 14 of the 1862 Act authorize construction of certain other railroads "upon the same terms and conditions in all respects as are provided in this act for the construction of the" Union Pacific. By amending § 3's proviso to cover the entire Act, Congress left no doubt that the exception of mineral lands also applied to the land grants made to those other railroads.

If Congress had reserved the right to the minerals underlying the thousands of miles of right of way granted by its transcontinental railroad legislation of 1862, 1864 and 1866, it might reasonably be expected that it would have manifested some consciousness of this reservation when, in the Act of July 26, 1866, 14 Stat. 251, it finally settled upon a general federal mineral policy. This is



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particularly true in view of the fact that the policy determined was not one of zealously reserving the minerals for the Government but one of making the country's mineral riches readily available for immediate development by private interests. Section 1 of the Act provided "That the mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation . . . ." Other sections set forth the conditions for acquiring mineral lands. Yet nowhere in the Act is there intimation of government ownership of the mineral rights now found, for the first time, to have been reserved by Congress in its grants to the railroads in the 1860's.

This failure of Congress to provide for disposition of the minerals lying beneath the right of way may not fairly be attributed to oversight. No congressional policy of reserving mineral rights from public land grants was in existence in the 1860's. Such a policy did not begin to evolve until the last decade of the nineteenth century, when Congress reserved the mineral rights to certain lands sold to cities for cemetery and park purposes, 26 Stat. 502. And it received its first general application in the Act of March 3, 1909, 35 Stat. 844, which permitted agricultural entrymen on public lands subsequently found to contain coal deposits to obtain patents to the land, with coal rights reserved to the United States. The novelty of thus separating surface ownership from ownership of the subsoil was made plain by a colloquy in the House debate on this Act:

"Mr. Stephens of Texas. I desire to know the difference between this law which the gentleman proposes and the law as it now exists. What change is proposed, and why?"

"Mr. Mondell [of Wyoming, Chairman of the House Public Lands Committee]. . . . This bill simply provides that in any case where, subsequent

to the location or the entry, the character of the land has been called into question the entryman may, if he so elect, accept a limited patent. It is the first legislation before Congress providing for a limited patent, or a patent reserving the mineral. . . .

"Mr. Stephens of Texas. Is it not a fact that valuable minerals are reserved now to the Government?

"Mr. Mondell. No; that is not true. The patent having issued, the patent carries everything in the land with it . . . .

"In other words, the patents issued by the Government of the United States heretofore have been patents in fee." 43 Cong. Rec. 2504.<sup>6</sup>

In 1910 the Act was extended to provide for issuance of patents to lands that were known to contain coal at the time they were settled for agricultural purposes. 36

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<sup>6</sup> The executive officers who sponsored passage of the 1909 Act recognized that they were advocating a new policy. Secretary of the Interior Garfield's 1907 report to the President stated:

" . . . I can not urge too strongly the need of a change in the policy hitherto adopted by the Government for the disposition of the coal land.

" . . . The experience in other sections of our country and abroad leads me to believe that the best possible method . . . is for the Government to retain the title to the coal, and to lease under proper regulations which will induce development when needed, prevent waste, and prevent monopoly. Such a method permits the separation of the surface from the coal and the unhampered use of the surface for purposes to which it may be adapted." Report of the Secretary of the Interior 15 (1907), H. R. Doc. No. 5, 60th Cong., 1st Sess. 15.

President Theodore Roosevelt's special message to Congress of January 22, 1909, recommended: "Rights to the surface of the public land should be separated from rights to forests upon it and to minerals beneath it, and these should be subject to separate disposal." 15 Messages and Papers of the Presidents 7266.

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Stat. 583. The Surface Patent Act of 1914, 38 Stat. 509, applied the statutory policy with respect to coal to all withdrawn non-metallic mineral lands. This Act has been described as "perhaps the first serious attempt, not locally limited, to sever the surface title from the mineral title in disposing of the public domain." Morrison and De Soto, *Oil and Gas Rights*, 508. It was followed by the Stock-Raising Homestead Act of 1916, 39 Stat. 862, which reserved all minerals to the United States while providing for the granting of surface patents. Significantly, in the comprehensive Mineral Leasing Act of 1920, 41 Stat. 437, Congress did what it had not done in 1866—it set forth a plan for the development of the minerals that the 1909–1916 Acts had reserved for the United States.

The Thirty-seventh Congress was confronted with what it deemed the pressing need to stimulate the rapid construction of a transcontinental railroad. In the Act of 1862 it offered the Union Pacific luring incentives to attempt this task, which "many intelligent persons considered insurmountable." *United States v. Union Pacific R. Co.*, 91 U. S. 72, 80. The specific grant contained in § 2 has long been interpreted as conveying the entire present interest in the land forming the right of way. This body of opinions, written by members of the Court more steeped in public land law and more sensitive to the circumstances of the times than we can possibly be, seems to me to constitute too weighty a construction of § 2 to be now overturned. It is of course the Court's duty to enforce the will of Congress once that has been reasonably ascertained from the language in which Congress expressed its will. But the ascertainment of what Congress meant from what it said, in legislation like that before the Court, does not gain clarity with time so as to displace the uniform construction put by this Court from the beginning, almost eighty years ago, on what Congress said. The Court cannot in 1957 retrieve what Congress



granted in 1862. The hindsight that reveals the Act as lavish or even profligate ought not to influence the Court to narrow the scope of the 1862 grant by reading it in the light of a policy that did not mature until half a century thereafter. As the Court said in a very early construction of the Act before us: "No argument can be drawn from the wisdom that comes after the fact." *United States v. Union Pacific R. Co.*, *supra*, at 81.

I would affirm the judgment of the Court of Appeals.

BENZ ET AL. v. COMPANIA NAVIERA  
HIDALGO, S. A.

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

No. 204. Argued March 6, 1957.—Decided April 8, 1957.

The Labor Management Relations Act of 1947 does not apply to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port, though American unions to which the foreign seamen did not belong participated in the picketing; and the Act therefore does not preclude a remedy under state law for such damages. Pp. 138-147.

(a) Congress could have made the Labor Management Relations Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within territorial waters of the United States; but Congress did not do so. Pp. 142-147.

(b) The cases of *Sailors' Union of the Pacific*, 92 N. L. R. B. 547, and *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 46 N. W. 2d 94, are inapposite to the question for decision here. P. 143, n. 5.

(c) An intent on the part of Congress to change the contractual agreement made by the foreign shipowner and the foreign seamen in this case cannot be read into the Labor Management Relations Act. Pp. 146-147.  
233 F. 2d 62, affirmed.

*Kneland C. Tanner* argued the cause for petitioners. With him on the brief was *Richard R. Carney*.

*John D. Mosser* argued the cause for respondent. With him on the brief was *Lofton L. Tatum*.

MR. JUSTICE CLARK delivered the opinion of the Court.

While the petitioners in this diversity case present several questions, the sole one decided is whether the Labor Management Relations Act of 1947<sup>1</sup> applies to a

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<sup>1</sup> 61 Stat. 136, 29 U. S. C. § 141.

controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port. We decide that it does not, and therefore do not reach other questions raised by the parties.

The S. S. *Riviera* on September 3, 1952, sailed into harbor at Portland, Oregon, for repairs, to load a cargo of wheat, and to complete an insurance survey. It was owned by respondent, a Panamanian corporation, and sailed under a Liberian flag. The crew was made up entirely of nationals of countries other than the United States, principally German and British. They had agreed to serve on a voyage originating at Bremen, Germany, for a period of two years, or until the vessel returned to a European port. A British form of articles of agreement was opened at Bremen. The conditions prescribed by the British Maritime Board were incorporated into the agreement, including wages and hours of employment, all of which were specifically set out. The crew further agreed to obey all lawful commands of the Master of the *Riviera* in regard to the ship, the stores, and the cargo, whether on board, in boats, or on shore.

On or about September 9, 1952, the members of the crew went on strike on board the vessel and refused to obey the orders of the Master. They demanded that their term of service be reduced, their wages be increased, and more favorable conditions of employment be granted.<sup>2</sup>

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<sup>2</sup> The demands were first transmitted to the Master on September 7, 1952, by a person identifying himself as a delegate of the Sailors' Union of the Pacific. None of the crew belonged to that union. At 3 a. m. on September 8, 1952, the same party and some of the crew members called on the Master in his cabin. They demanded that he come to the crew's quarters and bargain with them on wages and conditions on the ship. This demand was refused. While claim was made that filthy conditions existed aboard and contaminated food was served, the court, after hearing evidence and personally inspecting the vessel, found to the contrary. There is no issue here as to these findings.



They refused to work, demanding their back pay and transportation or its cost to their ports of engagement. The Master told the crew to continue their work or they would be discharged. When they declined to work he discharged them and ordered them to leave the ship, which they refused to do. This situation continued until September 26, 1952, when the striking crewmen left the vessel pursuant to an order of the United States District Court entered in a possessory libel filed by the respondent. The crew had picketed the vessel from September 9, 1952, when the strike began, until September 26, when they left the ship. On September 15, 1952, they had designated the Sailors' Union of the Pacific as their collective bargaining representative. The striking crew or others acting for them continued the picketing from September 26, 1952, until they withdrew the picket line on October 13, 1952. The Sailors' Union of the Pacific began picketing the *Riviera* on October 14 and continued to do so until restrained by an injunction issued in an action for injunctive relief and damages filed against it and its principal representatives by the respondent. Two days later Local 90 of the National Organization of Masters, Mates and Pilots of America set up a picket line at the *Riviera* which was maintained until December 8, 1952. This picketing was stopped by a writ issued against that union and its representatives in the second action for injunction and damages filed by respondent and consolidated here. On December 10, 1952, another picket line was established at the vessel. It was maintained this time by the Atlantic and Gulf Coast District, S. I. U.,<sup>3</sup> until it too was enjoined on December 12 in a third action filed by the respondent in which the prayer likewise was for an in-

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<sup>3</sup> None of the crew were members of any of the three unions involved in the intermittent picketing.

junction and damages. These three cases have been consolidated for consideration here. All of the picketing was peaceful.

The ship sailed in December 1952. In June 1953, the injunction orders were vacated on appeal to the Court of Appeals and were ordered dismissed as moot. The cases were returned to the District Court for trial on the damage claims. 205 F. 2d 944. The ship had not returned to an American port at the time of trial in 1954. At the trial the court found that the purpose of the picketing "was to compel the [respondent] to re-employ" the striking members of the crew for a shorter term and at more favorable wage rates and conditions than those agreed upon in the articles. The court further found that as a result of the picketing the employees of the firms repairing and loading the vessel refused to cross the picket line and the ship was forced to stand idly by without repairs or cargo, all to the damage of respondent. The unions and their representatives contended that the trial court was without jurisdiction because the Labor Management Relations Act had pre-empted the field. However, the trial court entered judgment for damages against the three unions as well as their principal representatives. The judgments were based on a common-law theory that the picketing was for an unlawful purpose under Oregon law. The court found that respondent had no remedy under the Labor Management Relations Act because that Act "is concerned solely with the labor relations of American workers between American concerns and their employees in the United States, and it is not intended to, nor does it cover a dispute between a foreign ship and its foreign crew." The Court of Appeals thought that *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656 (1954), governed, but that Oregon law did not permit recovery against the unions since they were unincor-

porated associations. 233 F. 2d 62.<sup>4</sup> This, in effect, left the judgments standing against the individual representatives of the unions, the petitioners here. We granted certiorari in order to settle the important question of jurisdiction posed. 352 U. S. 889.

It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing.

It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case*, 120 U. S. 1 (1887). The exercise of that jurisdiction is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all. *Cunard S. S. Co. v. Mellon*, 262 U. S. 100 (1923). It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The question here therefore narrows to one of intent of the Congress as to the coverage of the Act.

The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does not

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<sup>4</sup> A cross-petition for certiorari was filed for a review of this question. The petition was denied. *Compania Naviera Hidalgo, S. A., v. Benz*, 352 U. S. 890.



"cover a dispute between a foreign ship and its foreign crew." The Court of Appeals, though not passing on the question, noted that "It may well be that American laws should not be construed to apply, without some more explicit Congressional indication than we are able to find in the National Labor Relations Act, as amended, to situations with as many points of foreign contact as the situation at bar." 233 F. 2d, at 65.

Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws.<sup>5</sup> The whole background of the Act is concerned with

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<sup>5</sup> Petitioners rely on two cases to bolster their argument that the Act applies to a foreign dispute such as the one here. We need only say that these cases are inapposite, without, of course, intimating any view as to their result. First petitioners seek support in *Sailors' Union of the Pacific, AFL and Moore Dry Dock Co.*, 92 N. L. R. B. 547 (1950). That case, however, was brought to the Board by an American employer, the owner of the drydock, claiming that the picketing by an American Sailors' Union was of the drydock and constituted a secondary boycott and therefore an unfair labor practice. The Board in its opinion gave no indication that it felt that the Taft-Hartley Act was intended to apply to a dispute involving employment aboard a foreign vessel. In fact, in a forerunner of that same case, *Compania Maritima Sansoc Limitada*, Case No. 20-RC-809, May 1, 1950, CCH NLRB Decisions, 1950-1951, ¶10,081, a petition to represent employees on a Panamanian vessel manned by foreign seamen, and owned by a Panama corporation, the majority of whose stockholders were citizens of foreign countries, was dismissed on the ground that the internal economy of a vessel of foreign registry and ownership was involved. The Board thus made it clear that it would not assume jurisdiction when a foreign vessel was involved. It did assume jurisdiction in the later dispute because that dispute was between an American employer and an American union.

The second case on which petitioners rely is *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 46 N. W. 2d 94 (1950). There a suit for an injunction was brought by the American owner of a grain elevator in Duluth, Minn., charging an American union and its affiliate with a secondary boycott by picketing, not of a foreign ves-

industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that "the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers." The report declares further that because of the inadequacies of legislation "the *American* workingman has been deprived of his dignity as an individual," and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) H. R. Rep. No. 245, 80th Cong., 1st Sess. 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.

The problem presented is not a new one to the Congress. In the Seamen's Act of March 4, 1915, 38 Stat. 1164, the Congress declared it unlawful to pay a seaman wages in advance and specifically declared the prohibition applicable to foreign vessels "while in waters of the United States." *Id.*, at 1169, as amended, 46 U. S. C. § 599 (e). In *Sandberg v. McDonald*, 248 U. S. 185 (1918), this Court construed the Act as not covering advancements "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment. . . . Had Con-

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sel, but of the grain elevator. Though a Canadian union (affiliated with the American union) was joined as a defendant, the action ran between an American plaintiff-employer and an American defendant-union. There was no claim by the foreign vessel owner against a union.

gress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication." *Id.*, at 195. The Court added that "such sweeping and important requirement is not found specifically made in the statute." *Ibid.* See also *Neilson v. Rhine Shipping Co.*, 248 U. S. 205 (1918). In 1920 Congress amended § 4 of the Seamen's Act of 1915, and granted to every seaman on a vessel of the United States the right to demand one-half of his then earned wages at every port the vessel entered during a voyage. 41 Stat. 1006, 46 U. S. C. § 597. The section was made applicable to "seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." This Court in *Strathearn Steamship Co. v. Dillon*, 252 U. S. 348 (1920), upheld the applicability of the section to a British seaman on a British vessel under British articles. The Court pointed out:

"taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment . . . the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute." *Id.*, at 355.

In 1928, *Jackson v. S. S. Archimedes*, 275 U. S. 463, was decided by this Court. It involved advance payments made by a British vessel to foreign seamen before leaving



Manchester on her voyage to New York and return. It was contended that the advances made in Manchester were illegal and void. That there was "no intention to extend the provisions of the statute," the Court said, "to advance payments made by foreign vessels while in foreign ports, is plain. This Court had pointed out in the *Sandberg* case [*supra*] that such a sweeping provision was not specifically made in the statute . . ." *Id.*, at 470. Soon thereafter several proposals were made in Congress designed to extend the coverage of the Seamen's Act so as to prohibit advancements made by foreign vessels in foreign ports. A storm of diplomatic protest resulted. Great Britain, Italy, Sweden, Norway, Denmark, the Netherlands, Germany, and Canada all joined in vigorously denouncing the proposals.<sup>6</sup> In each instance the bills died in Congress.

And so here such a "sweeping provision" as to foreign applicability was not specified in the Act.<sup>7</sup> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual

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<sup>6</sup> 1 U. S. Foreign Rel.: 1928 at 830-838 (Dept. State 1942); *id.*: 1929 at 1005-1009 (Dept. State 1943); *id.*: 1931 at 808-814 (Dept. State 1946); *id.*: 1932 at 959-960 (Dept. State 1948).

<sup>7</sup> As far back as 1856 this Court was faced with a related problem. In *Brown v. Duchesne*, 19 How. 183 (1857), in construing our patent laws which were silent as to their coverage of foreign ships in our ports, the Court held that Congress had expressed no intention of subjecting the use of improvements on foreign vessels stopping at our ports to our patent laws. In this regard the Court said: "We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish." *Id.*, at 197.

provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.

*Affirmed.*

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

MR. JUSTICE DOUGLAS, dissenting.

The case involves a contest between American unions and a foreign ship. The foreign ship came to Portland, Oregon, to load a cargo of wheat for carriage to India. The crew members were paid about one-third the amount of cash wages that are paid to American seamen on American vessels carrying grain to the Orient. This foreign ship is in competition with those American vessels.

American unions, therefore, have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel. Their interest is in the re-employment of the foreign crew at better wages and working conditions. And they peacefully picketed the foreign vessel to further that interest.

The judgment we sustain today is one in damages against members of the American union who engaged in that peaceful picketing. It is for conduct precisely regulated by the Taft-Hartley Act.

If, as the District Court found, the purpose of the picketing was to prevent the repairing and loading of the foreign vessel, the question then arises whether the peace-

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ful picketing was not a secondary boycott condemned by § 303 (a)(1) of the Act.

If the purpose of the peaceful picketing was to force the foreign vessels to bargain with one of the American unions without any of them being first certified as the representative of the seamen, the question arises whether that was not a violation of § 303 (a)(2) of the Act.

If either § 303 (a)(1) or § 303 (a)(2) was violated, then the injured person may sue in the federal courts for damages, as provided in § 303 (b). The Court bases its decision that the Act is inapplicable on the conclusion that the underlying controversy was between the foreign vessel and its crew. It intimates, however, that the Act would apply if this suit had been brought by the American independent contractors whose employees refused to cross the picket line, although the identical conduct by the American unions were involved. But, even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under § 303 (b) to get protection from any unfair labor practice condemned by the Act. That is indeed the force of our ruling in *Teamsters Union v. New York, N. H. & H. R. Co.*, 350 U. S. 155, 160-161.

The Labor Board has asserted jurisdiction over unions that bring their pressures to bear on vessels of foreign registry (*In the matter of Sailors' Union of the Pacific*, 92 N. L. R. B. 547), at the same time that it has declined to assume jurisdiction over the foreign vessel.<sup>1</sup> *Id.*, at 560-561.

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<sup>1</sup> The Sailors' Union of the Pacific picketed the main gate of a San Francisco shipyard, where a ship of foreign registry and ownership was undergoing repairs, after the owner of the vessel refused to recognize the union as exclusive representative of the crew. After the picketing began, the union filed, with the Board's Regional Office, a petition to be certified as the representative of the vessel's crew. As



If there is to be peace along the waterfront and a full and free flow of commerce as declared in § 1 of the Act, these American unions should be subject only to disciplinary action by the federal agencies to whom Congress has entrusted the job of law enforcement.<sup>2</sup> Only by applying those centralized controls can we avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Union*, 346 U. S. 485, 490.

There is no hiatus in the federal regulatory scheme as was true in *United Workers v. Laburnum Corp.*, 347 U. S. 656. The facts alleged in the complaint, if true, might constitute unfair labor practices under the Act; and Congress has provided, as against American unions, both an

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noted by the Court, the Board's Regional Director administratively dismissed the petition, "inasmuch as the internal economy of a vessel of foreign registry and ownership is involved." The Board sustained the Regional Director's action on the ground that it had no jurisdiction over the foreign owner of the vessel. The Board, however, assumed jurisdiction over an unfair labor practice complaint, issued against the union by the same Regional Director, charging that the picketing violated § 8 (b) (4) (A) of the Act.

<sup>2</sup> That was the conclusion of the Minnesota Supreme Court in a situation similar to this one. An American union and a Canadian union picketed the dock of an American grain company to prevent the loading and unloading of vessels owned by a Canadian company, which had served notice that it would cease to recognize the Canadian union as bargaining representative for its crews. In a suit by the grain company against both unions, the Minnesota Supreme Court concluded that the state courts had no jurisdiction over the dispute which was governed by the Federal Act. "This action is directed not against the relationship between the Canadian Company and its employees or its relationship with the Canadian Union, but against acts of defendants done in the United States, and neither seeks to regulate the relationship between the Canadian Company and its employees or the Canadian Company and the Canadian Union." *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 109, 46 N. W. 2d 94, 104.

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administrative remedy and a remedy by way of damages. I see no answer therefore to the conclusion that state law has been pre-empted by federal law within the meaning of our decision in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468.

If American unions or their members are to be mulcted in damages for unfair labor practices affecting commerce, Congress has provided the way in which it shall be done.

Syllabus.

ALLEGHANY CORPORATION ET AL. v.  
BRESWICK & CO. ET AL.

NO. 36. APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.\*

Argued January 23-24, 1957.—Decided April 22, 1957.

In a suit by appellees, who are minority common stockholders of Alleghany Corporation (an investment company), a three-judge District Court set aside orders of the Interstate Commerce Commission granting Alleghany the status of a non-carrier to be "considered as a carrier" under §§ 5 (2) and 5 (3) of the Interstate Commerce Act and approving Alleghany's issuance of new preferred stock convertible into common stock. It also enjoined Alleghany from issuing the new preferred stock. The Commission's orders were based on its holding that Alleghany, being in control of the New York Central Railroad, needed Commission approval under § 5 (2) to merge one subsidiary of the New York Central into another. *Held*:

1. As common stockholders whose equity might be "diluted" by the issuance of the new preferred stock, appellees had sufficient financial interest to give them standing to sue to set aside the Commission's orders. Pp. 159-160.

2. Since the Commission's order conferring on Alleghany the status of a non-carrier to be "considered as a carrier" gave the Commission jurisdiction to approve the preferred stock issue, appellees could attack that order. P. 160.

3. The Commission had jurisdiction over Alleghany under §§ 5 (2) and 5 (3). Pp. 160-172.

(a) It is unnecessary to decide whether Commission approval of acquisition of control of a single integrated railroad system is required; if Alleghany in fact controlled Central, that was sufficient to meet the statutory requirement of "a person which is not a carrier and which has control of one or more carriers." Pp. 161-162.

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\*Together with No. 82, *Baker, Weeks & Co. et al. v. Breswick & Co. et al.*, and No. 114, *Interstate Commerce Commission v. Breswick & Co. et al.*, also on appeals from the same court.



(b) The Commission's findings amply support its conclusion that "control" of Central was in Alleghany. Pp. 162-165.

(c) The Commission was justified in finding that the merger of one of Central's subsidiaries into another involved an "acquisition of control" of a "carrier" by Central and Alleghany within the meaning of § 5 (2). Pp. 165-171.

(d) The failure to join two stockholders alleged to control Alleghany did not oust the Commission of jurisdiction. Pp. 171-172.

4. Appellees were not entitled to a hearing in the proceedings in which the Commission approved the merger of two of Central's subsidiaries and granted Alleghany the status of a non-carrier to be "considered as a carrier" under § 5 (2), since they were not "interested parties" within the meaning of § 5 (2)(b). Pp. 172-175.

(a) The fact that appellees were common stockholders of Alleghany is insufficient "interest," since that proceeding had no special effect on appellees and did not pose any individualized threat to their welfare. P. 174.

(b) That assertion of jurisdiction by the Commission would deprive appellees of the benefits of the Investment Company Act of 1940 did not give them sufficient "interest" in that proceeding. Pp. 174-175.

5. Appellees' claim that they were entitled to a hearing in the preferred stock proceeding is governed by § 20a (6), which provides that "The Commission may hold hearings, if it sees fit, to enable it to determine its decision on application for authority." P. 175.

6. The judgment of the District Court is reversed and the case is remanded for consideration by the District Court of appellees' claim that the preferred stock issue, as approved by the Commission, was in violation of the Interstate Commerce Act. P. 175.  
138 F. Supp. 123, reversed and remanded.

*Whitney North Seymour* argued the cause for the Alleghany Corporation, appellant in No. 36. With him on the brief were *David Hartfield, Jr.*, *Edward K. Wheeler*, *Robert G. Seaks* and *Morton Moskin*.

*Harold H. Levin* argued the cause for *Gruss et al.*, appellants in No. 36. With him on the brief were *Joseph M. Proskauer* and *Allen L. Feinstein*.

*Alexander Kahan* argued the cause for Neuwirth, appellant in No. 36. With him on the brief was *Arthur W. Lichtenstein*.

*Robert W. Ginnane* argued the cause for the Interstate Commerce Commission, appellant in No. 114. With him on the brief was *B. Franklin Taylor, Jr.*

*George Brussel, Jr.* argued the cause for Breswick & Co. et al., appellees. *Randolph Phillips*, appellee, argued the cause *pro se*. They filed a brief in Nos. 36 and 114.

*Edward M. Garlock* filed a Statement in Opposition to Appellees' Motion to Dismiss for Baker, Weeks & Co. et al., appellants in No. 82.

*Solicitor General Rankin*, *Assistant Attorney General Hansen* and *Daniel M. Friedman* filed a brief for the United States.

*Thomas G. Meeker*, *Joseph B. Levin* and *Aaron Levy* filed a brief for the Securities and Exchange Commission, as *amicus curiae*.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These are direct appeals under 28 U. S. C. § 1253 from a final judgment of a three-judge District Court for the Southern District of New York setting aside orders of the Interstate Commerce Commission and restraining appellant Alleghany Corporation from issuing a new class of preferred stock that had been approved by the Commission. The case raises numerous questions regarding the jurisdiction and powers of the Commission, especially under § 5 of the Interstate Commerce Act, for the understanding of which a rather detailed statement of the facts is necessary.

Section 5 (2)(a), in its pertinent portions, provides: "It shall be lawful, with the approval and authorization

of the Commission . . . (i) . . . for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise . . . ." 54 Stat. 899, 905, 49 U. S. C. § 5 (2)(a).<sup>1</sup>

Appellant Alleghany Corporation is a Maryland corporation whose charter provides for extensive powers of investment under no express limitation. After the passage of the Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. § 80a-1 *et seq.*, Alleghany registered as an investment company with the Securities and Exchange Commission. In 1944, in connection with an application by the Chesapeake & Ohio Railroad for approval by the Interstate Commerce Commission of acquisition of the property of the Norfolk Terminal & Transportation Com-

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<sup>1</sup> Section 5 (3) provides: "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, and section 313 of part III, (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest." 54 Stat. 907, 49 U. S. C. § 5 (3).



pany, Alleghany, alleging that it controlled the Chesapeake & Ohio, filed a supplementary application with the Commission joining the Chesapeake & Ohio's application and seeking approval of its own acquisition of control of the Terminal Company through the action of the Chesapeake & Ohio. In 1945, the Commission approved "acquisition of control" of the Terminal Company by the Chesapeake & Ohio and Alleghany as a transaction within § 5 (2) and further found that Alleghany "shall be considered as a carrier subject to the [reporting and securities] provisions of section 20 (1) to (10) and section 20a (2) to (11) of the act." 261 I. C. C. 239, 262.

Shortly thereafter, under the provisions of § 3 (c) (9) of the Investment Company Act,<sup>2</sup> the Securities and Exchange Commission held that Alleghany was no longer an investment company within the meaning of the Investment Company Act. 20 S. E. C. 731.

In March, April, and May 1954, several petitions and complaints were filed with the Interstate Commerce Commission by the New York Central Railroad, a stockholder, a protective committee, and bondholder creditors of the Central, asserting violations of the law in Alleghany's purchases of New York Central stock. In view of statements by Alleghany and Chesapeake & Ohio officials that Alleghany had disposed of its holdings of Chesapeake stock, that Commission, in June, ordered Alleghany to show cause why the 1945 order providing that Alleghany

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<sup>2</sup> "Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this title:

"... Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided*, That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act." 54 Stat. 789, 799, 15 U. S. C. § 80a-3 (c) (9).

should be "considered as a carrier" should not be set aside. Alleghany replied that it would accept an order terminating its control of the Chesapeake & Ohio but requested delay until it could file a new application which, it alleged, would require the Commission's approval and continuance of its status as a non-carrier to be "considered as a carrier" under the Interstate Commerce Act.

The present proceedings were commenced by the filing of such an application by Alleghany and Central—after the ousting of the old Central management in May in a proxy fight. The contents of the application were described fully in the Report of Division 4 of the Commission:

"The Cleveland, Cincinnati, Chicago and St. Louis Railway Company [the Big Four], the Louisville & Jeffersonville Bridge and Railroad Company [the Bridge Company or the Jeffersonville], The New York Central Railroad Company, and the Alleghany Corporation . . . on September 20, 1954, jointly applied under section 5 (2) of the Interstate Commerce Act . . . for approval and authorization of (1) (a) merger of the properties and franchises of the Jeffersonville into the Big Four for ownership, management, and operation; and (b) modification of the lease of January 2, 1930, under which Central, as lessee, operates the property of Big Four, lessor, to give effect to the acquisition of additional property pursuant to the proposed merger of Jeffersonville into Big Four; (2) acquisition by Central and Alleghany, by virtue of their control of Big Four, of control of the properties of Jeffersonville; and (3) continuation of Alleghany's status as a carrier subject to the provisions of section 20 (1) to (10), inclusive, and 20a (2) to (11), inclusive, of the act, as provided by section 5 (3) thereof." 290 I. C. C. 725-726.

The Big Four already owned all the capital stock of the Jeffersonville. The Big Four itself had ceased to be an operating carrier in 1930; since then the New York Central has operated it as lessee. In addition, the New York Central owns 98.98% of the common, and 86.45% of the preferred, stock of the Big Four.

On March 2, 1955, Division 4 of the Commission approved and authorized the merger of the Jeffersonville into the Big Four; approved continued control of the properties and franchises of the Jeffersonville by the Central and Alleghany; modified the lease between the Big Four and the Central; continued Alleghany as a non-carrier to be "considered as a carrier" subject to the reporting and securities provisions of the Act; and terminated the effective portions of the 1945 order in the Chesapeake & Ohio proceeding. 290 I. C. C. 725.

On reconsideration, the whole Commission on May 24, 1955, affirmed the conclusions of Division 4. It held that Alleghany had acquired control over Central; that at the time the present application was filed, Alleghany was in fact "a person not a carrier which controlled an established system"; that the acquisition of control over the Central was not within § 5 (2)'s requirement of Commission approval; that the rearrangement by Central of its ownership or control of its subsidiaries was within § 5 (2)'s requirement of approval by the Commission and that Alleghany as the controlling party was a necessary party; and that the terms and conditions of the transactions were fair and reasonable. Rejecting the suggestion of the Securities and Exchange Commission, which had intervened, the whole Commission also held that it had no discretion to yield jurisdiction over Alleghany to the former agency.<sup>3</sup> 295 I. C. C. 11.

<sup>3</sup> On this appeal, the Securities and Exchange Commission, as *amicus*, took no position on whether the District Court "correctly construed the relevant provisions of the Interstate Commerce Act



Subsequent to their application with respect to the Jeffersonville, Alleghany and Central, on December 17, 1954, filed an application under § 5 (2) to "acquire control" of the Boston & Albany Railroad Company, the Pittsfield and North Adams Railroad Corporation, and the Ware River Railroad Company through purchase by Central of their capital stock. The Central owned a little more than 16% of the Pittsfield's capital stock and none of the capital stock of the other two railroads. It operated the properties of the Boston & Albany, the Pittsfield, and the Ware River under leases due to expire in 1999, 1975, and 2873 respectively. On March 22, 1955, less than three weeks after it had approved the application in the Jeffersonville proceeding, Division 4 of the Commission approved the acquisition of such control by Alleghany and Central. (Opinion not reported.)

A third application filed by Alleghany, on February 18, 1955, sought permission from the Commission to issue a new 6% convertible preferred stock pursuant to a charter amendment, approved by all classes of Alleghany's stockholders, that permitted consummation of Alleghany's proposed plan of allowing its outstanding cumulative 5½% preferred stock to be exchanged for the new stock. On May 26, 1955, two days after the whole Commission affirmed Division 4's orders in the Jeffersonville proceeding, Division 4 approved the new stock issue (conditioning its approval on modification of one term), and on June 22, the full Commission denied reconsideration.

An action was then brought before a three-judge District Court by minority common stockholders of Alleghany to require the Commission to set aside its order granting Alleghany the status of a non-carrier to be "con-

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or orders of the ICC thereunder; nor on the extent of the jurisdiction of the court below." The views of the Securities and Exchange Commission were set forth only in relation to issues under the Investment Company Act.

sidered as a carrier" and its subsequent order approving the new class of preferred stock and to restrain Alleghany from issuing the new preferred stock. The three-judge District Court, convened under the Urgent Deficiencies Act, 28 U. S. C. §§ 1336, 1337, 2321-2325, granted first a preliminary injunction, 134 F. Supp. 132 (Circuit Judge Hincks, dissenting), and then a permanent injunction setting aside the Commission's order designating Alleghany as a "carrier" and also its order approving Alleghany's new class of preferred stock, restraining its issue. 138 F. Supp. 123.<sup>4</sup>

Alleghany moved for a new trial based on the "acquisition of control" involved in the Boston & Albany proceeding. The District Court held that the Commission's order in that proceeding gave no validity to the orders in the Jeffersonville proceeding because of the Commission's failure to provide specifically in its Boston & Albany order that Alleghany should be "considered as a carrier." 138 F. Supp., at 138. On appeal here from the final judgment below, we noted probable jurisdiction. 351 U. S. 903, 352 U. S. 816.

Alleghany urges initially that the Commission's orders dealing with its status under the Interstate Commerce Act and dealing with its new preferred stock were not reviewable at the suit of appellees, that appellees had no standing. We find that appellees do have standing to challenge these orders. This is not a case where "the order under attack does not deal with the interests of

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<sup>4</sup> After the preliminary injunction was granted, Alleghany moved in the District Court for suspension of the injunction pending appeal to this Court. The two judges who heard the motion divided, and the motion was therefore denied. On application to Circuit Justice Harlan, a stay was granted with respect to that portion of the new preferred stock that had been issued before the District Court's injunction was granted. 75 S. Ct. 912. The New York Stock Exchange, however, continued to suspend trading in the new preferred stock.

investors," or where the "injury feared is the indirect harm which may result to every stockholder from harm to the corporation." *Pittsburgh & W. Va. R. Co. v. United States*, 281 U. S. 479, 487. The appellees are common stockholders of Alleghany. The new preferred stock issue approved by the Commission is convertible, and under relevant notions of standing, the threatened "dilution" of the equity of the common stockholders provided sufficient financial interest to give them standing. See *American Power & Light Co. v. SEC*, 325 U. S. 385, 388-389.

Having acquired standing to institute proceedings in the District Court by virtue of the threatened financial injury, appellees could also attack the order of the Commission conferring on Alleghany the status of a person not a carrier but to be "considered as a carrier." The status order was a source of the threatened financial injury. If the Commission acted out of bounds in decreeing its status order, it had no power to approve the new preferred stock issue and the plaintiffs would be entitled to relief.<sup>5</sup>

This brings us to the substantive issues in the litigation. In the main, these involve the jurisdiction of the Com-

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<sup>5</sup> See *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 144, where the fact that the "contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers . . . in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission." Whether reviewability of a status order, without more, be deemed a matter of standing to review or a matter of finality of administrative action, the basis for decision is the same: has the action of the administrative agency threatened the interests of the complainant, whether corporation or, as here, stockholder otherwise qualified to sue, sufficiently to allow attack? (This does not mean of course that the same agency action that allows attack by one allows attack by the other.)



mission under §§ 5 (2) and 5 (3) of the Act, defining its powers.<sup>6</sup> The validity of the status order under § 5 (3) turns on compliance with the statutory requirement of § 5 (2) of Commission approval "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise . . . ." Appellants Alleghany and the Commission contend that the Jeffersonville and the Boston & Albany transactions both support the Commission's assertion of jurisdiction. The District Court disagreed with respect to the former and, as we have seen, p. 159, *supra*, found it unnecessary to pass on the latter.

Whether the Jeffersonville transaction met the statutory requirement of § 5 (2) raises three questions. (1) Was Commission approval of Alleghany's acquisition of control over Central required? (2) Did Alleghany in fact control Central? (3) Did the Jeffersonville transaction involve an acquisition of control by Alleghany over the properties of the Jeffersonville?

The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of "a person which is not a carrier and which has control of one or more carriers" because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, "two or more carriers."

The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of "a person which is not a carrier and which has control of one or more carriers" refers to "control" and not

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<sup>6</sup> A brief summary of the history of § 5 is set forth in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U. S. 298, 315 (appendix).

to "approved control." There seems to be no reason to read in the word "approved." Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5 (7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction.

Control in fact then is sufficient to satisfy the requirement of § 5 (2). Division 4 of the Commission reported the following:

"The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint-venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice president of Alleghany holds a similar position with Central." 290 I. C. C., at 727.

Division 4 recognized that "the present control of the Central system has passed to Alleghany by regular corporate procedures . . . ." *Id.*, at 741.

The full Commission reached this conclusion:

"The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors who permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central." 295 I. C. C. 11, 16.

The District Court, however, held that "if the Commission's opinions contain a conclusion that Alleghany is in control of New York Central, those opinions lack sufficient findings to support that conclusion." 134 F. Supp., at 147. It noted that the order of Division 4 "discloses the fact that Alleghany's beneficial holdings of the Central stock are less than the combined individual holdings of Kirby, Young, Richardson and the Murchison group," and concluded that "the findings do no more than say that Alleghany, with someone else, controls New York Central. They do not even say whether the someone else, alone, has control." *Ibid.*

We think that the District Court took too restricted a view of what constitutes "control." In 1939, in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146, arising under the Federal Communications Act, 48 Stat. 1064, 1065, 47 U. S. C. § 152 (b), this Court rejected artificial tests for "control," and left its determination in a particular case as a practical concept to the agency charged with enforcement.<sup>7</sup> This was the broad scope

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<sup>7</sup> "Investing the [Federal Communications] Commission with the duty of ascertaining 'control' of one company by another [as the basis for the Commission's jurisdiction], Congress did not imply



designed for "control" as employed by Congress in the Transportation Act of 1940, 54 Stat. 899-900, 49 U. S. C. § 1 (3)(b).<sup>8</sup> See *United States v. Marshall Transport Co.*, 322 U. S. 31, 38.

That Act also added § 1 (3)(b) to the Interstate Commerce Act, providing:

"For the purposes of [section] 5 . . . of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect

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artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 303, *et seq.*" 307 U. S., at 145-146.

<sup>8</sup> "This phrase ["control"] has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corp. v. United States* (307 U. S. 125, decided April 17, 1939)." H. R. Rep. No. 2832, 76th Cong., 3d Sess. 63. (This was the Conference Report.)

means; and to include the power to exercise control.” 54 Stat. 899-900, 49 U. S. C. § 1 (3)(b).

Section 1 (3)(a) provides:

“The term ‘person’ as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.” 54 Stat. 899, 49 U. S. C. § 1 (3)(a).

The Commission’s findings, setting forth the events surrounding the proxy fight for control of Central, the common directors in both, the stockholdings of Alleghany’s officers and stockholders in Central, and the sworn statement of Central in the Central-Alleghany application that Central is controlled by Alleghany amply support its conclusion that “control” of Central was in Alleghany. See footnote 7, *supra*.

The question remains whether the second portion of the statutory requirement of Commission approval “for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise . . .” has been met. What constitutes an acquisition of control? The District Court gave this restricted interpretation:

“A merger of carriers may involve an acquisition of control by a non-carrier, where, through the merger, the non-carrier acquires control (direct or indirect) of a carrier or carrier property which the non-carrier had previously not controlled; *United States v. Marshall Transport Co.*, 322 U. S. 31 . . . . But where, as in the instant case, the non-carrier (Alleghany) is (according to our assumption, *arguendo*) already in indirect control of a carrier (Bridge Company), and the merger still leaves the non-carrier

in indirect control of such property, no acquisition by the non-carrier results from the merger. . . ." 138 F. Supp., at 127-128.<sup>9</sup>

We think that this is too narrow a reading of the statute. Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an "acquisition of control" under § 5 (2).

The Court has already considered twice what constitutes an "acquisition of control" under the Interstate Commerce Act. In *New York Central Securities Corp. v. United States*, 287 U. S. 12, the Court interpreted § 5 (2) as it read in the Transportation Act of 1920, 41 Stat. 456, 481:

"Whenever the Commission is of opinion . . . that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

In that case the order of the Commission permitting the New York Central Railroad to acquire control, by lease,

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<sup>9</sup> The United States, which had supported the orders of the Interstate Commerce Commission in the District Court proceedings, on this appeal has taken the position that the judgment of the District Court should be affirmed because the merger of the Jeffersonville into the Big Four did not involve an "acquisition of control" over the Jeffersonville by Alleghany.



of the railroad systems of the Big Four and the Michigan Central Railroad Companies, was under review. Minority stockholders contended, *inter alia*, that the Commission could not authorize "acquisition of control" by lease since the Central had already acquired control of both railroads by stock ownership. The Court held that the "disjunctive phrasing of the statute 'either under a lease or by the purchase of stock' must be read in the light of its obvious purpose and cannot be taken to mean that one method must be exclusive of the other." 287 U. S., at 23. Nowhere did it intimate that the lease was not an "acquisition of control," even though the Central already had stock ownership control of both railroads. In fact, the refusal to set aside the Commission's order necessarily involved approval of the Commission's finding of an "acquisition of control," and the Court further stated:

"The public interest is served by economy and efficiency in operation. If the expected advantages are inadequately secured by stock ownership and would be better secured by lease, the statute affords no basis for the contention that the latter may not be authorized although the former exists. The fact that one precedes the other cannot be regarded as determinative if the desired coordination is not otherwise obtainable." *Ibid.*

The Transportation Acts of 1933, 48 Stat. 211, and 1940, 54 Stat. 898, rewrote § 5 but retained the "acquisition of control" language, except that the phrase relating to method of acquisition—"under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system"—became, for acquisitions by both carriers and non-carriers, an all-inclusive phrase in the 1940 Act—"through ownership of their stock or otherwise." These changes do not lessen the authority of the *New York Central Securities* case in the scope to be given to an "acquisition of control."

In *United States v. Marshall Transport Co.*, 322 U. S. 31, the Court interpreted § 5, as amended by the 1940 Act, 54 Stat. 899, 905, 49 U. S. C. § 5. The Court held that the non-carrier parent (Union) of a carrier (Refiners) that proposed to purchase the property and franchises of another carrier (Marshall) "acquired control" of the property and franchises of the vendor and was therefore subject to the Commission's jurisdiction. The substantive issues in that case were of course different from those of the present case, since there had been no prior relation between the non-carrier parent and the vendor-carrier. In reaching its decision, however, the Court was explicit regarding the purpose of § 5:

"It is not doubted that if Union, having control of Refiners, sought to acquire stock control of Marshall, Union would be required by § 5 (2)(b) to apply for the Commission's authority to do so. But it is said that having control of Refiners, Union may, by procuring Refiners' compliance with the purchase provisions of the statute alone, extend its control indefinitely to other carriers merely by directing the purchase of their property and business by Refiners, without subjecting itself to the jurisdiction of the Commission as provided in § 5 (3), so long as Union does not act directly as the purchaser of the property or of a controlling stock interest in such other carriers.

"We think that neither the language nor the legislative history of the statute admits of so narrow a construction. Section 5 (4) makes it unlawful, without the approval of the Commission as provided by § 5 (2)(a), for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Not only is this language broad

enough in terms to embrace the acquisition of control by a non-carrier through the purchase, by a controlled carrier, of the property and business of another carrier, but the legislative history indicates that such was its purpose." *Id.*, at 36-37. See also *id.*, at 37-40.

In other words, a non-carrier may not gain "control" over carriers free of Commission regulation merely by operating through subsidiaries.

The crux of each inquiry to determine whether there has been an "acquisition of control" is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease? This is the issue, and not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case, the parent can always, by operating through subsidiaries, make itself more remote. In deciding this type of issue, of course, the finding of the Commission that a given transaction does or does not constitute a significant increase in the power of one company over another is not to be overruled so long as "there is warrant in the record for the judgment of the expert body . . . ." *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146.

The principal issue, therefore, in the Jeffersonville proceeding is not Alleghany's remoteness from, or closeness to, the proposed transaction but rather the nature of the proposed transaction itself. The Big Four, whose stock was largely owned by Central, owned all the stock of the Jeffersonville. (By agreement between the Big Four and the Central, this stock was held by the Central.) The proposal was to merge the Jeffersonville into the Big



Four. While the immediate practical effects of the merger on the operation of the Jeffersonville might be small, even minimal, a merger is the ultimate in one company obtaining control over another. So long as the Jeffersonville existed as a separate company, there was always the possibility that the Big Four, through the Central, might sell, or be forced to divest itself of, the Jeffersonville stock, and that the control of the Jeffersonville might thus pass to another railroad. In considering this possibility, it is important to note that the Jeffersonville does not connect physically with the Big Four but connects with it only by virtue of the Big Four's trackage rights over the Baltimore & Ohio, and that the Jeffersonville, with its few miles of track, also connects with the Pennsylvania, Baltimore & Ohio, Louisville & Nashville, Illinois Central, and Chesapeake & Ohio Railroads.

The merger of the Jeffersonville into the Big Four virtually precludes any change in the relation of the Jeffersonville lines to the Central system. The Jeffersonville will be no more. In view of this, it cannot reasonably be said that there has been no increase in the power of the Big Four, the Central, and, through its relation with them, Alleghany over the Jeffersonville. While it is not always profitable to analogize "fact" to "fiction," La Fontaine's fable of the crow, the cheese, and the fox demonstrates that there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach.

Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress to oversee combinations and consolidations of carriers and "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . ." and the further requirement that "All of the provisions of this Act shall be administered

and enforced with a view to carrying out the above declaration of policy." National Transportation Policy, 54 Stat. 899, 49 U. S. C., preceding § 1. We hold that the Commission was justified in finding that the merger of the Jeffersonville into the Big Four involved an "acquisition of control" of the Jeffersonville by Central and Alleghany within the meaning of § 5 (2) of the Act. Since the status order of the Commission is supportable by virtue of the Jeffersonville proceeding, we need not consider the District Court's denial of Alleghany's motion, based on the Boston & Albany proceeding, for a new trial.

Several other matters urged by appellees remain to be considered. Appellees contend that Alleghany did not acquire control of any carrier in the Jeffersonville proceeding since the application was made by the Big Four as lessor and the Central as lessee and that therefore the Big Four was a statutory lessor and not a carrier within § 5. We need not discuss the distinction that appellees seek to assert between lessors and carriers, for the Jeffersonville, the railroad whose control we have held was acquired by Alleghany, was an operating carrier.

Appellees also urge that the *Marshall Transport* case, 322 U. S. 31, requires dismissal of Alleghany's application because two stockholders, alleged to dominate Alleghany, did not join in the application and therefore in the absence of those two indispensable parties, the Commission had no jurisdiction to proceed. But in the *Marshall Transport* case, the Commission was refusing to approve a subsidiary's application to acquire control of the property and operating rights of another carrier unless the non-carrier parent submitted itself to the Commission's jurisdiction, and the Court upheld the Commission's power to refuse to approve the application.

Although the Court in that case used language of "jurisdiction," the problem is not strictly jurisdictional in the sense that if the Commission wrongly decides that

corporation or person A does not "control" non-carrier B (which is "considered as a carrier") and therefore that A need not join B's application to acquire control of C, the Commission loses jurisdiction over B, the power to regulate B. The Commission's jurisdiction over a non-carrier depends on whether the activities of the non-carrier fall within § 5 (2) and (3) and does not depend on the action of the parent. For example, if Alleghany were contending that it could reshuffle the whole Central system without Commission approval, alleging that the Commission had no jurisdiction over it through failure to join two stockholders controlling it in the original status order proceedings, this whole problem would appear in a clearer context. The basis of the Commission's jurisdiction in the present case is Alleghany's status as "a person which is not a carrier and which has control of one or more carriers," seeking permission "to acquire control of another carrier through ownership of its stock or otherwise . . . ." The failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction. Since that is so, the status order submitting Alleghany to the Commission's jurisdiction cannot be attacked on that basis.

Appellees further argue, and the District Court held, 134 F. Supp., at 147-149 and 138 F. Supp., at 136-137, that under §§ 5 (2) (b) and 17 (3), appellees were entitled to an evidentiary hearing of some sort in the merger-status order proceeding (as distinguished from the subsequent preferred stock proceeding) even though the Commission had discretion to dispense with a "public hearing." Section 5 (2) (b), in its relevant portion, provides:

"Whenever a transaction is proposed under subparagraph (a) . . . the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed



transaction is situated, and also such carriers and the applicant or applicants . . . and shall afford reasonable opportunity for interested parties to be heard. . . . a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. . . ." 54 Stat. 906, as amended, 63 Stat. 485-486, 49 U. S. C. § 5 (2)(b).

Section 17 (3) provides, in part, that "All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested." 54 Stat. 914, 49 U. S. C. § 17 (3).

We need not determine the bounds of the Commission's power to dispense with, or limit, hearings under § 5 (2)(b), for appellees' claim of a right to a hearing in the merger-status order proceeding must fail for another reason—lack of the requisite interest of "interested parties."

The reference in § 5 to "interested parties," like the reference in § 1 (20) to "party in interest," must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a legislative hearing and "interest" is not equivalent to "concern." It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standing—*e. g.*, "the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order." *Moffat Tunnel League v. United States*, 289 U. S. 113, 119. In each case, the sufficiency of the "interest" in these situations must be determined with reference to the particular context in which the party seeks to assert its position.

Appellees assert three grounds of interest in the merger-status order proceeding: that they were common stock-

holders of Alleghany, that the assertion of jurisdiction by the Interstate Commerce Commission would deprive them of the benefits of the Investment Company Act, 54 Stat. 789, 15 U. S. C. § 80a-1 *et seq.*, and that the proposed preferred stock issue was unfair.

The fact that appellees were common stockholders of Alleghany is insufficient "interest." The proceeding before the Commission was to determine whether the Jeffersonville-Big Four merger was a transaction requiring Commission approval as an acquisition of control by "a person which is not a carrier and which has control of one or more carriers" of "another carrier through ownership of its stock or otherwise . . . ." 54 Stat. 905, 49 U. S. C. § 5 (2)(a)(i). Unlike the subsequent preferred stock order whose threatened financial injury to appellees was sufficient to confer standing to bring the present proceedings, the merger agreement had no special effect on appellees or on common stockholders of Alleghany. See *New York Central Securities Corp. v. United States*, 287 U. S. 12, 19-20. Nor did the proposed status order that Alleghany should be "considered as a carrier" and therefore regulated by the Interstate Commerce Commission by itself pose any individualized threat to the welfare of the appellees.

Reliance on the alleged benefits of protection under the Investment Company Act subtly begs the question. Alleghany would be subject to regulation under the Investment Company Act only if the Interstate Commerce Commission lacked jurisdiction to regulate it under § 5 of the Interstate Commerce Act. The fact that there may be another Act that gives appellees greater protection as investors is immaterial to the appellees' right to a hearing in the merger-status order proceeding. The question here is whether the proposed transaction falls within the Interstate Commerce Commission's jurisdiction, not what the consequences will be if it does not. No special threat

to appellees arises from the mere assertion of Commission jurisdiction to regulate Alleghany. When subsequent Commission action in approving the Alleghany's new preferred stock issue did present a special threat to appellees, that provided the "interest" sufficient to attack the Commission's jurisdiction in the present proceeding. But this threat could not retroactively confer upon them the right to a hearing in the merger-status order proceeding, in which they had no "interest."

Appellees' claim that they were entitled to a hearing in the preferred stock proceeding is governed by § 20a (6) of the Act, which provides that "The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority." 41 Stat. 495, 49 U. S. C. § 20a (6).

For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. This disposition renders it needless to pass on appellees' motion to dismiss in No. 82.

*Reversed and remanded.*

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

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

Alleghany Corporation, though not a carrier as that term is used in the Interstate Commerce Act, is subject to supervision by the Interstate Commerce Commission, 49 U. S. C. § 5 (3), and exempt from the control of the Securities and Exchange Commission under the Investment Company Act of 1940, 15 U. S. C. § 80a-3 (c)(9), if



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it has the approval of the Interstate Commerce Commission to "acquire control of two or more carriers through ownership of their stock or otherwise." 49 U. S. C. § 5 (2)(a)(i).

"Control" as used in § 5 is defined in § 1 (3)(b):

"... to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

"Control" thus means "actual" as well as "legal" control and includes the exercise of "indirect" as well as "direct" means. It seems obvious, therefore—so obvious as to be beyond the realm of dispute or argument—that if one has "actual" control through "indirect" means and changes the means whereby he commands that power, he has only retained "control," not acquired it within the meaning of § 5 (3). For one who has "control," as defined, does not acquire it when he merely changes the method or means of its exercise. Yet it is clear that Alleghany did no more than that.

Alleghany has control of the New York Central.

Most of the stock of the Big Four (Cleveland, Cincinnati, Chicago, & St. Louis R. Co.) is owned by Central. The lines of the Big Four are operated by Central as lessee.

There is a Bridge Company (the Louisville & Jeffersonville Bridge & R. Co.) whose stock, prior to the transaction about to be discussed, was owned by the Big Four and held by Central under the lease.

Alleghany, Central, the Big Four, and the Bridge Company applied to the Interstate Commerce Commission for

permission to merge the Bridge Company into the Big Four and for Central thereafter to operate the properties of the Bridge Company under the Big Four lease. The merger was an intra-system rearrangement of properties that did not affect one whit Alleghany's "control" in the statutory sense of the Bridge Company. Before the merger Alleghany had "control" of the Bridge Company. It therefore did not "acquire control" but only *retained* it as a result of the merger.

There was another transaction which Alleghany says caused it to "acquire control" of a carrier within the meaning of § 5 (3) and therefore to have a carrier status under the Interstate Commerce Act. Alleghany and Central applied to the Commission for permission to acquire the stock of Boston & Albany R. Co., Pittsfield & North Adams R. Corp., and Ware River R. Co. Central was operating the properties of those three roads under leases—two of the leases being for 99 years each and one for 999 years. The Commission approved this stock acquisition by Central.

There are two reasons why this transaction did not give Alleghany a carrier status. In the first place, § 5 (3) gives a noncarrier the status of a carrier only "to the extent provided by the Commission in such order." The Commission made no such order in connection with the acquisition of the stock of the three New England carriers.

In the second place Alleghany, through Central, had "actual control" of those three carriers prior to the acquisition of their stock. That "control" was evident by the long-term leases over the properties of those carriers. Alleghany, therefore, did not "acquire control" when Central acquired the stock of the three companies. The form of Alleghany's control changed by the stock acquisition. But the financial master of the three New England carriers was the same before Central acquired

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their stock, as it was afterwards. As stated by the District Court, where a noncarrier is "already in indirect control of a carrier" and the transaction relied upon "still leaves the non-carrier in indirect control of such property, no acquisition by the non-carrier results from the merger." 138 F. Supp. 123, 127-128.

The court that made that ruling had as one of its members the late Judge Frank, who had no superior when it came to an understanding of the ways of high finance and to an analysis of regulatory measures dealing with it. I see no answer to what Judge Frank and his colleagues concluded on this phase of the case.

That view of § 5 (2) is plainly reflected in the legislative history. This control over noncarriers who acquired control of carriers was introduced in 1933. Commissioner Eastman pointed out to Congress the evil which was to be remedied—"holding companies have been bringing carriers under common control and hence combining them without any supervision or approval by the commission."<sup>1</sup> The Senate Report stated that the amendment gave the Commission control over holding companies that "effect consolidations without approval of the commission."<sup>2</sup> To "acquire control" within the meaning of § 5 (2) means then to put under common control carriers that previously were separate. We would strain to find a construction which would enable holding companies to run for shelter under the Act merely because, within the system they control, there have been corporate rearrangements or readjustments that change the internal structure of the system.

Alleghany points with alarm to the loopholes in the law that will be created if it is held that Alleghany did not "acquire" control in connection with the Bridge

<sup>1</sup> Hearings, House Committee on Interstate and Foreign Commerce on H. R. 9059, 72d Cong., 1st Sess., p. 250.

<sup>2</sup> S. Rep. No. 87, 73d Cong., 1st Sess., p. 1.



Company merger and the acquisition of the stock of the New England carriers. No loopholes will be created. Central could do neither of those two things without the approval of the Commission, since § 5 (2)(a) requires Commission approval of many intra-system transactions *by carriers*. That is the force of the holding in *New York Central Securities Corp. v. United States*, 287 U. S. 12. The loophole that is created comes from granting Alleghany a carrier status. Then Alleghany escapes the far more rigorous supervision which is imposed on it by the Investment Company Act.

The only other means by which Alleghany could have acquired a carrier status was in connection with financial transactions long since liquidated. Alleghany had a carrier status, granted it by the Interstate Commerce Commission, when it acquired the stock of the Chesapeake & Ohio R. Co. and two other carriers. That order, issued in 1945, gave it a carrier status "unless and until otherwise ordered" by the Commission. That order was terminated by the Commission on May 24, 1955.

The approval of the preferred stock issue that is involved in this litigation did not come until later, *viz.* June 22, 1955. At that time it seems plain that Alleghany had no carrier status and could not obtain one on the basis of the intercorporate transactions on which it relies.

I would affirm the judgment below.

AUTOMOBILE CLUB OF MICHIGAN *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 89. Argued March 6-7, 1957.—Decided April 22, 1957.

The Commissioner of Internal Revenue, by rulings in 1934 and 1938, exempted petitioner automobile club from income taxes as a "club" within the meaning of provisions corresponding to § 101 (9) of the Internal Revenue Code of 1939. In 1945, the Commissioner revoked his 1934 and 1938 rulings, which were based upon a mistake of law, and directed petitioner to file returns for 1943 and subsequent years. The Commissioner also determined that prepaid membership dues received by petitioner should be treated as income in the year received. The Tax Court sustained the Commissioner's determinations, and the Court of Appeals affirmed. *Held*: The judgment is affirmed. Pp. 181-190.

1. The Commissioner had power to apply the revocation retroactively to 1943 and 1944. Pp. 183-185.

(a) The doctrine of equitable estoppel does not bar correction by the Commissioner of a mistake of law. P. 183.

2. In the circumstances of this case, the Commissioner did not abuse the discretion vested in him by § 3791 (b) of the 1939 Code. Pp. 184-186.

(a) It is clear from the language and legislative history of § 3791 (b) that it confirmed the authority of the Commissioner to correct any ruling, regulation or Treasury decision retroactively, and empowered him, in his discretion, to limit retroactive application to the extent necessary to avoid inequitable results. P. 184.

(b) *Helvering v. Reynolds Co.*, 306 U. S. 110, distinguished. Pp. 184-185.

(c) Having dealt with petitioner upon the same basis as other automobile clubs, the Commissioner did not abuse his discretion. Pp. 185-186.

(d) The 2-year delay in proceeding with petitioner's case did not, in the circumstances, vitiate the Commissioner's action. P. 186.

3. In the circumstances of this case, assessment of tax deficiencies against petitioner for 1943 and 1944 was not barred by limitations under §§ 275 (a) and 276 (b) of the 1939 Code. Pp. 186-187.

(a) The express condition prescribed by Congress was that the statute was to run against the United States from the date of the actual filing of the return, and no action of the Commissioner's can change or modify the conditions under which the United States consents to the running of the statute of limitations against it. P. 187.

(b) Form 990 returns are not tax returns within the contemplation of § 275 (a) of the 1939 Code. Pp. 187-188.

4. The Commissioner's determination that the entire amount of prepaid dues received in each year by petitioner should be reported as income for that year (instead of being allocated over the following 12 months) did not exceed the permissible limits of the Commissioner's discretion under § 41 of the 1939 Code. Pp. 188-190.

230 F. 2d 585, affirmed.

*Ellsworth C. Alvord* and *Raymond H. Berry* argued the cause for petitioner. With them on the brief were *A. H. Moorman* and *Lincoln Arnold*.

*John N. Stull* argued the cause for respondent. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Rice*, *I. Henry Kutz* and *Joseph F. Goetten*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1945, the Commissioner of Internal Revenue revoked his 1934 and 1938 rulings exempting the petitioner from federal income taxes, and retroactively applied the revocation to 1943 and 1944. The Commissioner also determined that prepaid membership dues received by the petitioner should be taken into income in the year received, rejecting the petitioner's method of reporting as income only that part of the dues as was recorded on petitioner's books as earned in the tax year. The Tax Court sustained the Commissioner's determinations,<sup>1</sup> and

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<sup>1</sup> 20 T. C. 1033.



the Court of Appeals for the Sixth Circuit affirmed.<sup>2</sup> This Court granted certiorari.<sup>3</sup>

The Commissioner had determined in 1934 that the petitioner was a "club" entitled to exemption under provisions of the internal revenue laws corresponding to § 101 (9) of the Internal Revenue Code of 1939,<sup>4</sup> notifying the petitioner that ". . . future returns, under the provisions of section 101 (9) . . . will not be required so long as there is no change in your organization, your purposes or methods of doing business." In 1938, the Commissioner confirmed this ruling in a letter stating: ". . . as it appears that there has been no change in your form of organization or activities which would affect your status the previous ruling of the Bureau holding you to be exempt from filing returns of income is affirmed . . . ." Accordingly the petitioner did not pay federal taxes from 1933 to 1945. The Commissioner revoked these rulings in 1945, however, and directed the petitioner to file returns for 1943 and subsequent years.<sup>5</sup> Pursuant to this

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<sup>2</sup> 230 F. 2d 585.

<sup>3</sup> 352 U. S. 817.

<sup>4</sup> Section 101 (9) provided as follows:

"The following organizations shall be exempt from taxation under this chapter—

"(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder . . . ." 53 Stat. 33, 26 U. S. C. (1934 ed., Supp. V) § 101 (9).

The earlier statute sections were identical to the 1939 section. 52 Stat. 480 (1938); 49 Stat. 1673 (1936); 48 Stat. 700 (1934); 47 Stat. 193 (1932).

<sup>5</sup> The letter of revocation stated that in order to qualify as a club under § 101 (9), the ". . . organization should be so composed and its activities be such that fellowship among the members plays a material part in the life of the organization . . . ." It was then stated that the previous rulings were revoked because "[t]he evidence submitted

direction, the petitioner filed, under protest, corporate income and excess profits tax returns for 1943, 1944 and 1945.

The Commissioner's earlier rulings were grounded upon an erroneous interpretation of the term "club" in § 101 (9) and thus were based upon a mistake of law. It is conceded that in 1943 and 1944 petitioner was not, in fact or in law, a "club" entitled to exemption within the meaning of § 101 (9), and also that petitioner is subject to taxation for 1945 and subsequent years.<sup>6</sup> It is nevertheless contended that the Commissioner had no power to apply the revocation retroactively to 1943 and 1944, and that, in any event, the assessment of taxes against petitioner for 1943 and 1944 was barred by the statute of limitations.

The petitioner argues that, in light of the 1934 and 1938 rulings, the Commissioner was equitably estopped from applying the revocation retroactively. This argument is without merit. The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.<sup>7</sup> The decision in *Stockstrom v. Commis-*

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shows that fellowship does not constitute a material part of the life of . . . [petitioner's] organization and that . . . [petitioner's] principal activity is the rendering of commercial services to . . . [its] members."

<sup>6</sup> Petitioner renders various services for its members. Among these are emergency road service when a car is disabled; furnishing maps, road and other travel information; and publishing a monthly magazine containing news of travel and of laws pertaining to the use of automobiles.

<sup>7</sup> *Keystone Auto. Club v. Commissioner*, 181 F. 2d 402; *Schafer v. Helvering*, 65 App. D. C. 292, 83 F. 2d 317, aff'd, 299 U. S. 171; *John M. Parker Co. v. Commissioner*, 49 F. 2d 254; *Southern Maryland Agricultural Fair Assn. v. Commissioner*, 40 B. T. A. 549; *Yokohama Ki-Ito Kwaisha, Ltd.*, 5 B. T. A. 1248; see also, *Chattanooga Auto. Club v. Commissioner*, 182 F. 2d 551 (by implication); *Warren Auto. Club v. Commissioner*, 182 F. 2d 551 (by implication); *Smyth v. California State Auto. Assn.*, 175 F. 2d 752 (by implication); *Automobile Club of St. Paul v. Commissioner*, 12 T. C. 1152 (by implication).

sioner, 88 U. S. App. D. C. 286, 190 F. 2d 283, to the extent that it holds to the contrary, is disapproved.

Petitioner's reliance on *H. S. D. Co. v. Kavanagh*, 191 F. 2d 831, and *Woodworth v. Kales*, 26 F. 2d 178, is misplaced because those cases did not involve correction of an erroneous ruling of law. Reliance on *Lesavoy Foundation v. Commissioner*, 238 F. 2d 589, is also misplaced because there the court recognized the power in the Commissioner to correct a mistake of law, but held that in the circumstances of the case the Commissioner had exceeded the bounds of the discretion vested in him under § 3791 (b) of the 1939 Code.<sup>8</sup>

The Commissioner's action may not be disturbed unless, in the circumstances of this case, the Commissioner abused the discretion vested in him by § 3791 (b) of the 1939 Code. That section provides:

"RETROACTIVITY OF REGULATIONS OR RULINGS.—

The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."

The petitioner contends that this section forbids the Commissioner taking retroactive action. On the contrary, it is clear from the language of the section and its legislative history<sup>9</sup> that Congress thereby confirmed the authority of the Commissioner to correct any ruling, regulation or Treasury decision retroactively, but empowered him, in his discretion, to limit retroactive application to the extent necessary to avoid inequitable results.

The petitioner, citing *Helvering v. Reynolds Co.*, 306 U. S. 110, argues that resort by the Commissioner to

<sup>8</sup> 53 Stat. 467, 26 U. S. C. § 3791 (b).

<sup>9</sup> H. R. Rep. No. 704, 73d Cong., 2d Sess. 38; S. Rep. No. 558, 73d Cong., 2d Sess. 48.



§ 3791 (b) was precluded in this case because the repeated re-enactments of § 101 (9) gave the force of law to the provision of the Treasury regulations relating to that section. These regulations provided that when an organization had established its right to exemption it need not thereafter make a return of income or any further showing with respect to its status unless it changed the character of its operations or the purpose for which it was originally created.<sup>10</sup> *Helvering v. Reynolds Co.* is inapplicable to this case. As stated by the Tax Court: "The regulations involved there [*Helvering v. Reynolds Co.*] . . . purported to determine what did or did not constitute gain or loss. The regulations here . . . in nowise purported to determine whether any organization was or was not exempt."<sup>11</sup> These regulations did not provide the exemption or interpret § 101 (9), but merely specified the necessary information required to be filed in order that the Commissioner might rule whether or not the taxpayer was entitled to exemption. This is thus not a case of ". . . administrative construction embodied in the regulation[s] . . ." which, by repeated re-enactment of § 101 (9), ". . . Congress must be taken to have approved . . . and thereby to have given . . . the force of law." *Helvering v. Reynolds Co.*, 306 U. S., at 114, 115.

We must, then, determine whether the retroactive action of the Commissioner was an abuse of discretion in the circumstances of this case. The action was the consequence of the reconsideration by the Commissioner, in 1943, of the correctness of the prior rulings exempting automobile clubs, initiated by a General Counsel Memorandum interpreting § 101 (9) to be inapplicable to such organizations.<sup>12</sup> The Commissioner adopted the General

<sup>10</sup> Treas. Reg. 86, Art. 101-1 (1934); Treas. Reg. 94, Art. 101-1 (1936); Treas. Reg. 103, § 19.101-1 (1939).

<sup>11</sup> 20 T. C., at 1041.

<sup>12</sup> G. C. M. 23688, 1943 Cum. Bull. 283.

Counsel's interpretation and proceeded to apply it, effective from 1943, indiscriminately to automobile clubs.<sup>13</sup> We thus find no basis for disagreeing with the conclusion, reached by both the Tax Court and the Court of Appeals, that the Commissioner, having dealt with petitioner upon the same basis as other automobile clubs, did not abuse his discretion. Nor did the two-year delay in proceeding with the petitioner's case, in these circumstances, vitiate the Commissioner's action.

The petitioner's contention that the statute of limitations barred the assessment of deficiencies for 1943 and 1944 is also without merit. Its returns for those years were not filed until October 22, 1945. Within three years, on August 25, 1948, the petitioner and the Commissioner signed consents extending the period to June 30, 1949. The period was later extended to June 20, 1950. Notice of deficiencies was mailed to petitioner on February 20, 1950. The assessments were therefore within time under §§ 275 (a) and 276 (b) <sup>14</sup> unless, as the peti-

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<sup>13</sup> See, e. g., *Chattanooga Auto. Club v. Commissioner*, 182 F. 2d 551; *Warren Auto. Club v. Commissioner*, 182 F. 2d 551; *Keystone Auto. Club v. Commissioner*, 181 F. 2d 402; *Smyth v. California State Auto. Assn.*, 175 F. 2d 752; *Automobile Club of St. Paul v. Commissioner*, 12 T. C. 1152.

<sup>14</sup> Section 275 (a) provides as follows:

"Except as provided in section 276—

"(a) GENERAL RULE.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period." 53 Stat. 86, 26 U. S. C. § 275 (a).

Section 276 (b) provides as follows:

"(b) WAIVER.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration

tioner asserts, the statute of limitations began to run from the dates when, if there was a duty to file, the statute required filing.<sup>15</sup> The petitioner argues that because its omission to file on March 15, 1944, and March 15, 1945, was induced by the Commissioner's 1934 and 1938 rulings, it is only equitable to interpret the statute of limitations as running from those dates in the circumstances of this case. But the express condition prescribed by the Congress was that the statute was to run against the United States from the date of the actual filing of the return, and no action of the Commissioner can change or modify the conditions under which the United States consents to the running of the statute of limitations against it. In *Lucas v. Pilliod Lumber Co.*, 281 U. S. 245, 249, this Court held:

"Under the established general rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here assent that the statute might begin to run was conditioned upon the presentation of a return duly sworn to. No officer had power to substitute something else for the thing specified. . . ." <sup>16</sup>

It is also argued that the Form 990 returns filed by the petitioner in compliance with § 54 (f) of the 1939 Code, as amended,<sup>17</sup> constituted the filing of returns for the pur-

of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon." 53 Stat. 87, 26 U. S. C. § 276 (b).

<sup>15</sup> The 1943 tax return was due on March 15, 1944. The 1944 tax return was due on March 15, 1945.

<sup>16</sup> To the extent that the decision in *Balkan Nat. Ins. Co. v. Commissioner*, 101 F. 2d 75, is to the contrary, it is disapproved.

<sup>17</sup> 53 Stat. 28, as amended, 58 Stat. 36, 26 U. S. C. § 54 (f).



poses of § 275 (a). But the Form 990 returns are merely information returns in furtherance of a congressional program to secure information useful in a determination whether legislation should be enacted to subject to taxation certain tax-exempt corporations competing with taxable corporations.<sup>18</sup> Those returns lack the data necessary for the computation and assessment of deficiencies and are not therefore tax returns within the contemplation of § 275 (a). Cf. *Commissioner v. Lane-Wells Co.*, 321 U. S. 219.

The final issue argued concerns the treatment of membership dues and arises because such dues are paid in advance for one year. The dues upon collection are deposited in a general bank account and are not segregated from general funds but are available and are used for general corporate purposes. For bookkeeping purposes, however, the dues upon receipt are credited to an account carried as a liability account and designated "Unearned Membership Dues." During the first month of membership and each of the following eleven months one-twelfth of the amount paid is credited to an account designated "Membership Income." This method of accounting was followed by petitioner from 1934. The income from such dues reported by petitioner in each of its tax returns for 1943 through 1947 was the amount credited in the year to the "Membership Income" account. The Commissioner determined that the petitioner received the prepaid dues under a claim of right, without restriction as to their disposition, and therefore the entire amount received in each year should be reported as income. The Commissioner relies upon *North American Oil v. Burnet*, 286 U. S. 417, 424, where this Court said: "If a taxpayer receives earnings under a claim of right

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<sup>18</sup> H. R. Rep. No. 871, 78th Cong., 1st Sess. 24-25; S. Rep. No. 627, 78th Cong., 1st Sess. 21.

and without restriction as to its disposition, . . . [it] has received income which . . . [it] is required to return . . . .”

The petitioner does not deny that it has the unrestricted use of the dues income in the year of receipt, but contends that its accrual method of accounting clearly reflects its income, and that the Commissioner is therefore bound to accept its method of reporting membership dues. We do not agree. Section 41 of the Internal Revenue Code of 1939 required that “[t]he net income shall be computed . . . in accordance with the method of accounting regularly employed in keeping the books . . . but . . . if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. . . .”<sup>19</sup> The pro rata allocation of the membership dues in monthly amounts is purely artificial and bears no relation to the services which petitioner may in fact be called upon to render for the member.<sup>20</sup> Section 41 vests the Commissioner with discretion to determine whether the petitioner’s method of accounting clearly reflects income. We cannot say, in the circumstances here, that the discretionary

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<sup>19</sup> 53 Stat. 24, 26 U. S. C. § 41.

<sup>20</sup> *Beacon Publishing Co. v. Commissioner*, 218 F. 2d 697, and *Schuessler v. Commissioner*, 230 F. 2d 722, are distinguishable on their facts. In *Beacon*, performance of the subscription, in most instances, was, in part, necessarily deferred until the publication dates after the tax year. In *Schuessler*, performance of the service agreement required the taxpayer to furnish services at specified times in years subsequent to the tax year. In this case, substantially all services are performed only upon a member’s demand and the taxpayer’s performance was not related to fixed dates after the tax year. We express no opinion upon the correctness of the decisions in *Beacon* or *Schuessler*.

HARLAN, J., dissenting.

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action of the Commissioner, sustained by both the Tax Court and the Court of Appeals, exceeded permissible limits. See *Brown v. Helvering*, 291 U. S. 193, 204-205.

*Affirmed.*

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

MR. JUSTICE BURTON, whom MR. JUSTICE CLARK joins, concurring in part and dissenting in part.

I join in the Court's opinion insofar as it holds (a) that the Commissioner did not abuse his discretion under § 3791 (b) of the Internal Revenue Code of 1939 when, in 1946, he revoked previous rulings exempting petitioner from federal income taxes and directed petitioner to file returns for 1943 and 1944, and (b) that assessment of deficiencies for those years was not barred by the statute of limitations. However, for the reasons stated by MR. JUSTICE HARLAN, I dissent from the Court's holding that the Commissioner acted within his discretion under § 41 of the Internal Revenue Code of 1939 when he determined, in reliance upon the "claim of right" doctrine, that petitioner's method of accounting for prepaid membership dues did not clearly reflect its income.

MR. JUSTICE HARLAN, dissenting.

I think collection of the 1943 and 1944 taxes, based on the Commissioner's retroactive revocation of his 1934 and 1938 exemption rulings, was barred by the three-year statute of limitations.<sup>1</sup> I would hold that the limitations period began to run when the taxpayer, relying on the exemption ruling, duly filed its Form 990 returns<sup>2</sup> for the years 1943 and 1944. I see no reason why we should

<sup>1</sup> 53 Stat. 86, 26 U. S. C. § 275 (a).

<sup>2</sup> 58 Stat. 36, 26 U. S. C. § 54 (f).



strain to construe "return" in § 275 (a) as excluding an information return when such a return was the only one required of this taxpayer, exempt from taxation at the time, and especially when that construction produces the inequitable consequences which have resulted here. Section 275 (a) should be construed in conjunction with § 276 (a),<sup>3</sup> which provides that an assessment may be made without regard to the statute of limitations in "the case of a false or fraudulent return with intent to evade tax or of a failure to file a return . . . ." In my judgment, a taxpayer who files a return on one form rather than another because the Commissioner directs him to do so cannot be charged with the "failure" contemplated by the statute. See *Stockstrom v. Commissioner*, 88 U. S. App. D. C. 286, 190 F. 2d 283; *Balkan Nat. Ins. Co. v. Commissioner*, 101 F. 2d 75. *Commissioner v. Lane-Wells Co.*, 321 U. S. 219, cited by the Court, is inapposite because the taxpayer there was required by applicable statutes and regulations to file two returns and had filed only one. Compare *Germantown Trust Co. v. Commissioner*, 309 U. S. 304. Under the decision of the Court, the Commissioner may revoke his rulings retroactively so long as his action does not constitute an "abuse of discretion." I see no reason why that power should not also be subjected to the three-year limit established by Congress.

I also disagree with the Court's holding that the Commissioner may properly tax in the year of receipt the full amount of petitioner's prepaid membership dues. The Commissioner seeks to justify that course under the "claim of right" doctrine announced in *North American Oil v. Burnet*, 286 U. S. 417. However, that doctrine, it seems to me, comes into play only in determining whether the treatment of an item of income should be influenced by the fact that the right to receive or keep it

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<sup>3</sup> 53 Stat. 87, 26 U. S. C. § 276 (a).

is in dispute; it does not relate to the entirely different question whether items that admittedly belong to the taxpayer may be attributed to a taxable year other than that of receipt in accordance with principles of accrual accounting. See *Brown v. Helvering*, 291 U. S. 193, where these two problems were involved and were treated as distinct. The collection of taxes clearly should not be made to depend on the vicissitudes of litigation with third parties in which the taxpayer may be engaged. That is quite a different thing, however, from holding that the Commissioner may force taxpayers to abandon reasonable and accurate methods of accounting simply because they do not reflect advance receipts as income in the year received. Under § 41 of the Internal Revenue Code of 1939,<sup>4</sup> the income of the taxpayer is to be determined "in accordance with the method of accounting regularly employed in keeping the [taxpayer's] books," unless "the method employed does not clearly reflect" the taxpayer's income. Under § 42,<sup>5</sup> items of gross income need not be reported in the taxable year in which received by the taxpayer if, "under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period." And it is clear that accrual methods of accounting may be employed. *United States v. Anderson*, 269 U. S. 422. The Commissioner's own regulations authorize the deferral of income in some instances.<sup>6</sup>

The Court, however, now by-passes the Commissioner's "claim of right" argument, and rests its decision instead on the ground that the "pro rata allocation of the member-

<sup>4</sup> 53 Stat. 24, 26 U. S. C. § 41.

<sup>5</sup> 53 Stat. 24, 26 U. S. C. § 42.

<sup>6</sup> Regulations 111, §§ 29.22 (a)-17 (2) (a) (bond premiums), 29.42-4 (long-term contracts). See also I. T. 3369, 1940-1 Cum. Bull. 46 (prepaid subscriptions to periodicals); I. T. 2080, III-2 Cum. Bull. 48 (1924) (advance receipts from sales of tickets for tourist cruises).

ship dues in monthly amounts is purely artificial and bears no relation to the services which petitioner may in fact be called upon to render for the member," so that it cannot say that in doing what he did the Commissioner exceeded the limits of his discretion. I do not understand this, because the Commissioner does not deny—as, indeed, he could not—that the method of accounting used by the taxpayer reflects its net earnings with considerably greater accuracy than the method he proposes. Nor does he urge that the taxpayer's accounting system defers income in a manner or to an extent that would make the Government unreasonably dependent on the continued solvency of the taxpayer's business. And no other circumstances have been shown which would justify application of the statutory exception.

On both of these grounds I would reverse the judgment below.



UNITED STATES *v.* WITKOVICH.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

No. 295. Argued February 28, 1957.—Decided April 29, 1957.

Appellee was indicted under § 242 (d) of the Immigration and Nationality Act of 1952 on the charge that, as an alien against whom a final order of deportation had been outstanding for more than six months, he had willfully failed to give information requested by the Immigration and Naturalization Service under the purported authority of clause (3) of that Section. The information he was charged with failing to furnish concerned (1) present membership in and activities on behalf of the Communist Party and other organizations, and (2) associations with particular individuals. *Held*: Construing clause (3) of § 242 (d) in the context of the entire Section and of the scheme of the legislation as a whole, with due regard to the principle of so construing statutes as to avoid raising constitutional questions, the information an alien is required to furnish under clause (3) relates solely to his availability for deportation; and dismissal of the indictment for failure to state an offense is sustained. Pp. 194–202.

140 F. Supp. 815, affirmed.

*John F. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *J. F. Bishop*.

*Pearl M. Hart* argued the cause for appellee. With her on the brief was *Cyril D. Robinson*.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Appellee was indicted under § 242 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, originally part of § 23 of the Internal Security Act of 1950, 64 Stat. 1010, on the charge that, as an alien against whom a final order of deportation had been outstanding

for more than six months, he had wilfully failed to give information to the Immigration and Naturalization Service as required by that section. Appellee moved to dismiss the indictment on the grounds, *inter alia*, that it failed to state an offense within the statute and in the alternative, if it did so, that the statute was unconstitutional. The District Court held that the statute as construed by it was not unconstitutional. 140 F. Supp. 815. Thereupon the United States filed a motion for clarification of the court's opinion, and appellee filed a supplemental motion to dismiss the indictment, claiming that the statute as construed by the district judge did not authorize the Government to elicit the demanded information. The District Court, in a second opinion, dismissed the indictment for failure to state an offense. 140 F. Supp., at 820. The case was brought here, 352 U. S. 817, under the Criminal Appeals Act of 1907, as amended, 18 U. S. C. § 3731.

The Section, as amended, 68 Stat. 1232, 8 U. S. C. (Supp. II) § 1252 (d), is as follows:

“(d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such

reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

The District Court construed § 242 (d) as conferring upon the Attorney General "power to supervise the alien to make sure he is available for deportation, and no further power." Accordingly, it held that clause (3) of this subsection is to be restricted to require only "such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes." 140 F. Supp., at 819-820. The court found that the questions listed in the indictment, which are set forth in the margin,\* were not relevant to appellee's availability for depor-

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\*"(a) Q. Do you subscribe to the Daily Worker?

"(b) Q. Mr. Witkovich, can you read in any other language other than Slovene and English?

"(c) Q. Since the order of supervision was entered on March 4, 1954, have you at any time visited the office of the 'Narodny Glasnik,' 1413 West 18th Street, Chicago, Illinois?

"(d) Q. Since the order of supervision was entered on March 4, 1954, Mr. Witkovich, have you ever visited the offices of the Bohemian publication 'Nova Dova' or the Slovakian publication 'Ludovy Noviny,' 1510 West 18th Street, Chicago, Illinois?

"(e) Q. Do you know the editor of the 'Narodni Glasnik'?

"(f) Q. Do you know Leo Fisher?

"(g) Q. Do you know Anton Minerich?

"(h) Q. Do you know Nick Rajkovich?

[Footnote continued on p. 197]



tation. The interpretation that the District Court thus placed on § 242 (d) was derived from a consideration of its relation to the entire statutory scheme of deportation of which it is a part. The court below was further guided by the principle that requires courts, when construing statutes, to avoid constitutional doubts. "To hold that the statute intended to give an official the unlimited right to

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"(i) Q. Do you know Arsenio Bartl?

"(j) Q. Do you know John Zuskar?

"(k) Q. Do you know Calvin Brook?

"(l) Q. Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U. S. A.?

"(m) Q. Since the order of supervision was entered on March 4, 1954 have you attended any meeting of any organization other than the singing club?

"(n) Q. Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?

"(o) Q. Have you distributed petitions or leaflets published by the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case since the order of deportation was entered June 25, 1953?

"(p) Q. Since the order of supervision have you attended any meetings or lectures at the Peoples Auditorium, 2457 West Chicago Avenue, Chicago, Illinois?

"(q) Q. Since the order of supervision was entered against you have you attended any meetings or socials at the Chopin Cultural Center, 1547 North Leavitt Street, Chicago?

"(r) Q. Have you attended any movies since your order of supervision was entered at the Cinema Annex, 3210 West Madison Street, Chicago?

"(s) Q. Are you acquainted with an individual named Irving Franklin?

"(t) Q. Are you now a member of the Communist Party of U. S. A.?

"(u) Q. Are you now or have you ever been a member of the Slovene American National Council?

"(v) Q. Are you now or have you ever been a member of the United Committee of South Slavic Americans?"

subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask would raise very serious constitutional questions." *Id.*, at 821.

The Government does not support the questions put to the alien on the basis of the construction that the District Court placed upon § 242 (d). This construction authorizes all questions reasonably appropriate to keep the Attorney General advised regarding the continued availability for departure of a deportable alien. The Government contends that the District Court misconceived the scope of the statute. It points to what it characterizes as "the eloquent breadth" of clause (3), whereby the alien is to give "such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." This, says the Government, establishes a requirement "in the broadest possible statutory terms for the furnishing of information by the alien." And this view, it maintains, fits into the statutory scheme. In the circumstances defined by § 242 (a), an alien may be detained pending determination of deportability; and § 242 (c) authorizes such detention for six months after the alien has been found deportable. So, the Government argues, § 242 (d), though it does not authorize detention after six months, is an attempt to accomplish in a modified form the ends that would justify detention in the earlier stages of the deportation process. Our decision in *Carlson v. Landon*, 342 U. S. 524, is heavily invoked. If, so the argument runs, detention of active alien Communists pending deportation hearings was sustainable under § 242 (a), the national interest in avoiding recurrence of past Communist activity for which appellee is being deported should at least require him to answer questions regarding any present Communist relationships. For this view of the purpose of supervision, support is found in two other statutory provisions:

§ 242 (e), making an alien's wilful failure to leave the country a felony but providing for suspension of sentence and release of the alien upon judicial consideration, *inter alia*, of the effect of release upon the national security and the likelihood of resumption of conduct that serves as a basis for deportation; and the recital in § 2 (13) of the Internal Security Act of 1950, that "numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes . . . are free to roam the country at will without supervision or control." 64 Stat. 987.

The language of § 242 (d)(3), if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of aliens whose deportation has not been effected within six months after it has been commanded. The Government itself shrinks from standing on the breadth of these words. But once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative. A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or by the rule of constitutional adjudication, relied on by the District Court, that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts.

The preoccupation of the entire subsection of which clause (3) is a part is certainly with availability for deportation. Clause (1) requires the alien's periodic appearance for the purpose of identification, and clause (2) dealing with medical and psychiatric examination, when necessary, clearly is directed to the same end; and the "reasonable written restrictions on [the alien's] conduct or activities" authorized by clause (4) have an implied scope to be gathered from the subject matter, *i. e.*, the object of the statute as a whole. Moreover, this limi-



tation of "reasonableness" imposed by clause (4) upon the Attorney General's power to restrict suggests that, if we are to harmonize the various provisions of the section, the same limitation must also be read into the Attorney General's seemingly limitless power to question under clause (3). For, assuredly, Congress did not authorize that official to elicit information that could not serve as a basis for confining an alien's activities. Nowhere in § 242 (d) is there any suggestion of a power of broad supervision like unto that over a probationer. When Congress did want to deal with the far-flung interest of national security or the general undesirable conduct of aliens, it gave clear indication of this purpose, as in § 242 (e). In providing for the release of aliens convicted of wilful failure to depart, that subsection specifically requires courts to inquire into both the effect of the alien's release upon national security and the likelihood of his continued undesirable conduct.

The legislative history likewise counsels confinement of the mere words to the general purpose of the legislative scheme of which clause (d) is a part, namely, the actual deportation of certain undesirable classes of aliens. Section 242 (d), as it was reported by the House Judiciary Committee and passed by the House in 1949, was in its present state in all but one significant respect. It provided for indefinite detention of any alien who wilfully failed to comply with the regulations, to appear, to give information or to submit to medical examination, or who knowingly gave false information or violated a reasonable restriction upon his activity. H. R. Rep. No. 1192, 81st Cong., 1st Sess., pp. 2-3. The report of the House Committee, although in several places focusing only upon availability for deportation, does indicate concern over the threat to the national interest represented by undesirable but undeportable aliens. The Senate Judiciary Committee, while sharing the desire of the House

to control the activities of such aliens, substituted for the House bill's detention provision the imposition of criminal penalties for failure to comply with the conditions of supervision. The report of the Senate Committee significantly states the reason for the change: "This provision in the bill as it passed the House of Representatives appears to present a constitutional question." S. Rep. No. 2239, 81st Cong., 2d Sess., p. 8. This history, although suggesting a desire to exercise continuing control over the activities as well as the availability of aliens whose deportation had been ordered but not effected, shows a strong congressional unwillingness to enact legislation that may subject the Attorney General's supervisory powers to constitutional challenge.

Acceptance of the interpretation of § 242 (d) urged by the Government would raise doubts as to the statute's validity. By construing the Act to confer power on the Attorney General and his agents to inquire into matters that go beyond assuring an alien's availability for deportation we would, at the very least, open up the question of the extent to which an administrative officer may inhibit deportable aliens from renewing activities that subjected them to deportation. See 70 Harv. L. Rev. 718. This is not *Carlson v. Landon*, *supra*, where the question was whether an alien could be detained during the customarily brief period pending determination of deportability. Contrariwise, and as the Senate and House Committees recognized in passing on § 242 (d), supervision of the undeportable alien may be a lifetime problem. In these circumstances, issues touching liberties that the Constitution safeguards, even for an alien "person," would fairly be raised on the Government's view of the statute.

The path of constitutional concern in this situation is clear.

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of

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constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U. S. 22, 62.

See also cases cited in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348, note 8.

Section 242 (d) is part of a legislative scheme designed to govern and to expedite the deportation of undesirable aliens, and clause (3) must be placed in the context of that scheme. As the District Court held and as our own examination of the Act confirms, it is a permissible and therefore an appropriate construction to limit the statute to authorizing all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue. Accordingly, the judgment of the District Court is

*Affirmed.*

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

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON joins, dissenting.

The Congress has authorized the Attorney General to retain an alien in custody during the pendency of deportation proceedings. 66 Stat. 208, 8 U. S. C. § 1252 (a). This Court approved such custody in *Carlson v. Landon*, 342 U. S. 524 (1952). The Congress has also authorized the Attorney General to retain an alien in custody for six months subsequent to a final order of deportation within which to "effect the alien's departure." 66 Stat. 210, 8 U. S. C. § 1252 (c). The section here in question further declares that an alien under a final order of



deportation for over six months "shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General." 64 Stat. 1011, as amended, 8 U. S. C. (Supp. IV) § 1252 (d). The Attorney General has implemented this provision by a regulation requiring the alien, *inter alia*, to "Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper." 8 CFR § 242.3 (c)(3). This language was taken from subsection (3) of 8 U. S. C. § 1252 (d), the source of the Attorney General's power of supervision. But today the Court has denied the Attorney General the right to question the deportee in regard to activities in conjunction with the deportee's prior conduct on which the deportation order was based. By its interpretation the Court has deleted the crux of this subsection from the Act and limited this phase of the Attorney General's "supervision" of aliens under final deportation order for over six months solely to interrogation relevant to the availability of the alien for deportation. In this respect the construction places an alien who has been under a final order of deportation for more than six months in a more favorable position than one who is under no order at all. Other aliens are obliged to report to the Attorney General when called upon to do so. Indeed, they must testify or claim their privilege. No privilege was claimed here. The Congress could not have intended the anomalous result reached today, one which is entirely foreign to its over-all plan of control over resident aliens. For the power of the Attorney General over aliens generally see 66 Stat. 223-225, 8 U. S. C. §§ 1301-1306.

The majority reasons that the entire subsection of which clause (3) is a part is preoccupied with an alien's availability for deportation. We believe, however, that "the danger to the public safety of [the alien's] presence

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within the community," *United States ex rel. Potash v. District Director of Immigration and Naturalization*, 169 F. 2d 747, 751 (1948), was the basis on which the Congress placed this power with the Attorney General. In short, "the alien's anticipated personal conduct . . . [based on his past action] must be considered." See the dissenting opinion in *Carlson v. Landon*, *supra*, at 563-564. And so here, highly relevant to the decision regarding any additional supervision that is to be placed over appellee, or the removal of any prior supervision, is information as to whether he has resumed his past activities in the Communist Party. Yet the Court does not allow inquiry into this and related areas unless it is necessary to determine appellee's availability for deportation. The Attorney General is thereby deprived of this information vital to the exercise of his supervisory duties.

The statute was motivated by national security problems with which the Congress felt impelled to deal. In § 1252 (d) Congress was not concerned with "actual deportation," but with that class of deportees who could not be deported because no country would permit them entrance. It believed that an alien finally ordered deported but who could no longer be held in custody pending eventual effectuation of the order should be under the supervision of the Attorney General. All aliens, regardless of their status, are under some supervision and must answer inquiries in respect to: (1) the date and place of their entry into the United States; (2) the activities in which they have been and intend to be engaged; (3) the length of time they expect to remain in the United States; (4) their police or criminal record, if any; and (5) *such additional matters as may be prescribed*. 66 Stat. 224, 8 U. S. C. § 1304 (a). In addition, all aliens must register<sup>1</sup> and be

<sup>1</sup> The alien registration form includes a long series of questions requiring answer under oath by the alien. It covers virtually every type of question involved here, except those directed at whether the

fingerprinted, 66 Stat. 224, 8 U. S. C. § 1302; they must notify the Attorney General of their address annually and any change must be filed within 10 days thereof, 66 Stat. 225, 8 U. S. C. § 1305. Criminal penalties are imposed for willful failure to comply with any of these registration provisions, 66 Stat. 225, 8 U. S. C. § 1306. Congress thought that deportees should have closer supervision than other aliens. As the Court indicated in *Carlson v. Landon*, *supra*, at 538, "aliens arrested for deportation would have opportunities to hurt the United States . . . ." Deportees have a stronger motivation for carrying on subversive activities than other persons and are more likely to adopt old habits, return to old haunts, and resume old activities. Since 1939 Congress had been considering the tightening of controls over such aliens. Even then a bill introduced in Congress referred to "the likelihood of the alien's resuming the course of conduct which made him deportable." H. R. 5643, 76th Cong., 1st Sess.; 84 Cong. Rec. 5179. In the Eighty-first Congress a House Committee declared in comment on its bill which contained a provision similar to that here involved, "The situation has now become so serious . . . that the committee feels that the enactment of legislation of this type is a necessity, not only to the proper administration of the immigration laws, but from the standpoint of the national security of the United States." H. R. Rep. No. 1192, 81st Cong., 1st Sess. 8. Before the presidential veto of the proposed Internal Security Act of 1950, H. R. 9490, 81st Cong., 2d Sess., of which this provision was a part,

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appellee knew a specific person. One of the questions requires disclosure of the alien's participation in clubs, organizations, or societies; another is directed at any criminal convictions of the alien either in or outside of the United States; still another inquires as to the alien's affiliation or activity in organizations influencing or furthering in any way the political activities, public relations, or public policy of a foreign government.



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but to which the President expressed no opposition on constitutional grounds,<sup>2</sup> a substitute bill had been offered in the Senate.<sup>3</sup> This proposal contained the identical language which this Court now reads out of the Act, *i. e.*, requiring the alien to give "information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." While this substitute bill was not enacted, the same language was included within the present Act, showing that the section here involved has long been acceptable to all sides. In view of the legislative history of the forerunners of the present provision it is surprising that the Court now reads out of the Act the identical language which has repeatedly been included by the Congress. In so doing the Court deprives the Attorney General of a power of supervision over deportees that he possesses and exercises every day over other aliens not under deportation orders.

The Court takes the position that any construction other than that today adopted "would, at the very least, open up the question of the extent to which an administrative officer may inhibit deportable aliens from renewing activities that subjected them to deportation." But no such question is involved here. As the trial judge puts the issue, it is whether the Congress may constitutionally

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<sup>2</sup> The President in his message to the Congress explaining his veto of the Internal Security Act of 1950 stated that he would "be glad to approve" § 23, the forerunner of the section here involved, "although the language of [§ 23] is in some respects weaker than is desirable." H. R. Doc. No. 708, 81st Cong., 2d Sess. 3.

<sup>3</sup> S. 4130, 81st Cong., 2d Sess. This substitute was proposed by Senators Benton, Douglas, Graham, Humphrey, Kefauver, Lehman, and the Chairman of the Senate Judiciary Committee, Senator Kilgore. For a discussion of the effect of the bill on the problem here presented see the remarks of Senator Humphrey at 96 Cong. Rec. 14486.

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give the Attorney General "the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question . . . ." 140 F. Supp., at 821. There is nothing in the record to indicate that the Attorney General attempted further to "inhibit" the appellee "from renewing activities that subjected [him] to deportation." It may be that the Attorney General would have tried further to "inhibit" appellee if the answers put to him had indicated any necessity therefor in the interest of national security. But that stage was never reached. All the Attorney General undertook was to question appellee. He got no answers. And the Court, in affirming, prevents the Attorney General from obtaining any answers to the questions. It is for this reason that we dissent. The scope of the Attorney General's right to inquiry is the sole issue here. The Congress beyond any question gave the Attorney General the authority he exercised. Whether it placed further authority in his hands to "inhibit" the alien's activities is not involved. We, therefore, see no necessity of invoking the rule of avoidance of constitutional questions. There are none to avoid for the Attorney General clearly has the right to question as to activities indicated by past conduct. It will be soon enough to pass on other supervisory powers when they are here.

However, since the majority has enlarged the issue to include the power to restrict the alien's activities we feel it necessary to comment thereon. We believe that the purpose of the Act was to prevent a deportable alien from using the period of his further residence for the continuation of subversive, criminal, immoral, or other undesirable activities which formed the basis of his ordered deportation. This is a part of the "congressional plan" with reference to control of subversive activities within the United States. *Pennsylvania v. Nelson*, 350 U. S. 497, 503-504 (1956). Several thousand alien Communists who have

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been finally ordered deported will from now on, due to the Court's decision today, be under virtually no statutory supervision. Still they will, in all probability, remain among us for neither they nor the countries of which they are nationals wish them to leave. To their countries they are potential agents. The House Committee on the Judiciary recognized this danger in its report on facilitating the deportation of aliens. H. R. Rep. No. 1192, 81st Cong., 1st Sess. 8-13. Case histories set out in this report indicate that aliens ordered deported were refused visas by their native countries so that they might remain in the United States and carry on the very activities for which they were ordered deported. See also Hearings before the Senate Subcommittee on Immigration and Naturalization of the Committee on the Judiciary on S. 1832, 81st Cong., 1st Sess. 323. Were the deportee to cease the activity, no doubt his native land would issue the requisite visa and deal with him when he was returned.

In our view the power of the Congress with respect to aliens is exceedingly broad. Nothing points this out more forcibly than our own cases. Congress may expel any noncitizen it may determine is undesirable. The power given here is merely supplemental to that of expulsion and is a necessary concomitant thereof under the circumstances here presented. It gives to the Attorney General supervision of alien deportees whose past record discloses activities dangerous to our people. The appellee does not contest the charge as to his past activities. As we see it, the Congress has merely provided *limited* supervision which might prevent the alien from resuming the activity which brought on his ordered deportation. It may turn out that further limited supervisory precautions need not be exercised over appellee. However, we are in no position to know. The Attorney General himself does not know because he was prevented



from requiring the alien to give him the information. It is vital to effective supervision by the Attorney General for him to have the information he sought here. We believe that the counterbalancing necessity of preventing further detrimental conduct, or at least providing the authorities charged with the internal security of our country with some warning signal of it, substantially outweighs "issues touching liberties" which might be raised by the interrogation. Like "the police establishment of fire lines during a fire . . . the validity of the restraints . . . depends on all the conditions which obtain at the time . . . ." *Hirabayashi v. United States*, 320 U. S. 81, 99 (1943).

To us jailing alien deportees on the basis of our safety pending deportation proceedings as well as for six months thereafter, admittedly valid, is largely futile if the Attorney General cannot subsequently supervise them effectively. Certainly the Congress intended no such stultification.

We regret that the Court has used the rule of avoidance of constitutional issues to strip the Attorney General of this important power so necessary in the performance of his duty to protect our internal security.

UNITED STATES FOR THE BENEFIT OF SHERMAN  
ET AL., TRUSTEES, v. CARTER ET AL., DOING BUSI-  
NESS AS CARTER CONSTRUCTION CO., ET AL.

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

No. 48. Argued December 5, 1956.—Decided April 29, 1957.

As required by the Miller Act, a contractor who had a contract with the United States for the construction of federal buildings furnished a payment bond with a surety. The collective-bargaining contract under which employees of the contractor were hired obligated the contractor to pay them wages at specified rates and, in addition, to pay 7½ cents per hour of their labor to the trustees of a health and welfare fund established for their benefit and that of other construction workers. When the contractor failed to pay in full the required contributions to the health and welfare fund, the trustees of the fund sued (in the name of the United States) the surety to recover the balance due the fund, plus liquidated damages, attorneys' fees, court costs and expenses. *Held*: The surety was liable under § 2 (a) of the Miller Act, 40 U. S. C. § 270a. Pp. 211-221.

(a) The surety's liability on a Miller Act bond must be at least coextensive with the obligations imposed by the Act if the bond is to have its intended effect. Pp. 215-216.

(b) In this case, the trustees' rights against the surety depend upon, and are to be measured by, the applicable provisions of § 2 (a) of the Act. P. 216.

(c) The Miller Act is to be given a liberal construction to effectuate its protective purposes. P. 216.

(d) The essence of the policy of the Miller Act is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material. Pp. 216-217.

(e) The Miller Act does not limit recovery on the statutory bond to "wages." P. 217.

(f) The contractor's employees will not have been "paid in full" for their labor in accordance with the collective-bargaining agreements until the required contributions to the health and welfare fund have been made. Pp. 217-218.

(g) The contractor's obligation to contribute to the fund was covered by the statutory bond, even though that obligation was not

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set forth in the construction contract with the United States but appeared only in the master labor agreements. P. 218.

(h) In the circumstances here, the trustees stand in the shoes of the employees and are entitled to enforce their rights. Pp. 218-220.

(i) The trustees of the fund have an even better right to sue on the bond than does the usual assignee, since they are claiming recovery for the sole benefit of beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. P. 220.

(j) For purposes of the Miller Act, contributions to the fund are in substance as much "justly due" to the employees who have earned them as are the wages paid to them directly in cash. P. 220.

(k) The trustees are also entitled, under the Act, to recover liquidated damages, attorneys' fees, court costs, and other related expenses of this litigation, since these items must be included if the employees are to be "paid in full" the "sums justly due" them. P. 220.

229 F. 2d 645, reversed and remanded.

*Thomas E. Stanton, Jr.* argued the cause for petitioners. With him on the brief were *Gardiner Johnson* and *Charles P. Scully*.

*Richard C. Dinkelspiel* argued the cause for respondents. With him on the brief was *John W. Dinkelspiel*.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case concerns the extent of the liability of the surety on a payment bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings.<sup>1</sup> The collective-bargaining contract under

<sup>1</sup> ". . . (a) before any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sureties satisfactory



which the laborers were hired obligated the contractor to pay them wages at specified rates and, in addition, to pay 7½ cents per hour of their labor to the trustees of a health and welfare fund established for their benefit and that of other construction workers. When the contractor failed

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to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

“(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. . . .

“SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. . . .

“(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.” 49 Stat. 793, 794, 40 U. S. C. §§ 270a (1) (2), 270b.

to pay in full the required contributions to the health and welfare fund, the trustees of the fund sued the surety on the contractor's payment bond to recover the balance due the fund, plus liquidated damages, attorneys' fees, court costs and expenses. For the reasons hereafter stated, we hold that § 2 (a) of the Miller Act imposes liability on the surety.

In November 1952, the respondent contractor, Donald G. Carter, contracted with the United States to construct certain public buildings at Air Force bases in California. As required by the Miller Act, he filed performance and payment bonds executed by the respondent, Hartford Accident and Indemnity Company, as surety. The payment bond was in the penal sum of \$52,434.30, and provided that the obligation of the surety shall be void "if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . otherwise to remain in full force . . . ."

The terms under which Carter employed laborers for the prosecution of the work were prescribed in master labor agreements governing the conditions of employment in the construction industry in 46 counties of northern California. Those agreements had been negotiated in June 1952 through collective bargaining between the local council of a labor union representing construction workers and several associations of employers, one of which acted as an agent for Carter. The agreements obligated Carter to pay wages to his employees at specified rates which were to be not less than the prevailing rates determined by the Government. The agreements required also that, beginning February 1, 1953, Carter was to pay to the trustees of a health and welfare fund 7½ cents for each hour worked by his construction employees.

The specified fund was established by a trust agreement dated March 4, 1953, and negotiated by the parties

to the master labor agreements. Its pertinent provisions were as follows: The fund was to be administered by a board of trustees representing employers and employees. The trustees were authorized to use employer contributions to purchase various types of insurance, such as life, accidental death, hospitalization and surgical benefit policies, with eligible employees and their dependents as the beneficiaries.<sup>2</sup> The employees had no rights to the insurance benefits except as provided in the policies. Also, they had no right, title or interest in the contributions, and it was expressly stated that the contributions "shall not constitute or be deemed to be wages" due the employees.

The trustees had the sole power to demand and enforce prompt payment of employer contributions. Those contributions were payable in monthly installments. Any installment not paid by the 25th of the month in which it came due was delinquent, and the sum of \$20 per delinquency or 10% of the amount due, whichever was greater, was owed by the delinquent employer as liquidated damages and not as a penalty. If the trustees filed suit to secure payment of any installments, the defaulting employer was to pay the reasonable attorneys' fees, court costs and all other reasonable expenses of the trustees incurred in the litigation.

Carter became insolvent after completing the construction work and paying his employees the wages payable

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<sup>2</sup> The trustees established by regulation the requirements for eligibility for insurance benefits. Any employee in the bargaining unit, whether or not a member of the laborers' union, could become eligible. Each employee was given a credit for every hour he worked for an employer obligated to contribute to the fund. Any employee who received credits for at least 400 hours in a designated six-month period was entitled to the benefits of the plan for the succeeding six months. His eligibility during that period did not depend on his further employment in the construction industry.



directly to them. However, he failed to make his required contributions to the fund for February, March and April 1953. Pursuant to § 2 (b) of the Miller Act, the trustees of the fund, in the name of the United States, instituted this action on the payment bond against Carter and his surety in the United States District Court for the Northern District of California. The complaint sought recovery of the unpaid contributions and the prescribed liquidated damages, attorneys' fees, court costs and expenses, in the total amount of about \$500. The facts were stipulated and the court, after hearing, granted the surety's motion for summary judgment. The Court of Appeals affirmed, holding that the trustees had no right to sue on the bond under § 2 (a) of the Act, since they were neither persons who had furnished labor or material, nor were they seeking sums "justly due" such persons. 229 F. 2d 645. We granted certiorari to resolve the questions of statutory construction which are at issue. 351 U. S. 917.

Section 1 (a) (2) of the Miller Act provides that before any contract exceeding \$2,000 for the construction of any public work of the United States is awarded to any person, such person shall furnish to the United States a payment bond with a satisfactory surety "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract . . . ." 49 Stat. 793, 40 U. S. C. § 270a (2). Section 2 (a), which is at issue here, provides that "Every person *who has furnished labor or material* in the prosecution of the work provided for in such contract . . . and who has not been *paid in full* therefor . . . shall have the right to sue on such payment bond . . . for the sum or sums *justly due him . . .*" (Emphasis supplied.) 49 Stat. 794, 40 U. S. C. § 270b (a).

The surety's liability on a Miller Act bond must be at least coextensive with the obligations imposed by the

Act if the bond is to have its intended effect. The bond involved here was furnished to meet the statutory requirements of the Act and appears, on its face, to comply with these requirements. There is no indication that the coverage of the bond was intended to exceed them. The bond insures prompt payment "to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . ." The trustees' rights against the surety depend upon, and are to be measured by, the applicable provisions of § 2 (a) of the Act.

While the precise questions of statutory construction now presented are ones of first impression, prior decisions of this Court construing the Miller Act of 1935 and its predecessor, the Heard Act of 1894,<sup>3</sup> indicate that the Miller Act should receive a liberal construction to effectuate its protective purposes.

"The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *Fleisher Engineering Co. v. United States*, 311 U. S. 15, 17, 18; cf. *United States v. Irwin*, 316 U. S. 23, 29, 30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds." *Clifford F. MacEvoy Co. v. United States*, 322 U. S. 102, 107.

The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. The

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<sup>3</sup> Act of August 13, 1894, 28 Stat. 278, as amended, 33 Stat. 811, 36 Stat. 1167. See 40 U. S. C. (1934 ed.) § 270.

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essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material. Thus the Act provides a broad but not unlimited protection.<sup>4</sup>

It is undisputed that if the collective-bargaining agreement had required the contractor to pay each employee 7½ cents per hour above the prevailing wage rate, and the employee had, by contract with his bargaining representative, agreed to contribute that sum to the fund, the surety would have been obligated to make good any default in the contractor's payment of that extra 7½ cents per hour. The surety argues that employer contributions made directly to a health and welfare fund should be treated differently. It contends that, under the provisions of the trust agreement, the unpaid contributions are not "wages" due to Carter's employees, and that the employees, having received all the "wages" owed to them, have been "paid in full" as that term is used in § 2 (a) of the Act. The Act, however, does not limit recovery on the statutory bond to "wages." The parties have stipulated that contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by

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<sup>4</sup> One limitation, inapplicable here, comes from the proviso in § 2 (a). See n. 1, *supra*. In the *MacEvoy Co.* case, *supra*, this Court concluded that the effect of the proviso was to limit the right to bring suit on the bond to "(1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor." 322 U. S., at 107-108. Here the trustees of the fund are claiming sums on behalf of workmen who supplied labor for the project directly to the contractor under an express contractual relationship with him.



Carter's employees. The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been "paid in full" for their labor in accordance with the collective-bargaining agreements.

The surety suggests that Carter's obligation to contribute to the fund was not covered by the statutory bond because that obligation was not set forth in his construction contract with the United States, but appeared only in the master labor agreements. Those labor agreements were also the source of Carter's obligation to pay the "wages" payable directly to his employees, an obligation concededly guaranteed by the bond. Nothing in the Miller Act restricted the obligations of the surety to what was set forth specifically in Carter's agreement with the United States. In fact, the surety's obligations extended to some persons who had no contractual relationship with Carter. For example, persons who contributed labor and material to Carter's subcontractors were entitled to the Act's protection. See the *MacEvoy Co.* case, *supra*, at 105, 107-108. As long as Carter's obligations relating to compensation for labor have not been satisfied, his employees will not have been "paid in full" and the Miller Act will not have served its purpose.

The surety also argues that the trustees are not entitled to recover the promised contributions under § 2 (a) of the Miller Act, since they are neither persons who have furnished labor or material, nor are they seeking "sums justly due" to persons who have furnished labor or material. An answer to this contention is found in cases arising under the Heard Act involving suits by assignees of the claims of persons furnishing labor or material. Such assignees were not the persons who had furnished the

labor or material for which the claims were made. They did not seek "sums justly due" to persons who had themselves furnished labor or material, since the assignments had extinguished the right which those persons had to the performance of the contractors' obligation.<sup>5</sup> Yet these cases established that assignees of the claims of persons furnishing labor or material came within the protection of the statutory bond.<sup>6</sup> It was pointed out that a denial of an assignee's right to sue on the bond might deprive those for whom the security was intended of a fair chance to realize upon their claims by assignment.<sup>7</sup> There is nothing in the language, legislative history, or related decisions to indicate that Congress intended to overturn these cases when it replaced the Heard Act with the broader and more liberal provisions of the Miller Act.<sup>8</sup>

If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense,

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<sup>5</sup> 4 Corbin, *Contracts* (1951 ed.), § 891; *Restatement, Contracts*, § 150. See also, *Looney v. District of Columbia*, 113 U. S. 258; *Blair v. Commissioner*, 300 U. S. 5.

<sup>6</sup> *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 35; *U. S. Fidelity & Guaranty Co. v. Bartlett*, 231 U. S. 237, 243; *United States v. Rundle*, 100 F. 400, 403; *United States v. Brent*, 236 F. 771, 777; *Bartlett & Kling v. Dings*, 249 F. 322, 325.

<sup>7</sup> See *United States v. Rundle*, *supra*.

<sup>8</sup> See *United States v. Conn*, 19 F. R. D. 274, 277. In *Clifford F. MacEvoy Co. v. United States*, 322 U. S. 102, 105-106, this Court concluded that—

"The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries. There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."

assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions, but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment. The trustees stand in the shoes of the employees and are entitled to enforce their rights.

Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, these contributions are in substance as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.

The trustees' claim for liquidated damages, attorneys' fees, court costs and other related expenses of this litigation has equal merit. The contractor's obligation to pay these items is set forth in the trust agreement. It is stipulated that they form a part of the consideration which Carter agreed to pay for services performed by his employees. If the employees are to be "paid in full" the "sums justly due" to them, these items must be included. Their amount, however, remains to be determined.

We hold that the Miller Act makes the surety liable on its payment bond for the delinquent contributions to the



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fund, together with the additional items above described. The judgment of the Court of Appeals, therefore, is reversed and the cause is remanded to the District Court for further action consistent with this opinion.

*Reversed and remanded.*

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

FOURCO GLASS CO. *v.* TRANSMIRRA  
PRODUCTS CORP. ET AL.

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

No. 310. Argued April 2, 1957.—Decided April 29, 1957.

1. Venue in patent infringement actions is governed exclusively by 28 U. S. C. § 1400 (b), which provides that any such action may be brought "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business"; and 28 U. S. C. § 1391 (c) has no application to such actions. *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561. Pp. 222-229.
  2. A patent infringement action may not be brought against a corporation in a judicial district in which it is not shown to have committed any of the alleged acts of infringement and which is outside the State where it was incorporated, though it has a regularly established place of business in such judicial district. Pp. 222-229.
  3. The 1948 revision and recodification of the Judicial Code, 62 Stat. 869, made no substantive change in § 48 of the Judicial Code when it recodified it as 28 U. S. C. § 1400 (b). Pp. 225-228.
- 233 F. 2d 885, reversed and remanded.

*Edward S. Irons* argued the cause for petitioner. With him on the brief was *Harold J. Birch*.

*W. R. Hulbert* argued the cause for respondents. With him on the brief was *William W. Rymer, Jr.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The question presented is whether 28 U. S. C. § 1400 (b) is the sole and exclusive provision governing venue in patent infringement actions, or whether that section is supplemented by 28 U. S. C. § 1391 (c).

Section 1400 is titled "Patents and copyrights," and subsection (b) reads:

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Section 1391 is titled "Venue generally," and subsection (c) reads:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Petitioner, Fourco Glass Company, a West Virginia corporation, was sued for patent infringement in the Southern District of New York. It moved to dismiss for lack of venue,<sup>1</sup> because, although it had a regularly established place of business in the district of suit, there was no showing that it had committed any of the alleged acts of infringement there. The District Court held that there had been no showing of any acts of infringement in the district of suit and that venue in patent infringement actions is solely and exclusively governed by § 1400 (b), as a special and specific venue statute applicable to that species of litigation. It accordingly granted the motion and dismissed the action. 133 F. Supp. 531. The Court of Appeals, without passing on the District Court's ruling that there had been no showing of acts of infringement in the district of suit, reversed, 233 F. 2d 885, 886, holding that proper construction "requires . . . the insertion in" § 1400 (b) "of the definition of corporate

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<sup>1</sup> Under Rule 12 (b) (3) of Federal Rules of Civil Procedure.



residence from" § 1391 (c), and that the two sections, when thus "read together," mean "that this defendant may be sued in New York, where it 'is doing business.'" We granted certiorari<sup>2</sup> because of an asserted conflict with this Court's decision in *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, and to resolve a conflict among the circuits<sup>3</sup> upon the question of venue in patent infringement litigation.

We start our considerations with the *Stonite* case. The question there—not legally distinguishable from the question here—was whether the venue statute applying specifically to patent infringement litigation (then § 48 of the Judicial Code, 28 U. S. C. (1940 ed.) § 109) was the sole provision governing venue in those cases, or whether that section was to be supplemented by what was then § 52 of the Judicial Code (28 U. S. C. (1940 ed.) § 113), which authorized—just as its recodified counterpart, 28 U. S. C. § 1392 (a), does now—an action, not of a local nature, against two or more defendants residing in different judicial districts within the same state, to be brought in either district. That supplementation, if permissible, would have fixed venue over *Stonite Products Company* (an inhabitant of the Eastern District of Pennsylvania) in the District Court for the Western District of Pennsylva-

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<sup>2</sup> 352 U. S. 820.

<sup>3</sup> The Third Circuit, in *Ackerman v. Hook*, 183 F. 2d 11, the Seventh Circuit in *C-O-Two Fire Equipment Co. v. Barnes*, 194 F. 2d 410, and the Tenth Circuit, in *Ruth v. Eagle-Picher Company*, 225 F. 2d 572, as well as numerous District Courts, have held that 28 U. S. C. § 1400 (b) alone controls venue in patent infringement cases, while, on the other hand, the Fifth Circuit, in *Dalton v. Shakespeare Co.*, 196 F. 2d 469, and in *Guiberson Corp. v. Garrett Oil Tools, Inc.*, 205 F. 2d 660, and several District Courts, have held that the provisions of 28 U. S. C. § 1391 (c) are to be read into, and as supplementing, § 1400 (b), as the Second Circuit held in this case, and that, hence, a corporation may be sued for patent infringement in any district where it merely "is doing business."

nia, where the suit was brought, because its codefendant was an inhabitant of that district.

After reviewing the history of, and the reasons and purposes for, the adoption by Congress of the venue statute applying specifically to patent infringement suits—ground wholly unnecessary to replot here—this Court held “that § 48 is the exclusive provision controlling venue in patent infringement proceedings” and “that Congress did not intend the Act of 1897 [which had become § 48 of the Judicial Code, 28 U. S. C. (1940 ed.) § 109] to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.”<sup>4</sup>

The soundness of the *Stonite* case is not here assailed, and, unless there has been a substantive change in what was § 48 of the Judicial Code at the time the *Stonite* case was decided, on March 9, 1942, it is evident that that statute would still constitute “the exclusive provision controlling venue in patent infringement proceedings.”

The question here, then, is simply whether there has been a substantive change in that statute since the *Stonite* case. If there has been such change, it occurred in the 1948 revision and recodification of the Judicial Code.<sup>5</sup> At the time of the *Stonite* case the venue provisions of that statute (§ 48 of the 1911 Judicial Code, 28 U. S. C. (1940 ed.) § 109) read:

“In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business.”

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<sup>4</sup> 315 U. S., at 563, 566.

<sup>5</sup> 62 Stat. 869.

The reports of the Committee on the Judiciary of the Senate,<sup>6</sup> and of the House,<sup>7</sup> respecting the 1948 revision and recodification of the Judicial Code, make plain that every change made in the text is explained in detail in the Revisers' Notes. As shown by their notes on § 1400 (b), the Revisers placed the venue provisions (quoted above) of old § 48 (28 U. S. C. (1940 ed.) § 109), with word changes and omissions later noted, in § 1400 (b), and placed the remainder, or process provisions, with certain word changes, in § 1694 of the 1948 Code. The Revisers' Notes on § 1400 (b) point out that "Subsection (b) is based on section 109 of title 28, U. S. C., 1940 ed., with the following changes:" (1) "Words 'civil action' were substituted for 'suit,' and words 'in law or in equity,' after 'shall have jurisdiction' were deleted, in view of Rule 2 of the Federal Rules of Civil Procedure"; (2) "Words in subsection (b) 'where the defendant resides' were substituted for 'of which the defendant is an inhabitant' " because the "Words 'inhabitant' and 'resident,' as respects venue, are synonymous" [we pause here to observe that this treatment, and the expressed reason for it, seems to negative any intention to make corporations suable, in patent infringement cases, where they are merely "doing business," because those synonymous words mean *domicile*, and, in respect of corporations, mean the state of incorporation only. See *Shaw v. Quincy Mining Co.*, 145 U. S. 444]; and (3) "Words 'whether a person, partnership, or corporation' before 'has committed' were omitted as surplusage."

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<sup>6</sup> S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2, which contains the statement "Appended to the report are the revisers' notes to each section, together with accompanying tables. These explain in great detail the source of the law and the changes made in the course of the codification and revision."

<sup>7</sup> H. R. Rep. No. 308, 80th Cong., 1st Sess., p. 7, which contains the statement "The reviser's notes are keyed to sections of the revision and explain in detail every change made in text."



Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.<sup>8</sup>

"The change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. *United States v. Ryder*, 110 U. S. 729, 740; *United States v. LeBris*, 121 U. S. 278, 280; *Logan v. United States*, 144 U. S. 263, 302; *United States v. Mason*, 218 U. S. 517, 525." *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 198-199.

In the light of the fact that the Revisers' Notes do not express any substantive change, and of the fact that several of those having importantly to do with the revision

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<sup>8</sup> Mr. William W. Barron, the Chief Reviser of the Code, in his article on "The Judicial Code 1948 Revision," 8 F. R. D. 439, pointed out, pp. 445-446, that: "... no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised."

Professor James William Moore of Yale University, a special consultant on this revision, stated that: "Venue provisions have not been altered by the revision." Hearings before Subcommittee No. 1 of the House Judiciary Committee on H. R. 1600 and H. R. 2055, 80th Cong., 2d Sess., p. 1969.

Judge Albert B. Maris of the Third Circuit, a member of a committee of the Judicial Conference of the United States to collaborate with the congressional committees in carrying forward the work of this revision, stated that: "[C]are has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval." *Id.*, p. 1959.

say no change is to be presumed unless clearly expressed, and no substantive change being otherwise apparent, we hold that 28 U. S. C. § 1400 (b) made no substantive change from 28 U. S. C. (1940 ed.) § 109 as it stood and was dealt with in the *Stonite* case.

The main thrust of respondents' argument is that § 1391 (c) is clear and unambiguous and that its terms include all actions—including patent infringement actions—against corporations, and, therefore, that the statute should be read with, and as supplementing, § 1400 (b) in patent infringement actions. That argument is not persuasive, as it merely points up the question and does nothing to answer it. For it will be seen that § 1400 (b) is equally clear and, also, that it deals specially and specifically with venue in patent infringement actions. Moreover, it will be remembered that old § 52 of the Judicial Code (28 U. S. C. (1940 ed.) § 113) was likewise clear and generally embrative, yet the *Stonite* case held that it did not supplement the specific patent infringement venue section (then § 48 of the Judicial Code, 28 U. S. C. (1940 ed.) § 109). The question is not whether § 1391 (c) is clear and general, but, rather, it is, pointedly, whether § 1391 (c) supplements § 1400 (b), or, in other words, whether the latter is complete, independent and alone controlling in its sphere as was held in *Stonite*, or is, in some measure, dependent for its force upon the former.

We think it is clear that § 1391 (c) is a general corporation venue statute, whereas § 1400 (b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of actions, *i. e.*, patent infringement actions. In these circumstances the law is settled that "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another stat-

ute which otherwise might be controlling.' *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208." *MacEvoy Co. v. United States*, 322 U. S. 102, 107.

We hold that 28 U. S. C. § 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U. S. C. § 1391 (c). The judgment of the Court of Appeals must therefore be reversed and the cause remanded for that court to pass upon the District Court's ruling that there had been no showing of acts of infringement in the district of suit.

*Reversed and remanded.*

MR. JUSTICE HARLAN, believing that the Revisers' Notes have been given undue weight, *Ex parte Collett*, 337 U. S. 55, 61-71, and that they are in any event unclear, dissents for the reasons given by the Court of Appeals, 233 F. 2d 885. See also *Dalton v. Shakespeare Co.*, 196 F. 2d 469; Lindley, C. J., dissenting in *C-O-Two Fire Equipment Co. v. Barnes*, 194 F. 2d 410, 415; *Denis v. Perfect Parts, Inc.*, 142 F. Supp. 259; Moore, Commentary on the U. S. Judicial Code, 184-185, 193-194.



PENNSYLVANIA ET AL. v. BOARD OF DIRECTORS  
OF CITY TRUSTS OF THE CITY  
OF PHILADELPHIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT.

No. 769. Decided April 29, 1957.

By will probated in 1831, Stephen Girard left a fund to the City of Philadelphia in trust for the erection, maintenance and operation of a "college," providing that it was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The college was established and is now being operated by a Board appointed under a Pennsylvania statute. *Held*: The Board is an agency of the State, and its refusal to admit Negro boys to the college solely because of their race violates the Fourteenth Amendment. *Brown v. Board of Education*, 347 U. S. 483. Pp. 230-231. 386 Pa. 548, 127 A. 2d 287, reversed and remanded.

*Thomas D. McBride*, Attorney General, and *Lois G. Forer*, Deputy Attorney General, for the Commonwealth of Pennsylvania, *Abraham L. Freedman* and *David Berger* for the City of Philadelphia et al., and *William T. Coleman, Jr.*, *Raymond Pace Alexander* and *Louis Pollak* for *Foust et al.*, appellants.

*Owen B. Rhoads* for appellee.

PER CURIAM.

The motion to dismiss the appeal for want of jurisdiction is granted. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari, 28 U. S. C. § 2103, the petition is granted. 28 U. S. C. § 1257 (3).

Stephen Girard, by a will probated in 1831, left a fund in trust for the erection, maintenance, and operation of a "college." The will provided that the college was to

admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The will named as trustee the City of Philadelphia. The provisions of the will were carried out by the State and City and the college was opened in 1848. Since 1869, by virtue of an act of the Pennsylvania Legislature, the trust has been administered and the college operated by the "Board of Directors of City Trusts of the City of Philadelphia." Pa. Laws 1869, No. 1258, p. 1276; Purdon's Pa. Stat. Ann., 1957, Tit. 53, § 16365.

In February 1954, the petitioners Foust and Felder applied for admission to the college. They met all qualifications except that they were Negroes. For this reason the Board refused to admit them. They petitioned the Orphans' Court of Philadelphia County for an order directing the Board to admit them, alleging that their exclusion because of race violated the Fourteenth Amendment to the Constitution. The State of Pennsylvania and the City of Philadelphia joined in the suit also contending the Board's action violated the Fourteenth Amendment. The Orphans' Court rejected the constitutional contention and refused to order the applicants' admission. 4 D. & C. 2d 671 (Orph. Ct. Philadelphia). This was affirmed by the Pennsylvania Supreme Court. 386 Pa. 548, 127 A. 2d 287.

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U. S. 483. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

SCHWARE *v.* BOARD OF BAR EXAMINERS OF  
NEW MEXICO.

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO.

No. 92. Argued January 14–15, 1957.—Decided May 6, 1957.

In 1953 the Board of Bar Examiners of New Mexico refused to permit petitioner to take the bar examination, on the ground that he had not shown "good moral character," and thereby precluded his admission to the bar of that State. It was conceded that petitioner was qualified in all other respects. Petitioner made a strong showing of good moral character, except that it appeared that from 1933 to 1937 he had used certain aliases, that he had been arrested (but never tried or convicted) on several occasions prior to 1940, and that from 1932 to 1940 he was a member of the Communist Party. The State Supreme Court sustained the Board. *Held*: On the record in this case, the State of New Mexico deprived petitioner of due process in denying him the opportunity to qualify for the practice of law. Pp. 233–247.

(a) A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment. Pp. 238–239.

(b) A State can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar; but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. P. 239.

(c) Even in applying permissible standards, officers of the State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. P. 239.

(d) Whether the practice of law is a "right" or a "privilege" need not here be determined; it is not a matter of the State's grace, and a person cannot be barred except for valid reasons. P. 239, n. 5.

(e) Petitioner's use from 1934 to 1937 of certain aliases, for purposes which were not wrong and not to cheat or defraud, does



not support an inference of bad moral character more than 20 years later. Pp. 240-241.

(f) The arrests of petitioner are insufficient to support a finding that he had bad moral character at the time he applied to take the bar examination. Pp. 241-243.

(g) Petitioner's membership in the Communist Party from 1932 to 1940 does not justify an inference that he presently has bad moral character. Pp. 243-246.

(h) The use of aliases, the arrests, and former membership in the Communist Party do not in combination warrant exclusion of petitioner from the practice of law. P. 246.

(i) In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies cannot be said to raise substantial doubts as to his present good moral character. P. 246.

60 N. M. 304, 291 P. 2d 607, reversed and remanded.

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

*William A. Sloan* and *Fred M. Standley*, Attorney General of New Mexico, argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether petitioner, Rudolph Schware, has been denied a license to practice law in New Mexico in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

New Mexico has a system for the licensing of persons to practice law similar to that in effect in most States.<sup>1</sup> A Board of Bar Examiners determines if candidates for admission to the bar have the necessary qualifications. When the Board concludes that an applicant qualifies

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<sup>1</sup> Generally, see N. M. Stat. Ann., 1953, § 18-1-8 and the Rules Governing Admission to the Bar appended thereto.

it recommends to the State Supreme Court that he be admitted. If the court accepts the recommendation, the applicant is entitled to practice law upon taking an oath to support the constitutions and laws of the United States and New Mexico. An applicant must pass a bar examination before the Board will give him its recommendation. The Board can refuse to permit him to take this examination unless he demonstrates that he has "good moral character."

In December 1953, on the eve of his graduation from the University of New Mexico School of Law, Schware filed an application with the Board of Bar Examiners requesting that he be permitted to take the bar examination scheduled for February 1954. His application was submitted on a form prescribed by the Board that required answers to a large number of questions. From the record, it appears that he answered these questions in detail. Among other things, he disclosed that he had used certain aliases between 1933 and 1937 and that he had been arrested on several occasions prior to 1940. When he appeared to take the examination, the Board informed him that he could not do so. He later requested a formal hearing on the denial of his application. The Board granted his request. At the hearing the Board told him for the first time why it had refused to permit him to take the bar examination. It gave him a copy of the minutes of the meeting at which it had voted to deny his application. These minutes read:

"No. 1309, Rudolph Schware. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the

requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed." <sup>2</sup>

At the hearing petitioner called his wife, the rabbi of his synagogue, a local attorney and the secretary to the dean of the law school to testify about his character.<sup>3</sup> He took the stand himself and was thoroughly examined under oath by the Board. His counsel introduced a series of letters that petitioner had written his wife from 1944 through 1946 while he was on duty in the Army. Letters were also introduced from every member of petitioner's law school graduating class except one who did not comment. And all of his law school professors who were then available wrote in regard to his moral

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<sup>2</sup> Apparently the Board had received confidential information that Schware had once been a member of the Communist Party. The Board's application form did not request disclosure of such information and so Schware did not mention it in his application. At the hearing he testified at length about his membership. The Board refused to let petitioner see the confidential information against him, although it appears that its initial denial of his application was partially based on this information. While this secret evidence was not made a part of the record of the hearing, counsel for petitioner contends that the Board was influenced by it in adhering to its view that petitioner was not qualified. In the New Mexico Supreme Court the members of the majority did not look at the confidential information. And while that court passed on petitioner's qualifications in the exercise of its original jurisdiction, the majority placed considerable reliance on the Board's recommendations. Therefore, petitioner contends, the Board's use of confidential information deprived him of procedural due process. Cf. *Goldsmith v. United States Bd. of Tax Appeals*, 270 U. S. 117; *Bratton v. Chandler*, 260 U. S. 110; *Minkoff v. Payne*, 93 U. S. App. D. C. 123, 210 F. 2d 689, 691; *In re Carter*, 89 U. S. App. D. C. 310, 192 F. 2d 15, cert. denied, 342 U. S. 862. We find it unnecessary to consider this contention.

<sup>3</sup> The dean was on sabbatical leave and not available.



character. The Board called no witnesses and introduced no evidence.

The record of the formal hearing shows the following facts relevant to Schware's moral character. He was born in a poor section of New York City in 1914 and grew up in a neighborhood inhabited primarily by recent immigrants. His father was an immigrant and like many of his neighbors had a difficult time providing for his family. Schware took a job when he was nine years old and throughout the remainder of school worked to help provide necessary income for his family. After 1929, the economic condition of the Schware family and their neighbors, as well as millions of others, was greatly worsened. Schware was then at a formative stage in high school. He was interested in and enthusiastic for socialism and trade-unionism as was his father. In 1932, despairing at what he considered lack of vigor in the socialist movement at a time when the country was in the depths of the great depression, he joined the Young Communist League.<sup>4</sup> At this time he was 18 years old and in the final year of high school.

From the time he left school until 1940 Schware, like many others, was periodically unemployed. He worked at a great variety of temporary and ill-paying jobs. In 1933, he found work in a glove factory and there he participated in a successful effort to unionize the employees. Since these workers were principally Italian, Schware assumed the name Rudolph Di Caprio to forestall the effects of anti-Jewish prejudice against him, not only in securing and retaining a job but in assisting in the organization of his fellow employees. In 1934 he went to California where he secured work on the

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<sup>4</sup> At times during 1932 more than 12,060,000 of the nation's 51,000,000 working persons were unemployed. Statistical Abstract of the United States (1956) 197.

docks. He testified that he continued to use the name Rudolph Di Caprio because Jews were discriminated against in employment for this work. Wherever Schware was employed he was an active advocate of labor organization. In 1934 he took part in the great maritime strikes on the west coast which were bitterly fought on both sides. While on strike in San Pedro, California, he was arrested twice on "suspicion of criminal syndicalism." He was never formally charged nor tried and was released in each instance after being held for a brief period. He testified that the San Pedro police in a series of mass arrests jailed large numbers of the strikers.

At the time of his father's death in 1937 Schware left the Communist Party but later he rejoined. In 1940 he was arrested and indicted for violating the Neutrality Act of 1917. He was charged with attempting to induce men to volunteer for duty on the side of the Loyalist Government in the Spanish Civil War. Before his case came to trial the charges were dismissed and he was released. Later in 1940 he quit the Communist Party. The Nazi-Soviet Non-Aggression Pact of 1939 had greatly disillusioned him and this disillusionment was made complete as he came to believe that certain leaders in the Party were acting to advance their own selfish interests rather than the interests of the working class which they purported to represent.

In 1944 Schware entered the armed forces of the United States. While in the service he volunteered for duty as a paratrooper and was sent to New Guinea. While serving in the Army here and abroad he wrote a number of letters to his wife. These letters show a desire to serve his country and demonstrate faith in a free democratic society. They reveal serious thoughts about religion which later led him and his wife to associate themselves with a synagogue when he returned to civilian

life. He was honorably discharged from the Army in 1946.

After finishing college, he entered the University of New Mexico law school in 1950. At the beginning he went to the dean and told him of his past activities and his association with the Communist Party during the depression and asked for advice. The dean told him to remain in school and put behind him what had happened years before. While studying law Schware operated a business in order to support his wife and two children and to pay the expenses of a professional education. During his three years at the law school his conduct was exemplary.

At the conclusion of the hearing the Board reaffirmed its decision denying Schware the right to take the bar examination. He appealed to the New Mexico Supreme Court. That court upheld the denial with one justice dissenting. 60 N. M. 304, 291 P. 2d 607. In denying a motion for rehearing the court stated that:

“[Schware’s membership in the Communist Party], together with his other former actions in the use of aliases and record of arrests, and his present attitude toward those matters, were the considerations upon which [we approved the denial of his application].”

Schware then petitioned this Court to review his case alleging that he had been denied an opportunity to qualify for the practice of law contrary to the Due Process Clause of the Fourteenth Amendment. We granted certiorari. 352 U. S. 821. Cf. *In re Summers*, 325 U. S. 561, 562, 564–569. And see *Konigsberg v. State Bar of California*, *post*, p. 252, decided this day.

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protec-



tion Clause of the Fourteenth Amendment.<sup>5</sup> *Dent v. West Virginia*, 129 U. S. 114. Cf. *Slochower v. Board of Education*, 350 U. S. 551; *Wieman v. Updegraff*, 344 U. S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas v. Noble*, 261 U. S. 165; *Cummings v. Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia v. New York*, 291 U. S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo v. Hopkins*, 118 U. S. 356.

Here the State concedes that Schware is fully qualified to take the examination in all respects other than good moral character. Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character.

There is nothing in the record which suggests that Schware has engaged in any conduct during the past 15 years which reflects adversely on his character. The New Mexico Supreme Court recognized that he "presently

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<sup>5</sup> We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379.

enjoys good repute among his teachers, his fellow students and associates and in his synagogue." Schware's professors, his fellow students, his business associates and the rabbi of the synagogue of which he and his family are members, all gave testimony that he is a good man, a man who is imbued with a sense of deep responsibility for his family, who is trustworthy, who respects the rights and beliefs of others. From the record it appears he is a man of religious conviction and is training his children in the beliefs and practices of his faith. A solicitude for others is demonstrated by the fact that he regularly read the Bible to an illiterate soldier while in the Army and law to a blind student while at the University of New Mexico law school. His industry is depicted by the fact that he supported his wife and two children and paid for a costly professional education by operating a business separately while studying law. He demonstrated candor by informing the Board of his personal history and by going to the dean of the law school and disclosing his past. The undisputed evidence in the record shows Schware to be a man of high ideals with a deep sense of social justice. Not a single witness testified that he was not a man of good character.

Despite Schware's showing of good character, the Board and court below thought there were certain facts in the record which raised substantial doubts about his moral fitness to practice law.

(1) *Aliases*.—From 1934 to 1937 Schware used certain aliases. He testified that these aliases were adopted so he could secure a job in businesses which discriminated against Jews in their employment practices and so that he could more effectively organize non-Jewish employees at plants where he worked. Of course it is wrong to use an alias when it is done to cheat or defraud another but it can hardly be said that Schware's attempt to forestall anti-Semitism in securing employment or organizing

his fellow workers was wrong. He did give an assumed name to police in 1934 when he was picked up in a mass arrest during a labor dispute. He said he did this so he would not be fired as a striker. This is certainly not enough evidence to support an inference that petitioner has bad moral character more than 20 years later.

(2) *Arrests*.—In response to the questions on the Board's application form Schware stated that he had been arrested on several occasions:

1. In 1934, while he was participating in a bitter labor dispute in the California shipyards, petitioner was arrested at least two times on "suspicion of criminal syndicalism." After being held for a brief period he was released without formal charges being filed against him. He was never indicted nor convicted for any offense in connection with these arrests.

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.<sup>6</sup> An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated. Moreover here, the special facts surrounding the 1934 arrests are relevant in shedding light on their present significance. Apparently great numbers of strikers were picked up by police in a series of arrests during the strike at San Pedro and many of these were charged with "criminal syndicalism."<sup>7</sup> The California syndi-

<sup>6</sup> Arrest, by itself, is not considered competent evidence at either a criminal or civil trial to prove that a person did certain prohibited acts. Cf. Wigmore, Evidence, § 980a.

<sup>7</sup> Petitioner testified that during a two-month period about 2,000 persons were arrested in connection with the strike. Generally, for criticism of these arrests and the conduct of the police during these and related strikes see S. Rep. No. 1150, 77th Cong., 2d Sess. 35, 131, 133-141.



calism statutes in effect in 1934 were very broad and vague.<sup>8</sup> There is nothing in the record which indicates why Schwere was arrested on "suspicion" that he had violated this statute. There is no suggestion that he was using force or violence in an attempt to overthrow the state or national government. Again it should be emphasized that these arrests were made more than 20 years ago and petitioner was never formally charged nor tried for any offense related to them.

2. In 1940 Schwere was arrested for violating the Neutrality Act of 1917 which makes it unlawful for a person within the United States to join or to hire or retain another to join the army of any foreign state.<sup>9</sup> He was indicted but before the case came to trial the prosecution dropped the charges. He had been charged with recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War. Schwere testified that he was unaware of this old law at the time. From the facts in the record it is not clear that he was guilty of its violation.<sup>10</sup> But even if it be assumed that the law was violated, it does not seem that such an offense indicated moral turpitude—even in 1940. Many persons in this country actively supported the Spanish Loyalist Government. During the prelude to World War II many idealistic young men volunteered to help causes they believed right. It is commonly known that a number of Ameri-

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<sup>8</sup> "The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Cal. Stat. 1919, c. 188, § 1. See also *De Jonge v. Oregon*, 299 U. S. 353, where application of a similar statute was held unconstitutional.

<sup>9</sup> 40 Stat. 39, now 18 U. S. C. § 959 (a).

<sup>10</sup> See Kiker, J. (dissenting), 60 N. M. 304, 321, 291 P. 2d 607, 618.

cans joined air squadrons and helped defend China and Great Britain prior to this country's entry into the war. There is no record that any of these volunteers were prosecuted under the Neutrality Act. Few Americans would have regarded their conduct as evidence of moral turpitude. In determining whether a person's character is good the nature of the offense which he has committed must be taken into account.<sup>11</sup>

In summary, these arrests are wholly insufficient to support a finding that Schware had bad moral character at the time he applied to take the bar examination.<sup>12</sup> They all occurred many years ago and in no case was he ever tried or convicted for the offense for which he was arrested.

(3) *Membership in the Communist Party.*—Schware admitted that he was a member of the Communist Party from 1932 to 1940. Apparently the Supreme Court of New Mexico placed heavy emphasis on this past membership in denying his application.<sup>13</sup> It stated:

“We believe one who has knowingly given his loyalties to [the Communist Party] for six to seven

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<sup>11</sup> For example, New Mexico makes conviction of a felony or a misdemeanor grounds for disbarment only if it involves moral turpitude. N. M. Stat. Ann., 1953, § 18-1-17 (1). Compare *In re Burch*, 73 Ohio App. 97, 54 N. E. 2d 803, where, in a disbarment proceeding, conviction for violation of a federal statute for failing to register as an agent of the German Government in 1941 was held not to evidence moral turpitude.

<sup>12</sup> In 1941 Schware was arrested by police in Texas while driving a friend's car to the west coast. Apparently the police suspected the car was stolen. After a brief delay they became convinced that the car was rightfully in petitioner's possession and he was allowed to go on his way. This detention offers no proof of bad moral character and the State does not rely on it here.

<sup>13</sup> Petitioner argues that a State constitutionally cannot consider his membership in a lawful political party in determining whether he is qualified for admission to the bar. He contends that a denial based on such membership abridges the right of free political associa-

years during a period of responsible adulthood is a person of questionable character.” 60 N. M., at 319, 291 P. 2d, at 617.

The court assumed that in the 1930's when petitioner was a member of the Communist Party, it was dominated by a foreign power and was dedicated to the violent overthrow of the Government and that every member was aware of this. It based this assumption primarily on a view of the nature and purposes of the Communist Party as of 1950 expressed in a concurring opinion in *American Communications Assn. v. Douds*, 339 U. S. 382, 422. However that view did not purport to be a factual finding in that case and obviously it cannot be used as a substitute for evidence in this case to show that petitioner participated in any illegal activity or did anything morally reprehensible as a member of that Party. During the period when Schwere was a member, the Communist Party was a lawful political party with candidates on the ballot in most States.<sup>14</sup> There is nothing in the record that gives any indication that his association with that Party was anything more than a political faith in a political party. That faith may have been unorthodox. But as counsel for New Mexico said in his brief, “Mere unorthodoxy [in the field of political and social ideas] does not as a matter of fair and logical inference, negative ‘good moral character.’ ”<sup>15</sup>

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tion guaranteed by the Fourteenth Amendment. Because of our disposition of this case, we find it unnecessary to pass on this contention.

<sup>14</sup> For example in 1936 its presidential nominee was on the ballot in 35 States, including New Mexico. Statistical Abstract of the United States (1937) 159.

<sup>15</sup> In *West Virginia State Board v. Barnette*, 319 U. S. 624, 642, this Court declared:

“If there is any fixed star in our constitutional constellation, it



Schware joined the Communist Party when he was a young man during the midst of this country's greatest depression. Apparently many thousands of other Americans joined him in this step.<sup>16</sup> During the depression when millions were unemployed and our economic system was paralyzed many turned to the Communist Party out of desperation or hope. It proposed a radical solution to the grave economic crisis. Later the rise of fascism as a menace to democracy spurred others who feared this form of tyranny to align with the Communist Party.<sup>17</sup> After 1935, that Party advocated a "Popular Front" of "all democratic parties against fascism." Its platform and slogans stressed full employment, racial equality and various other political and economic changes.<sup>18</sup>

During the depression Schware was led to believe that drastic changes needed to be made in the existing economic system. There is nothing in the record, however, which indicates that he ever engaged in any actions to

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is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

<sup>16</sup> According to figures of the Communist Party it had 14,000 members in 1932, 26,000 in 1934, 41,000 in 1936. W. Z. Foster, *From Bryan to Stalin* (1937), 303. It has been estimated that more than 700,000 persons in this country have been members of the Communist Party at one time or another between 1919 and 1951. Ernst and Loth, *Report on The American Communist* (1952), 14.

<sup>17</sup> For the numerous and varied reasons why individuals have joined the Communist Party, see Taylor, *Grand Inquest* (1955), 155-159; Ernst and Loth, *Report on The American Communist* (1952); Almond, *The Appeals of Communism* (1954); Crossman, *The God That Failed* (1949); Department of Defense, *Know Your Communist Enemy: Who Are Communists and Why?*, DOD PAM 4-6, Dec. 8, 1955. Many of these reasons are not indicative of bad moral character.

<sup>18</sup> See Moore, *The Communist Party of the U. S. A.; An Analysis of a Social Movement*, 39 *Am. Pol. Sci. Rev.* 31, 32-33.

overthrow the Government of the United States or of any State by force or violence, or that he even advocated such actions. Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct. As this Court declared in *Wieman v. Updegraff*, 344 U. S. 183, 191: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 136.<sup>19</sup> And finally, there is no suggestion that Schwere was affiliated with the Communist Party after 1940—more than 15 years ago. We conclude that his past membership in the Communist Party does not justify an inference that he presently has bad moral character.

The State contends that even though the use of aliases, the arrests, and the membership in the Communist Party would not justify exclusion of petitioner from the New Mexico bar if each stood alone, when all three are combined his exclusion was not unwarranted. We cannot accept this contention. In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies—the arrests for offenses for which petitioner was neither tried nor convicted, the use of an assumed name many years ago, and membership in the Communist Party during the 1930's—cannot be said to raise substantial doubts about his present good moral character. There is no evidence in the record which

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<sup>19</sup> And see *Schneiderman v. United States*, 320 U. S. 118, 136, where this Court stated:

"... under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

rationally justifies a finding that Schware was morally unfit to practice law.<sup>20</sup>

On the record before us we hold that the State of New Mexico deprived petitioner of due process in denying him the opportunity to qualify for the practice of law. The judgment below is reversed and the case remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK and MR. JUSTICE HARLAN join, concurring.

Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

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<sup>20</sup> It must be borne in mind that if petitioner otherwise qualifies for the practice of law and is admitted to the bar, the State has ample means to discipline him for any future misconduct. N. M. Stat. Ann., 1953, §§ 18-1-15 to 18-1-18.



FRANKFURTER, J., concurring.

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From the thirteenth century to this day, in England the profession itself has determined who should enter it. In the United States the courts exercise ultimate control. But while we have nothing comparable to the Inns of Court, with us too the profession itself, through appropriate committees, has long had a vital interest, as a sifting agency, in determining the fitness, and above all the moral fitness, of those who are certified to be entrusted with the fate of clients. With us too the requisite "moral character" has been the historic unquestioned prerequisite of fitness. Admission to practice in a State and before its courts necessarily belongs to that State. Of course, legislation laying down general conditions of an arbitrary or discriminatory character may, like other legislation, fall afoul of the Fourteenth Amendment. See *Cummings v. Missouri*, 4 Wall. 277. A very different question is presented when this Court is asked to review the exercise of judgment in refusing admission to the bar in an individual case, such as we have here.

It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar. No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said as it was of "many honest and sensible judgments" in a different context that it expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth." *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 598. Especially in this realm it is not our business to substitute our judgment for the State's judgment—for it is the State in all the panoply of its powers that is under review when the action of its Supreme Court is under review.

Nor is the division of power between this Court and that of the States in such matters altered by the fact that the judgment here challenged involves the application of a conception like that of "moral character," which has shadowy rather than precise bounds. It cannot be that that conception—moral character—has now been found to be so indefinite, because necessarily implicating what are called subjective factors, that the States may no longer exact it from those who are to carry on "the public profession of the law." (See *Elihu Root*, in 2 A. B. A. J. 736.) To a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession.

But judicial action, even in an individual case, may have been based on avowed considerations that are inadmissible in that they violate the requirements of due process. Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause. Such is the case here.

Living under hard circumstances, the petitioner, while still in his teens, encountered the confusions and dislocations of the great depression. By one of those chance occurrences that not infrequently determine the action of youth, petitioner joined the Young Communist League toward the end of his high-school days. That association led to membership in the Communist Party, which he retained until the Hitler-Stalin Pact began a disaffection that was completed by his break with the Party in 1940. After 1940, the record of his life, including three years of honorable service in the army, establishes that these early associations, and the outlook they reflected, had

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been entirely left behind.\* After his war service, three years as a small businessman, and one year at Western Michigan College, petitioner resolved on becoming a lawyer. And so in 1950, at the age of 36, he enrolled in the University of New Mexico Law School and made full disclosure of his early Communist career to its Dean. These are the facts that, taken together with the use of aliases and arrests without conviction or even prosecution, both in his early years, led the Supreme Court of New Mexico, in an original proceeding before it after adverse action by the Board of Bar Examiners, to deny petitioner's application to take the bar examination.

For me, the controlling element in determining whether such denial offended the Due Process Clause is the significance that the New Mexico Supreme Court accorded the early Communist affiliations. In its original opinion and in its opinion on rehearing, the court thus reiterated its legal position:

"We believe one who has knowingly given his loyalties to such a program and belief for six to seven years during a period of responsible adulthood is a person of questionable character." 60 N. M. 304, 319, 339, 291 P. 2d 607, 617, 630.

Since the New Mexico Supreme Court unequivocally held this to be a factor without which, on a fair reading of its opinion, it would not have denied the application, the conclusion that it drew from all the factors in necessary combination must fall if it drew an unwarranted legal conclusion from petitioner's early Communist affiliation. Not unnaturally the New Mexico Supreme Court evi-

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\*The only bit of evidence that may be adduced to the contrary is a single phrase in a letter to his wife in 1944. To give it an unfavorable and disqualifying significance in the entire context of the letter is to draw so strained a meaning as to be inadmissibly unreasonable.



dently assumed that use of aliases in the pre-1940 period, several unprosecuted arrests, and what it deemed "his present attitude toward those matters," 60 N. M., at 339, 291 P. 2d, at 630 (as drawn from the printed record and not on the basis of having given the petitioner a hearing before the court) precluded denial of his application on these factors alone.

This brings me to the inference that the court drew from petitioner's early, pre-1940 affiliations. To hold, as the court did, that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner "a person of questionable character" is so dogmatic an inference as to be wholly unwarranted. History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of communism during the depression era, only to have their eyes later opened to reality. Such experiences no doubt may disclose a woolly mind or naive notions regarding the problems of society. But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came to their senses and their sense of responsibility "questionable characters." Since the Supreme Court of New Mexico as a matter of law took a contrary view of such a situation in denying petitioner's application, it denied him due process of law.

I therefore concur in the judgment.

KONIGSBERG *v.* STATE BAR OF  
CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 5. Argued January 14, 1957.—Decided May 6, 1957.

In 1954 the Committee of Bar Examiners of California refused to certify petitioner to practice law in that State, though he had satisfactorily passed the bar examination, on the grounds that he had failed to prove (1) that he was of good moral character, and (2) that he did not advocate forcible overthrow of the Government. He sought review by the State Supreme Court, contending that the Committee's action deprived him of rights secured by the Fourteenth Amendment. The State Supreme Court denied his petition without opinion. *Held*:

1. This Court has jurisdiction to review the case, and the constitutional issues are properly here. Pp. 254–258.

2. The evidence in the record does not rationally support the only two grounds upon which the Committee relied in rejecting petitioner's application, and therefore the State's refusal to admit him to the bar was a denial of due process and equal protection of the laws, in violation of the Fourteenth Amendment. Pp. 258–274.

(a) That petitioner was a member of the Communist Party in 1941, if true, does not support an inference that he did not have good moral character, absent any evidence that he ever engaged in or abetted or supported any unlawful or immoral activities. Pp. 266–268.

(b) An inference of bad moral character cannot rationally be drawn from editorials in which petitioner severely criticized, *inter alia*, this country's participation in the Korean War, the actions and policies of the leaders of the major political parties, the influence of "big business" in American life, racial discrimination, and this Court's decisions in *Dennis v. United States*, 341 U. S. 494, and other cases. Pp. 268–269.

(c) On the record in this case, inferences of bad moral character from petitioner's refusal to answer questions about his political affiliations and opinions are unwarranted. Pp. 269–271.

(d) There is no evidence in the record which rationally justifies a finding that petitioner failed to show that he did not advocate forcible overthrow of the Government. Pp. 271–274.

Reversed and remanded.

*Edward Mosk* argued the cause for petitioner. With him on the brief was *Samuel Rosenwein*.

*Frank B. Belcher* argued the cause for respondents. With him on the brief was *Ralph E. Lewis*.

Briefs of *amici curiae* in support of petitioner were filed by *A. L. Wirin* for the American Civil Liberties Union, Southern California Branch, and *Osmond K. Fraenkel* for the National Lawyers Guild.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Raphael Konigsberg, graduated from the Law School of the University of Southern California in 1953 and four months later satisfactorily passed the California bar examination. Nevertheless, the State Committee of Bar Examiners, after several hearings, refused to certify him to practice law on the grounds he had failed to prove (1) that he was of good moral character and (2) that he did not advocate overthrow of the Government of the United States or California by unconstitutional means.<sup>1</sup> As permitted by state law, Konigsberg asked the California Supreme Court to review the Committee's refusal to give him its certification. He contended that he had satisfactorily proved that he met all the requirements for admission to the bar, and that the Committee's action deprived him of rights secured by the Fourteenth Amendment to the United States Consti-

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<sup>1</sup> Under California procedure the State Supreme Court may admit a person to the bar upon certification by the Committee of Bar Examiners that he meets the necessary requirements. California Business and Professions Code, 1937, § 6064. Section 6060 (c) requires that an applicant must have "good moral character" before he can be certified. Section 6064.1 provides that no person "who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."



tution. The State Supreme Court, without opinion, and with three of its seven justices dissenting, denied his petition for review. We granted certiorari because the constitutional questions presented were substantial. 351 U. S. 936.

### I.

Before reaching the merits, we must first consider the State's contention that this Court does not have jurisdiction to review the case. The State argues (1) that petitioner did not present his constitutional claims to the California Supreme Court in the manner prescribed by that court's rules, and (2) that the state court's decision not to grant him relief can be attributed to his failure to conform to its procedural rules rather than to a rejection of his constitutional claims.

In considering actions of the Committee of Bar Examiners the California Supreme Court exercises original jurisdiction and is not restricted to the limited review made by an appellate court. For example, that court declared in *In re Lacey*, 11 Cal. 2d 699, at 701, 81 P. 2d 935, at 936:

"That this court has the inherent power and authority to admit an applicant to practice law in this state or to reinstate an applicant previously disbarred despite an unfavorable report upon such application by the Board of Bar Governors of the State Bar, we think is now well settled in this state. . . . The recommendation of the Board of Bar Governors is advisory only . . . . [T]he final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive." <sup>2</sup>

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<sup>2</sup> See also *Preston v. State Bar of California*, 28 Cal. 2d 643, 171 P. 2d 435; *Brydonjack v. State Bar of California*, 208 Cal. 439, 281 P. 1018.

The California Supreme Court has a special rule, Rule 59 (b), which governs review of actions of the Bar Examiners.<sup>3</sup> Rule 59 (b) requires that a petition for review "shall specify the grounds relied on and shall be accompanied by petitioner's brief." Konigsberg complied with this rule. In his petition for review he specifically charged that the findings of the Committee were not supported by any lawful evidence.<sup>4</sup> The petition then went on to assert that the Committee's action, which was based on findings that the petition had previously alleged were not supported by evidence, was an attempt by the State of California in violation of the Fourteenth Amendment to deprive him "of liberty or property without due process of law" and to deny him "the equal protection of the laws."

Throughout the hearings before the Bar Examiners Konigsberg repeatedly objected to questions about his beliefs and associations asserting that such inquiries infringed rights guaranteed him by the First and Fourteenth Amendments. He urged that the Committee would abridge freedom of speech, press and assembly, violate due process, and deny equal protection of the laws if it denied his application because of his

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<sup>3</sup> Rule 59 (b) is set out at 36 Cal. 2d 43. Generally, the California Supreme Court divides its rules into two main parts: (1) "Rules on Appeal," which govern appeals in civil and criminal cases; and (2) "Rules on Original Proceedings in Reviewing Courts."

<sup>4</sup> The petition asserted:

"1. That the petitioner sustained his burden of proof of establishing his good moral character and all other requirements established by law in the State of California for applicants for admission to the bar.

"2. That the committee erred in asserting that the petitioner had failed to meet his burden of proof of establishing his good moral character.

"3. That no lawful evidence was received or exists supporting the denial of the application of the petitioner."

political opinions, writings, and affiliations. He asserted that he had affirmatively proved his good moral character and that there was no legal basis for finding that he was morally unfit to practice law. He insisted that in determining whether he was qualified the Committee had to comply with due process of law and cited as supporting his position *Wieman v. Updegraff*, 344 U. S. 183, and *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, where this Court condemned arbitrary findings as offensive to due process.<sup>5</sup> Since *Konigsberg* challenged the sufficiency of the evidence in his petition for review, it seems clear that the State Supreme Court examined the entire record of the hearings before the Bar Examiners<sup>6</sup> and must have been aware of the constitutional arguments made by *Konigsberg* during the hearings and the authorities relied on to support these arguments.

The State contends, however, that it was not enough for *Konigsberg* to raise his constitutional objections in his petition, in the manner prescribed by Rule 59 (b), and at the hearings. It claims that under California practice the State Supreme Court will not consider a contention unless it is supported by an argument and citation of authorities in a brief submitted by the person seeking review. Because *Konigsberg's* brief did not repeat, precisely and in detail, the constitutional objections set forth in his petition,<sup>7</sup> the argument continues, this Court is compelled to hold that the State Supreme Court could have refused relief to petitioner on a narrow procedural ground. But the California cases cited by the State do not require such a conclusion. It is true that the State

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<sup>5</sup> He also referred to *Near v. Minnesota*, 283 U. S. 697, and *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U. S. 583.

<sup>6</sup> Cf. *In re Admission to Practice Law*, 1 Cal. 2d 61, 33 P. 2d 829.

<sup>7</sup> The brief did refer to pages of the record where constitutional arguments were made and cases cited to support them.



Supreme Court has insisted that on appeal in ordinary civil cases alleged errors should be pointed out clearly and concisely, with reasons why they are erroneous, and with reference to supporting authorities.<sup>8</sup> However this case was not reviewed under the rules of appeal which apply to the ordinary civil case but rather under a special rule applying to original proceedings. We are pointed to nothing which indicates that the State Supreme Court has adopted any rule in this type of case which requires that contentions raised in the petition for review must also be set out in the brief. The one case cited, *Johnson v. State Bar of California*, 4 Cal. 2d 744, 52 P. 2d 928, indicates the contrary. In challenging the recommendation of the Board of Governors of the State Bar that he be suspended from the practice of law, Johnson alleged, apparently in an offhand way, that the entire State Bar Act was "unconstitutional." He made no argument and cited no authority to support this bare, sweeping assertion. While the court said that this was an insufficient presentation of the issue it nevertheless went ahead to consider and reject Johnson's argument and to hold the Act constitutional.

Counsel for California concedes that the state courts in criminal cases often pass on issues ineptly argued in a defendant's brief or sometimes not raised there at all.<sup>9</sup> As counsel states, the reasons for relaxing this standard in criminal cases are obvious—such cases may involve forfeiture of the accused's property, liberty, or life. While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning

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<sup>8</sup> *People v. McLean*, 135 Cal. 306, 67 P. 770; *Title G. & T. Co. v. Fraternal Finance Co.*, 220 Cal. 362, 30 P. 2d 515.

<sup>9</sup> See, e. g., *People v. Hadley*, 175 Cal. 118, 119, 165 P. 442, 443; *People v. Yaroslowsky*, 110 Cal. App. 175, 176, 293 P. 815, 816; *People v. Buck*, 72 Cal. App. 322, 237 P. 63.

a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

In view of the grounds relied on in *Konigsberg's* petition for review, his repeated assertions throughout the hearings of various federal constitutional rights, and the practices of the California Supreme Court, we cannot conclude that that court, with three of its seven justices dissenting, intended to uphold petitioner's exclusion from the practice of law because his lawyer failed to elaborate in his brief the constitutional claims set forth in his petition for review and in the record of the hearings. Our conclusion is that the constitutional issues are before us and we must consider them.<sup>10</sup>

## II.

We now turn to the merits. In passing on *Konigsberg's* application, the Committee of Bar Examiners conducted a series of hearings. At these hearings *Konigsberg* was questioned at great length about his political affiliations and beliefs. Practically all of these questions were directed at finding out whether he was or ever had been a member of the Communist Party. *Konigsberg* declined to respond to this line of questioning, insisting that it was an intrusion into areas protected by the Federal Constitution. He also objected on the ground that California law did not require him to divulge his political associations or opinions in order to qualify for the Bar and that questions about these matters were not relevant.<sup>11</sup>

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<sup>10</sup> Cf. *Bryant v. Zimmerman*, 278 U. S. 63, 67; *Rogers v. Alabama*, 192 U. S. 226; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116.

<sup>11</sup> The record, when read as a whole, shows that *Konigsberg* took the position that he would answer all questions about his character or loyalty except those directed to his political views and beliefs and

The Committee of Bar Examiners rejected Konigsberg's application on the ground that the evidence in the record raised substantial doubts about his character and his loyalty which he had failed to dispel. At the conclusion of the hearings, the Committee sent a formal written notice—which later served as the basis for his petition to the California Supreme Court—stating that his application was denied because:

1. He failed to demonstrate that he was a person of good moral character and

2. He failed to show that he did not advocate the overthrow of the Government of the United States or of the State by force, violence or other unconstitutional means.

He was not denied admission to the California Bar simply because he refused to answer questions.<sup>12</sup>

In Konigsberg's petition for review to the State Supreme Court there is no suggestion that the Committee had excluded him merely for failing to respond to its inquiries. Nor did the Committee in its answer indicate that this was the basis for its action. After responding to Konigsberg's allegations, the Bar Committee set forth a defense

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to questions about membership in the Communist Party. The record also shows that the Committee made no effort to pursue any other course of interrogation.

<sup>12</sup> Neither the Committee as a whole nor any of its members ever intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the Committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination of whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application.



of its action which in substance repeated the reasons it had given Konigsberg in the formal notice of denial for rejecting his application.<sup>13</sup>

There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the

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<sup>13</sup> The answer, in pertinent part, read as follows:

"[P]etitioner was invited to appear at a hearing before the Southern Subcommittee of the Committee of Bar Examiners on the 25th day of September, 1953, at which time he was informed of evidence raising doubts as to his fitness to practice law, and was questioned concerning such evidence and other matters relevant to his qualifications to become a member of the State Bar of California.

"On or before the 8th day of February, 1954 the Southern Subcommittee of the Committee of Bar Examiners *considered all of the evidence which had been presented, and determined that petitioner had failed to show his good moral character* so that his application must be denied. On or about the 8th day of February, 1954 said Subcommittee informed the petitioner in writing of the denial of his application and the reasons therefor.

"On or prior to the 17th day of May, 1954 [the Full Committee] *considered all of the evidence which had been introduced and determined that petitioner had not sustained the burden of proof* that he was possessor of the good moral character required by California Business and Professions Code, Section 6060 (c) and that he had not complied with Section 6064.1 of said Code, so that his application must be denied. Petitioner was notified of this decision and the reasons therefor by letter dated May 17, 1954.

"Petitioner has not complied with the requirements of California Business and Professions Code, Sections 6060 (c) and 6064.1 and so is not entitled to be and should not be admitted to practice law in the State of California." (Emphasis supplied.)

As pointed out in note 1, *supra*, § 6064.1 excludes applicants who advocate the overthrow of the Government of California or the United States by "unconstitutional means," while § 6060 (c) requires that an applicant must have good moral character.

Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to comply.<sup>14</sup> In our opinion, there is nothing in the record which indicates that the Committee, in a matter of such grave importance to Konigsberg, applied a brand new exclusionary rule to his application—all without telling him that it was doing so.<sup>15</sup>

If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. We do not mean to intimate any view on that

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<sup>14</sup> Cf. *Cole v. Arkansas*, 333 U. S. 196, 201.

<sup>15</sup> In presenting its version of the questions before this Court, the Bar Committee did not suggest that the denial of Konigsberg's application could be upheld merely because he had failed to answer questions. Nor was such a position taken on oral argument. Counsel, instead, reiterated what the Bar Committee had contended throughout, namely, that Konigsberg was rejected because he failed to dispel substantial doubts raised by the evidence in the record about his character and loyalty.

problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him.

We now pass to the issue which we believe is presented in this case: Does the evidence in the record support any reasonable doubts about Konigsberg's good character or his loyalty to the Governments of State and Nation? In considering this issue, we must, of course, take into account the Committee's contention that Konigsberg's failure to respond to questions was evidence from which some inference of doubtful character and loyalty can be drawn.

Konigsberg claims that he established his good moral character by overwhelming evidence and carried the burden of proving that he does not advocate overthrow of the Government. He contends here, as he did in the California court, that there is no evidence in the record which rationally supports a finding of doubt about his character or loyalty. If this contention is correct, he has been denied the right to practice law although there was no basis for the finding that he failed to meet the qualifications which the State demands of a person seeking to become a lawyer. If this is true, California's refusal to admit him is a denial of due process and of equal protection of the laws because both arbitrary and discriminatory.<sup>16</sup> After examination of the record,<sup>17</sup> we are compelled to agree with Konigsberg that the evidence does not rationally support the only two grounds upon which the Committee relied in rejecting his application for admission to the California Bar.

*A. Good Moral Character.*—The term "good moral character" has long been used as a qualification for

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<sup>16</sup> *Schware v. Board of Bar Examiners*, ante, p. 232; cf. *Wieman v. Updegraff*, 344 U. S. 183.

<sup>17</sup> Cf. *Local Union No. 10 v. Graham*, 345 U. S. 192, 197.



membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.<sup>18</sup> Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

While we do not have the benefit of a definition of "good moral character" by the California Supreme Court in this case, counsel for the State tells us that the definition of that term adopted in California "stresses elements of honesty, fairness and respect for the rights of others and for the laws of the state and nation." The decisions of California courts cited here do not support so broad a definition as claimed by counsel. These cases instead appear to define "good moral character" in terms of an absence of proven conduct or acts which have been historically considered as manifestations of "moral turpitude." To illustrate, California has held that an applicant did not have good character who had been convicted of forgery and had practiced law without a license,<sup>19</sup> or who had obtained money by false representations and had committed fraud upon a court,<sup>20</sup> or who had submitted false affidavits to the Committee along with his application for admission.<sup>21</sup> It should be emphasized that neither the definition proposed by counsel nor those appearing in the California cases equates unorthodox political beliefs or membership in lawful political parties

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<sup>18</sup> See *Jordan v. De George*, 341 U. S. 223, 232 (dissenting opinion); *United States ex rel. Iorio v. Day*, 34 F. 2d 920, 921; Cahn, Authority and Responsibility, 51 Col. L. Rev. 838.

<sup>19</sup> *In re Garland*, 219 Cal. 661, 28 P. 2d 354.

<sup>20</sup> *In re Wells*, 174 Cal. 467, 163 P. 657.

<sup>21</sup> *Spears v. State Bar of California*, 211 Cal. 183, 294 P. 697.

with bad moral character. Assuming for purposes of this case that counsel's broad definition of "good moral character" is the one adopted in California, the question is whether on the whole record a reasonable man could fairly find that there were substantial doubts about Konigsberg's "honesty, fairness and respect for the rights of others and for the laws of the state and nation."

A person called on to prove his character is compelled to turn to the people who know him. Here, forty-two individuals who had known Konigsberg at different times during the past twenty years attested to his excellent character.<sup>22</sup> These testimonials came from persons in every walk of life. Included among them were a Catholic priest, a Jewish rabbi, lawyers, doctors, professors, businessmen and social workers. The following are typical of the statements made about Konigsberg:

An instructor at the University of Southern California Law School:

"He seems to hold the Constitution in high esteem and is a vigorous supporter of civil rights. . . . He indicated to me an open-mindedness seemingly inconsistent with any calculated disregard of his duty as a loyal and conscientious citizen."

A rabbi:

"I unreservedly recommend Mr. Konigsberg as a person who is morally and ethically qualified to serve as a member of [the bar]."

A lawyer:

"I recommend Mr. Konigsberg unreservedly as a person of high moral principle and character. . . .

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<sup>22</sup> This testimony was in the form of written statements. Konigsberg offered to produce witnesses to testify in person but the Board preferred to have their statements in writing.

He is a much more profound person than the average bar applicant and exhibits a social consciousness which, in my opinion, is unfortunately too rare among applicants."

A Catholic Monsignor:

"I do not hesitate to recommend him to you. I am satisfied that he will measure up to the high requirements established for members of the legal profession."

Other witnesses testified to Konigsberg's belief in democracy and devotion to democratic ideas, his principled convictions, his honesty and integrity, his conscientiousness and competence in his work, his concern and affection for his wife and children and his loyalty to the country. These, of course, have traditionally been the kind of qualities that make up good moral character. The significance of the statements made by these witnesses about Konigsberg is enhanced by the fact that they had known him as an adult while he was employed in responsible professional positions. Even more significant, not a single person has testified that Konigsberg's moral character was bad or questionable in any way.

Konigsberg's background, which was also before the Committee, furnished strong proof that his life had always been honest and upright. Born in Austria in 1911, he was brought to this country when eight years old. After graduating from Ohio State University in 1931, he taught American history and literature for a time in a Cleveland high school. In 1934 he was given a scholarship to Ohio State University and there received his Master of Arts degree in Social Administration. He was then employed by the District of Columbia as a supervisor in its Department of Health. In 1936 he went to California where he worked as an executive for several social agencies and at one time served as District Super-



visor for the California State Relief Administration. With our entry into the Second World War, he volunteered for the Army and was commissioned a second lieutenant. He was selected for training as an orientation officer in the Army's information and education program and in that capacity served in North Africa, Italy, France, and Germany. He was promoted to captain and while in Germany was made orientation officer for the entire Seventh Army. As an orientation officer one of his principal functions was to explain to soldiers the advantages of democracy as compared with totalitarianism. After his honorable discharge in 1946 he resumed his career in social work. In 1950, at the age of thirty-nine, Konigsberg entered the Law School of the University of Southern California and was graduated in 1953. There is no criticism in the record of his professional work, his military service, or his performance at the law school.

Despite Konigsberg's forceful showing of good moral character and the fact that there is no evidence that he has ever been convicted of any crime or has ever done anything base or depraved, the State nevertheless argues that substantial doubts were raised about his character by: (1) the testimony of an ex-Communist that Konigsberg had attended meetings of a Communist Party unit in 1941; (2) his criticism of certain public officials and their policies; and (3) his refusal to answer certain questions about his political associations and beliefs. When these items are analyzed, we believe that it cannot rationally be said that they support substantial doubts about Konigsberg's moral fitness to practice law.

(1) *Testimony of the Ex-Communist.*—The suspicion that Konigsberg was or had been a Communist was based chiefly on the testimony of a single ex-Communist that Konigsberg had attended meetings of a Communist Party unit in 1941. From the witness' testimony it appears that this unit was some kind of discussion group. On cross-

examination she conceded that her sole basis for believing that Konigsberg was a member of that party was his attendance at these meetings. Her testimony concerned events that occurred many years before and her identification of Konigsberg was not very convincing.<sup>23</sup> She admitted that she had not known him personally and never had any contact with him except at these meetings in 1941. Konigsberg denied that he had ever seen her or known her. And in response to a Bar Examiner's question as to whether he was a communist, in the philosophical sense, as distinguished from a member of the Communist Party, Konigsberg replied: "If you want a categorical answer to 'Are you a communist?' the answer is no."<sup>24</sup>

Even if it be assumed that Konigsberg was a member of the Communist Party in 1941, the mere fact of membership would not support an inference that he did not have good moral character.<sup>25</sup> There was no evidence that he ever engaged in or abetted any unlawful or immoral activities—or even that he knew of or supported any actions of this nature. It may be, although there is no evidence in the record before us to that effect, that some members of that party were involved in illegal or disloyal activities, but petitioner cannot be swept into this group

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<sup>23</sup> Counsel for the Bar Committee acknowledged this in oral argument. He stated: "Now Mrs. Bennett's testimony left much to be desired, that I concede. Her identification of this man is not all that you might wish."

<sup>24</sup> Konigsberg gave this answer during the first hearing held by the Committee. He was not represented by counsel at the time. At a subsequent hearing he stated that his earlier willingness to answer this question was inconsistent with his general position that the Committee had no right to inquire into his political associations and beliefs. He said he would not answer if the same question were then presented to him.

<sup>25</sup> *Schwartz v. Board of Bar Examiners*, ante, p. 232; *Wieman v. Updegraff*, 344 U. S. 183. See *Schneiderman v. United States*, 320 U. S. 118, 136.

solely on the basis of his alleged membership in that party. In 1941 the Communist Party was a recognized political party in the State of California. Citizens of that State were free to belong to that party if they wanted to do so. The State had not attempted to attach penalties of any kind to membership in the Communist Party. Its candidates' names were on the ballots California submitted to its voters. Those who accepted the State at its word and joined that party had a right to expect that the State would not penalize them, directly or indirectly, for doing so thereafter.<sup>26</sup>

(2) *Criticism of Certain Public Officials and Their Policies.*—In 1950 Konigsberg wrote a series of editorials for a local newspaper. In these editorials he severely criticized, among other things, this country's participation in the Korean War, the actions and policies of the leaders of the major political parties, the influence of "big business" in American life, racial discrimination, and this Court's decisions in *Dennis* and other cases.<sup>27</sup> When read in the light of the ordinary give-and-take of political controversy the editorials Konigsberg wrote are not unusu-

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<sup>26</sup> Cf. *Ex parte Garland*, 4 Wall. 333, where this Court struck down an attempt to exclude from the practice of law individuals who had taken up arms against the United States in the War Between the States. See also *Cummings v. Missouri*, 4 Wall. 277; *Brown and Fassett, Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953).

<sup>27</sup> For example, petitioner wrote:

"When the Supreme Court of these benighted states can refuse to review the case of the Hollywood Ten thus making that high tribunal an integral part of the cold war machine directed against the American people—then the enemies of democracy have indeed won a major victory. When the commanders of the last legal bulwark of our liberties sell out to the enemy, then the fascists have gone far, much farther than most people think. He who cannot see the dangerous damnable parallel to what happened in Germany is willfully blind."



ally extreme and fairly interpreted only say that certain officials were performing their duties in a manner that, in the opinion of the writer, was injurious to the public. We do not believe that an inference of bad moral character can rationally be drawn from these editorials.<sup>28</sup> Because of the very nature of our democracy such expressions of political views must be permitted. Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism.<sup>29</sup> Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining "moral character," than if it should be attempted directly.

(3) *Refusal to Answer Questions.*—During the prolonged hearings before the Committee of Bar Examiners, Konigsberg was not asked directly about his honesty, trustworthiness, or other traits which are generally thought of as related to good character. Almost all of the Bar Examiners' questions concerned his political affiliations, editorials and beliefs. Konigsberg repeatedly declined to answer such questions, explaining that his refusal was based on his understanding that under the First and Fourteenth Amendments to the United States Constitution a State could not inquire into a person's political opinions or associations and that he had a duty not to answer. Essentially, this is the same stand he had

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<sup>28</sup> In 1948 Konigsberg appeared before the Un-American Activities Committee of the California Senate, commonly known as the Tenney Committee. At that time he sharply criticized this committee, accusing it of subverting the liberties of Americans, and declared:

"I pledge my word to use every democratic means to defeat you."

The State points to petitioner's criticism of this committee as casting doubt on his moral character. What is said in the text disposes of this contention.

<sup>29</sup> Cf. *Bridges v. California*, 314 U. S. 252.

taken several years before when called upon to answer similar questions before the Tenney Committee.

The State argues that Konigsberg's refusal to tell the Examiners whether he was a member of the Communist Party or whether he had associated with persons who were members of that party or groups which were allegedly Communist dominated tends to support an inference that he is a member of the Communist Party and therefore a person of bad moral character. We find it unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded. Prior decisions by this Court indicate that his claim that the questions were improper was not frivolous<sup>30</sup> and we find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making.<sup>31</sup> On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from

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<sup>30</sup> See, e. g., *United States v. Rumely*, 345 U. S. 41, 48 (concurring opinion); *Thomas v. Collins*, 323 U. S. 516, 531; *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642; *Cantwell v. Connecticut*, 310 U. S. 296, 303-304; *De Jonge v. Oregon*, 299 U. S. 353, 365-366. A dissenting opinion in *Jones v. Opelika*, 316 U. S. 584, 611, 618, which was adopted on rehearing, 319 U. S. 103, declared: "Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind."

<sup>31</sup> Cf. *Slochower v. Board of Education*, 350 U. S. 551, 557; *Sheiner v. Florida*, 82 So. 2d 657; *Ex parte Marshall*, 165 Miss. 523, 147 So. 791. And see *Ullmann v. United States*, 350 U. S. 422, 426-428; *Opinion of the Justices*, 332 Mass. 763, 767-768, 126 N. E. 2d 100, 102-103; *In re Holland*, 377 Ill. 346, 36 N. E. 2d 543; *Matter of Grae*, 282 N. Y. 428, 26 N. E. 2d 963.

Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted.

*B. Advocating the Overthrow of Government by Force.*—The Committee also found that Konigsberg had failed to prove that he did not advocate the overthrow of the Government of the United States or California by force and violence. Konigsberg repeatedly testified under oath before the Committee that he did not believe in nor advocate the overthrow of any government in this country by any unconstitutional means. For example, in response to one question as to whether he advocated overthrowing the Government, he emphatically declared: "I answer specifically I do not, I never did or never will." No witness testified to the contrary. As a matter of fact, many of the witnesses gave testimony which was utterly inconsistent with the premise that he was disloyal.<sup>32</sup> And Konigsberg told the Committee that he was ready at any time to take an oath to uphold the Constitution of the United States and the Constitution of California.<sup>33</sup>

Even if it be assumed that Konigsberg belonged to the Communist Party in 1941, this does not provide a reasonable basis for a belief that he presently advocates overthrowing the Government by force.<sup>34</sup> The ex-Communist, who testified that Konigsberg attended meetings of a Communist unit in 1941, could not remember any statements by him or anyone else at those meetings advocat-

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<sup>32</sup> See, for example, text at pp. 264-265.

<sup>33</sup> California Business and Professions Code, 1937, § 6067, requires: "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability."

<sup>34</sup> Compare the discussion in the text at footnote 25, *supra*, and see cases cited in that footnote.



ing the violent overthrow of the Government. And certainly there is nothing in the newspaper editorials that Konigsberg wrote that tends to support a finding that he champions violent overthrow. Instead, the editorials expressed hostility to such a doctrine. For example, Konigsberg wrote:

"It is vehemently asserted that advocacy of force and violence is a danger to the American government and that its proponents should be punished. With this I agree. Such advocacy is un-American and does undermine our democratic processes. Those who preach it must be punished."

Counsel for California offers the following editorial as evidence that Konigsberg advocates overthrow of the Government by force and violence:

"Loyalty to America, in my opinion, has always meant adherence to the basic principles of our Constitution and Declaration of Independence—not loyalty to any man or group of men. Loyalty to America means belief in and militant support of her noble ideals and the faith of her people. Loyalty to America today, therefore, must mean opposition to those who are betraying our country's traditions, who are squandering her manpower, her honor and her riches."

On its surface this editorial does not appear to be a call for armed revolution. To the contrary, it manifests a strongly held conviction for our constitutional system of government. However, the State attempts to draw an inference adverse to Konigsberg from his use of the word "militant" which it points out in one sense means "warlike." To us it seems far-fetched to say that exhortation to "militant" support of America's "noble ideals" dem-

onstrates a willingness to overthrow our democratic institutions.<sup>35</sup>

We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar.<sup>36</sup> In this case we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizen-

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<sup>35</sup> Petitioner also contends that it violates due process to make advocacy of overthrow of the Government of the United States or of a State by force, violence, or other unconstitutional means an automatic ground for denying the right to practice law regardless of the reasons for or the nature of such advocacy. Because of our disposition of the case, it is unnecessary to consider this argument.

<sup>36</sup> See *Cammer v. United States*, 350 U. S. 399, 406-407. Compare Chafee, the Harvard Law School Record, Nov. 1, 1950, and Nov. 8, 1950.

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ship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.

The judgment of the court below is reversed and the case remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

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

MR. JUSTICE FRANKFURTER, dissenting.

Insistence on establishment of the Court's jurisdiction is too often treated, with slighting intent, as a "technicality." In truth, due regard for the requirements of the conditions that alone give this Court power to review the judgment of the highest court of a State is a matter of deep importance to the working of our federalism. The admonition uttered a hundred years ago by Benjamin R. Curtis, one of the ablest Justices who ever sat on this Court, cannot be too often repeated: "Let it be remembered, also,—for just now we may be in some danger of forgetting it,—that questions of jurisdiction were questions of power as between the United States and the several States." 2 *Memoir of Curtis* 340-341. The importance of keeping within the limits of federal jurisdiction was emphasized in the opinion of Mr. Justice Stone, for a unanimous Court, in *Healy v. Ratta*, 292 U. S. 263, 270: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute [the action of Congress in conformity to the judiciary sections of the Constitution] has defined."

Prerequisites to the power of this Court to review a judgment of a state court are that a federal claim was



properly before the state court and that the state court based its decision on that claim. If a state court judgment is rested on a non-federal ground, *i. e.*, on relevant state law, this Court is constitutionally barred from reviewing it. While a State may not, under the guise of regulating its local procedure, strangle a federal claim so as to prevent it from coming before a state court, it has the undoubted power to prescribe appropriate procedure for bringing all questions for determination before its courts. Squeezing out of the record in this case all that can be squeezed, the most that the five pages of the Court's opinion dealing with this threshold question can be said to demonstrate is that there is doubt whether or not the claim under the United States Constitution was properly presented to the California Supreme Court, according to its requirements.

Before this Court can find that a State—and the judgment of the Supreme Court of California expresses “the power of the State as a whole,” *Ripsey v. Texas*, 193 U. S. 504, 509; *Skiriotes v. Florida*, 313 U. S. 69, 79—has violated the Constitution, it must be clear from the record that the state court has in fact passed on a federal question. As a safeguard against intrusion upon state power, it has been our practice when a fair doubt is raised whether a state court has in fact adjudicated a properly presented federal claim not to assume or presume that it has done so. The Court has not based its power to review on guess-work. It has remanded the case to the state court to enable it to make clear by appropriate certification that it has in fact rested its decision on rejection of a federal claim and has not reached its decision on an adequate state ground. Strict adherence to the jurisdictional requirement was insisted upon in *Whitney v. California*, the well-known civil liberties case, by a Court that included Justices Holmes and Brandeis, as mindful as any in protecting the liberties guaranteed by

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the Due Process Clause. *Whitney v. California*, 269 U. S. 530, 538; 274 U. S. 357. See also *Honeyman v. Hanan*, 300 U. S. 14; cf. *Minnesota v. National Tea Co.*, 309 U. S. 551.

The procedure of making sure, through appropriate certification by a state court, that the federal question was in fact adjudicated, is a safeguard against infringement of powers that belong to the States and at the same time duly protects this Court's jurisdiction to review denial of a federal claim by a state court, if in fact it becomes clear that there was such a denial. This may involve some delay in the final determination of a federal question. The price of such delay is small enough cost in the proper functioning of our federal system in one of its important aspects. This Court has a special responsibility to be particularly mindful of the respective boundaries between state and federal authority.

I would remand the case to the Supreme Court of California for its certification whether or not it did in fact pass on a claim properly before it under the Due Process Clause of the Fourteenth Amendment.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

I share the jurisdictional views of my brother FRANKFURTER. Even so, since the Court decides the case on the merits, I feel it appropriate to deal with it on that basis, since the case is important and my views about it differ widely from those of the Court. I feel impelled to do so, more particularly, for two reasons: (1) The record, in my opinion, reveals something quite different from that which the Court draws from it; (2) this case involves an area of federal-state relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter. Granting that this area of state action

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is not exempt from federal constitutional limitations, see *Schwartz v. Board of Examiners*, ante, p. 232, decided today, I think that in doing what it does here the Court steps outside its proper role as the final arbiter of such limitations, and acts instead as if it were a super state court of appeals.

The following is what I believe to be an accurate statement of the issue to be decided. California makes it one of its requirements concerning admission to its Bar that no one be certified to the Supreme Court who advocates the overthrow of the Government of the United States or of California by force or violence. It also requires that an applicant be of good moral character. The applicant has the burden of proof in showing that these requirements have been met. Petitioner, under examination by the designated state agency, made unequivocal disavowal of advocacy of the overthrow of the Government by force or violence. With a view to testing the reliability of this disavowal, and the moral character of petitioner, the Bar Examiners questioned him about organizations to which he belonged, especially current or past membership in the Communist Party. Petitioner persisted in refusing to answer these questions despite the entirely reasoned and repeated efforts of members of the Committee to secure answers. His refusals were not based on a claim that the questions were irrelevant to an examination of his fitness under California law. The refusals were based solely on the ground that constitutionally the Committee was limited to asking him whether he advocated the overthrow of the Government by force and violence, and having asked that question, it could ask him no related question.

On the basis of the foregoing circumstances, the Supreme Court of California refused to overrule the finding of the Bar Committee that he had not qualified for admission to the Bar.



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The question for this Court is whether in so refusing petitioner admission to the Bar, California through its Supreme Court deprived petitioner of liberty and property without due process.

At the outset there should be laid aside certain things which are *not* involved in this case. The Court does not find wanting in any respect California's requirements for admission to the Bar—that an applicant (a) must be “a person of good moral character,”<sup>1</sup> and (b) must not be an advocate of the overthrow of the Federal or State Government “by force, violence, or other unconstitutional means.”<sup>2</sup> Nor does the Court question the state rule of practice placing the burden of proof on the applicant in both respects.<sup>3</sup> The Court does not hold that the First or Fourteenth Amendment entitled Konigsberg to refuse to answer any of the questions put to him by the Bar Committee,<sup>4</sup> or that any of such questions were irrelevant or improper. The fairness of the four hearings

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<sup>1</sup> Section 6060, Cal. Bus. and Prof. Code (1937). The Court does suggest that this standard is “unusually ambiguous” and that it “can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.” I respectfully suggest that maintenance of high professional standards requires that a State be allowed to give that term its broadest scope.

<sup>2</sup> *Id.*, § 6064.1.

<sup>3</sup> *Spears v. State Bar*, 211 Cal. 183, 294 P. 697; *In re Wells*, 174 Cal. 467, 163 P. 657. All but 2 of the 48 States have this practice requirement. See Farley, Admission of Attorneys from Other Jurisdictions, in Survey of the Legal Profession, Bar Examinations and Requirements for Admission to the Bar, 151, 159.

<sup>4</sup> The Court does say: “Prior decisions by this Court indicate that his [Konigsberg's] claim that the questions were improper was not frivolous and we find nothing in the record which indicates that his position was not taken in good faith.” The record at least gives one pause as to the correctness of the latter conclusion. See pp. 292, 298–299, *infra*.

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accorded Konigsberg is not attacked in any respect.<sup>5</sup> The Court's decision rests wholly on the alleged insufficiency of the record to support the Committee's conclusion that Konigsberg had failed to meet the burden of establishing that he was a person of good moral character and not an advocate of violent overthrow of the Government. The Court says:

" . . . we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law."

This makes the record important. Before turning to it, however, it will be well to revert to the true character of the issue before us. The Court decides the case as if the issue were whether the record contains evidence demonstrating as a factual matter that Konigsberg had a bad moral character. I do not think that is the issue. The question before us, it seems to me, is whether it violates the Fourteenth Amendment for a state bar com-

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<sup>5</sup> The record contains the following exchange between Mr. O'Donnell, a member of the full State Bar Committee, and Mr. Mosk, the petitioner's counsel: "Mr. O'Donnell: There was some suggestion that the Subcommittee was not fair at the previous hearings. Mr. Mosk: May I interrupt immediately. There was no inference in any comments made by Mr. Konigsberg or myself. They were solely directed to the decision of the Subcommittee and our disagreement with the ultimate results. The Committee was absolutely fair and treated Mr. Konigsberg and myself with the utmost degree of fairness and impartiality. We have no complaints about the Subcommittee."

mittee to decline to certify for admission to the bar an applicant who obstructs a proper investigation into his qualifications by deliberately, and without constitutional justification, refusing to answer questions relevant to his fitness under valid standards, and who is therefore deemed by the State, under its law, to have failed to carry his burden of proof to establish that he is qualified.<sup>6</sup>

I do not understand the process of reasoning by which the Court attempts to make a separate issue out of petitioner's refusal to answer questions, and then, in effect, reads it out of the case because California has not constituted such refusal an "independent" ground for denying admission. What the State has done, and what the Bar Committee repeatedly warned the petitioner it would do,<sup>7</sup> is to say that the petitioner's refusal to answer questions made it impossible to proceed to an affirmative certification that he was qualified—*i. e.*, that his refusal placed him in a position where he must be deemed to have failed to sustain his burden of proof. Whether the State was justified in doing this under the Fourteenth Amendment is the sole issue before us, and that issue is not susceptible of the fragmentation to which the Court seeks to subject it. I am unable to follow the Court when it says, on the one hand, that on the issue of petitioner's qualifications "we must, of course, take into account the Committee's contention that Konigsberg's failure to respond to

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<sup>6</sup> Perhaps the most precise possible formulation of the question before us is whether a State may adopt a rule of administration to the effect that, in circumstances such as are disclosed here, an applicant who refuses to supply information relevant to his fitness may be deemed to have failed to sustain the burden of establishing his qualifications. I have no doubt that such a rule is constitutional. Cf. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 349-351; Fed. Rules Civ. Proc., 37 (b).

<sup>7</sup> See the italicized portions of pp. 286, 287, 288, 289, 290, 295, 299, 300, 301, 303, 306, 307, 308, 309, *infra*.



questions was evidence from which some inference of doubtful character and loyalty can be drawn,"<sup>8</sup> and, on the other hand, that the Committee was not entitled to treat petitioner's refusal to answer as a failure on his part to meet the burden of proof as to his qualifications.

Of course California has not laid down an abstract rule that refusal to answer any question under any circumstances *ipso facto* calls for denial of admission to the Bar. But just because the State has no such abstract statutory rule does not mean that a Bar Committee cannot in a particular case conclude that failure to answer particular questions so blocks the inquiry that it is unable to certify the applicant as qualified. In other words, what California has done here is to say that the Committee was justified in concluding that refusal to answer *these* questions under *these* circumstances means that the applicant has failed to meet the requirement that he set forth his qualifications affirmatively. Thus I think the Court is quite mistaken in stating that "the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg

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<sup>8</sup> Even on this basis I consider today's action of the Court unjustified upon this record. Whether considered as the adoption and application of a reasonable rule of administration, or as the drawing of an adverse inference of fact, the Committee's action in this case was proper. As the *Hammond* case shows, a State may treat a refusal to supply relevant information as establishing facts against the refusing party even though he does not have the burden of proof. *A fortiori*, a State need not give affirmative relief to one who refuses to supply evidence needed to support his own claim. Cf. Moore's Federal Rules and Official Forms (1956) 163-165, taking the position that judgment should be entered against a party to civil litigation who refuses to answer relevant questions, even where the refusal is justified by a valid privilege. In this case the Court takes the position, apparently, that refusal to supply relevant information cannot justify state action in a civil proceeding even where the refusal is unprivileged, and where the refusing party is a claimant upon whom rests the burden of proof.

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on his failure to answer.” I turn now to the State’s brief and the record, which show, it seems to me, that failure to answer was the reason for exclusion.

## I.

I had not supposed that it could be seriously contended that California’s requirements for admission to the bar do not authorize the rejection of a candidate for constitutionally unprotected obstruction of a valid investigation into his qualifications under such requirements. Cf. *Schwartz v. Board of Examiners*, *supra* (concurring opinion). And it is unmistakable from the State’s brief in this Court that California *does* claim the right, in the circumstances of this case, to reject the petitioner for his refusal to answer the questions that were relevant to his qualifications under the State’s requirements for admission to the Bar.<sup>9</sup> The following appears on pp. 56–59 of that brief:

“Even where no serious doubt arises with respect to an applicant’s qualifications, it is standard practice to inquire into many personal matters which a person is normally privileged to keep to himself. Thus, the standard application form required of all applicants asks the applicant for details of his past employment, education, whether he was ever suspended, reprimanded or censured as a member of any profession or organization, whether he has ever been arrested, whether he has ever been a party to a lawsuit and for the details of any incidents of a derogatory nature bearing on his fitness to practice law. If the answers to such questions embarrass an appli-

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<sup>9</sup> There is no question here of drawing an unfavorable inference from a claim of the Fifth Amendment privilege. Petitioner repeatedly disclaimed any assertion of that privilege.

cant, he is privileged to refuse to answer just as he is privileged to refuse to answer any question on the Bar examination. *However, in either case he runs the risk that failure to answer such questions will prevent his admission to the Bar.*

"Respondents submit that it is in no sense unreasonable or improper to *require an applicant to cooperate in supplying all requested information that is relevant to his statutory qualifications.* . . .

"(a) *Good Moral Character*:—Reasonable doubts that petitioner was a person of good moral character arose from many sources:

"(5) *Petitioner's refusal to answer questions in such broad areas of inquiry as to effectively prevent inquiry into broad areas of doubt.*

"Petitioner stated that he did not advocate the violent overthrow of the government. He thereafter took the position that any further inquiry by the Committee with respect to this requirement was foreclosed. This is equivalent to his appearing before the Committee and stating that he is a person of good moral character and the Committee must accept his statement and not inquire further. Even were there no adverse evidence in the record, respondents could properly refuse to certify an applicant as not having established his compliance with . . . Section 6064.1, where, as here, he took the position that his bare answer that he complied with the requirement foreclosed further inquiry. . . ." (*Italics, except as to subheading "(a)," added.*)

I now turn to the record which also shows in unmistakable terms that the Committee's primary concern related



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to the petitioner's persistent blocking of its efforts to test the veracity of his statement that he did not advocate forcible overthrow of government.<sup>10</sup>

## II.

The story is best told in the language of the record itself. I shall interpolate only to the extent necessary to put what is quoted in context.

The first hearing before the Subcommittee took place on September 25, 1953. At that time Konigsberg appeared without counsel. After some preliminary inquiries as to Konigsberg's history, and questioning as to his connections with allegedly "subversive" organizations, the following ensued:

"Q. I assume that you are acquainted with the State statute that we now have on our books where among other things we are obliged to inquire into this type of a thing, and where we find that any people appear to have the views of endeavoring to change our government and so forth by force or violence, or in other words the popular conception of communism that we are expressly prohibited from certifying that person. You are familiar with the statute?

"A. Yes, I am.

"Q. Mr. Konigsberg, are you a Communist?

"A. Mr. Chairman, I would be very glad to answer that question.

"Q. If you will answer the question, I would be very happy to have it.

"A. I would be very glad to answer it if the circumstances were different. That is when I am faced with a question of this kind or when anyone else is

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<sup>10</sup> In quoting from the record I have italicized some parts to give emphasis to this point.

faced with a question of this kind today what he is faced with is the fact that various nameless accusers or informers, or call them what you will, whom he has never had a chance to confront and cross-examine, he is put in a position of answering these statements or accusations or suspicions, and without any of the protections that ordinarily exist in such a situation, and I don't think that I can place myself in that position of having to answer something out in the void, some statement. I know these statements have been made obviously. I am not pretending to be shocked or naive about this. I can say very definitely I did not, I don't, I never would advocate the overthrow of the government by force or violence clearly and unequivocally, but to answer a specific question of that kind, whether I am a member of this party, that party or the Communist party, that puts me in the position, whatever the truth is, whether I was or wasn't you would get a dozen informers who would say the opposite, and as indicated by an editorial just two or three days ago in the Daily News questioning seriously why the word of these informers, these turn-coats is accepted unquestionably as against the word of other responsible citizens. Therefore, Mr. Preston, I do not think that under these circumstances, first, yes, I understand that under the law as it is today you may ask me specifically do I advocate the overthrow of the government by force or violence. I answer specifically I do not, I never did or never will. When you get into the other question of specific views in a political party, it seems to me only the fact, the right of political opinion is protected under the First Amendment and is binding on the states. Certainly attorneys ought to be in the leadership of those who defend the right of diverse political views. I think the First

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Amendment is important. . . . I answer again on the specific question of force and violence, I did not, I don't and never would advocate the overthrow of the government by force or violence.

"Q. When answering it you don't intend to give us a specific, categorical responsive answer?

"A. As I said I would be very happy to if we met out in the hall. I would be glad to answer you, but you see under these circumstances, that is I am speaking now under oath and I am speaking for the record, I am speaking against in a sense whatever evidence that may be in the files—I shouldn't dignify it by calling it evidence; I should say whatever statements may be there from various informers. I have told you about my record both in the Army and in the community. I have been active politically, I admit it. I am proud of it. I would be happy to discuss it. This is the record that I think should be the basis for judgment, not the record of some hysterical characters that appeared before the Tenney Committee or any such group.

"Q. I am not asking anyone else. *I am trying to ask you because you are the one who is seeking admission, the privilege of practicing law in this state.* That is the reason I am asking you the question. I made the question very broad, and what I would like you to tell us, if you will answer the question; now of course as you well know and you have told me in your answer up to this point, you don't have to answer the question, of course you don't have to answer the question, but we feel that on a matter of this kind, this kind of information, we have a job to inquire about your character. The statute says character, it doesn't say reputation. *The only way I can find out and aid this Committee in finding out about your character is to ask you these questions,*



*not what someone else thinks about you, your reputation. That is the reason I have asked the question. Could you give us a categorical answer?*

"A. I can only give you the answer I have given you, and I would be very happy to answer that under other circumstances."

At this point Konigsberg stated that his refusals to answer rested on rights of "free opinion, free speech," and that the legal profession should be the champion of "the right to diverse political opinion." He was then asked whether he had "ever knowingly participated in an organization which [he] then believed was sympathetic to the communistic cause," to which he replied that "I can't say I knowingly did that, because I don't think it would have made a great deal of difference to me if I had known one way or the other" if the organization's objectives were what he believed in, "say a better School Board or whatever the issue might have been." Then followed this:

"Q. Mr. Konigsberg, I assume that you know that your name has been listed in the public press by witnesses before the Congressional Un-American Activities Committee.

"A. Yes.

"Q. And have been identified by persons who said that you were a member of the Communist Party at the same time they were.

"A. I saw that report. That is the sort of thing I was referring to a moment ago when I referred to the various accusations."

Next there was discussion as to the attitude of the Association of American Universities with reference to teachers claiming the Fifth Amendment privilege against self-incrimination:

"Mr. Sterling: Let me try to clarify it as I understand it. This Association of Universities takes the

position that complete candor on the part of the teacher with respect to his political beliefs, and in particular whether or not he subscribes to the beliefs of the Communist Party is a prerequisite to continuing in the teaching job. He doesn't have to disclose whether or not he is a Communist or is sympathetic to the Communist beliefs, but that if he doesn't answer those questions with complete candor he has lost his right to a position in the teaching community. Translating that into terms of an Association of lawyers such as our State Bar or any Bar Association, *you are seeking admission to the profession and that we as your prospective colleagues have a right to expect complete candor from you on this particular question, and that if you don't wish to be completely candid with us then we are justified in saying you don't belong in our profession.* That I think is the stand that the American Universities took.

"A. I understand that. I can only say what I said several times already. Under those circumstances the constitutional guarantee of free speech means nothing, if it doesn't mean you can keep your views to yourself, and certainly lawyers recognize that and should be among the first to defend that right. I think the legal profession, particularly the leaders of the legal profession, should be the first to insist on it. Put another way, of what meaning is any constitutional guarantee if it becomes a crime to invoke that guarantee?"

This answer was then elaborated by the petitioner at some length, after which the record continues as follows:

"Mr. Sterling: If you accept as true the premise that the Communist Party, as it is embodied in the present Soviet Union government, has for its objective the overthrow of not only the government of the

United States but any other non-communist government, and that that overthrow may be accomplished either from within by a bloodless revolution or if necessary by force, if you accept that premise then I think that your argument about constitutional rights of free speech and right to have your own political views and so on go by the board because then it seems to me that we are asking you no more than whether or not you belong to or believe in the principles of such an organization as Mafia, which is pretty generally, I think, regarded as one which has objectives that can be accomplished according to their tenets by what we regard as criminal acts. Now if I asked you whether or not you believed in the right to murder you would answer me no, I think, but as I say this whole business seems to be a turn on whether you accept the premise that the Communist Party—I am paraphrasing for the purpose of illustration—if you accept the premise that the Communist Party believes in murder and has that as its objective then *I don't think you have a right or justification to refuse to answer the question of whether you belong to the Communist Party or whether you believe in its principles, you see.*

“A. Well I can't argue with you.

“Mr. Sterling: Well, you can say that you think my premise is wrong. You can say the Communist Party as constituted does not believe in the overthrow, is not trying to and does not have as its objective the overthrow of the United States by one means or the other. Then I simply have to disagree with you because it seems to me that is their objective.

“A. Well, are you suggesting, Mr. Chairman, that since of course this is a critical period in our country's history that in the face of such threats as you are basing your premise on that we have to forego



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then the use of the constitutional privileges or the protection of the Constitution, is that what your proposal is? I would like to understand your argument.

"Mr. Sterling: No, as I say you don't feel there is any question of constitutional privilege when in a proceeding such as this where we are charged with determining the moral qualifications of an applicant in the profession, you don't feel that the constitutional privilege is hurt if I ask you if you believed in murder?

"A. No.

"Mr. Sterling: You will answer that unhesitatingly, 'No, I don't believe in murder.' So I say that most of us now accept as true the premise that the Communist Party as we know it and as embodied in the Russian Government, the present Soviet Union Government, does have as its objective world domination by the Communist Party. So we accept that premise. *Therefore it seems to us that we have the right to ask the question of applicants for admission to the Bar, because our statute as we pointed out says that you are not qualified if you do believe in overthrowing or advocate the overthrow of the United States by force or violence.*

"A. I am answering specifically in terms of that statute too that I do not. That is the question you are asking me specifically. I am answering I never did, I do not and I never would advocate the overthrow of the government by force or violence. I do believe like leaders like Jefferson people should have the right through discussion, ballot, the minority view becomes the majority view, that changes like that are sought through the ballot box but never through force and violence. That I do not believe. I think my whole experience has shown that. I

don't know how more direct that can be, and the only reason as I said before that I don't specifically answer the question, 'Are you a member of this political party?' is because of the situation anyone is in who is faced with accusations as indicated by the newspaper report, accusations by people who I think are gradually being discredited by many sources, when you don't know who it is who is accusing you, you don't know on what evidence, anonymous faces, you never have a chance to cross examine them, how can anyone be put in that position? What can you fight except wind-mills and air in such a situation. The direct question, 'Do you believe in force and violence?' I answered that.

"Mr. Black: It still puzzles me a little to see why it is that you think you are prejudicing your own position by taking a position on that irrespective of whether there is any other evidence in the file or not.

"A. Because very practically this as you know has happened before. In the theory of today it is the words of these informers that is accepted above the words of anyone else.

"Mr. Black: How do you know?

"A. The newspaper report says so. Isn't that the report you were referring to where I was named before the Un-American Activities Committee?

"Mr. Preston: Yes, but that doesn't answer the question.

"Mr. Black: How do you assume this Committee accepts the hearsay report against your direct testimony?

"A. I am not assuming that. I didn't mean to give that implication. What I am saying is that where on one side we have these hearsay reports and nameless informers, and I don't need to go into a

discussion of how willing they are to sell their evidence, if it is evidence, when there is the possibility of their word being placed against my word or anyone in my position, and because in view of the hysteria today their word is accepted. All it has to do is appear in the paper and you are discredited. Wasn't it two or three weeks ago in San Francisco a woman won an amount in a suit for being called a 'Red,' a teacher, when it is prima facie—libel, whatever the case was. Then it becomes not only a basic matter of principle on the First Amendment but a matter of protecting yourself in a legal situation, because this is an official body. I am not talking to a group of people like I would be talking to on the street.

*"Mr. Sterling: You are afraid if you answer the question as to membership in the Communist Party in the negative and say, 'No, I am not a member and I never have been,' assuming you made that answer, you are afraid that we could find half a dozen people who would say that you were and had been, and therefore if you were on a perjury trial and the jury believed them and not you, you committed perjury.*

*"A. I am saying no matter what answer I gave whether I was or wasn't, undoubtedly there would be several whom you could get to say the opposite, and as I said before—*

*"Mr. Sterling: Subjecting you to a perjury charge?*

*"A. Yes. As I said before if you want to ask me outside in the hall I will tell you, but in view of these circumstances where you just have no right, you have no opportunity rather, to defend yourself against these people, I don't think that is fair play. I don't think that is justice. I don't think it is what the American democratic system teaches."*



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At this point Konigsberg testified that he did not recall knowing a Mrs. Bennett (formerly Mrs. Judson), the Subcommittee's next witness, the following occurring just before she testified:

"Mr. Preston: Is there any further statement you wish to make, Mr. Konigsberg?"

"A. By the Witness: I can't think of anything I could add to what I said unless there is some specific point you want me to enlarge on.

"Mr. Preston: I assume, of course, if I ask you the question as to if you were ever a member of the Communist Party you would give me substantially the same answer.

"A. Yes, I think I would.

"Mr. Preston: You observed, I assumed, Mr. Konigsberg, I didn't ask you in the first instance if you were a member of the Communist Party. I asked you if you were a Communist. I recognize there is a philosophical Communist. I made my first question very broad to include that.

"A. I understood you to say a member of the Communist Party.

"Mr. Preston: Would your answer be any different?"

"A. I thought you said a member of the Communist Party.

"Mr. Preston: I deliberately did not. The first question we discussed at length is, 'Are you a Communist?'"

"A. I will say no, definitely no. The only thing I would describe myself very simply as one who has read a lot, studied a lot, because as a teacher of history and political education in the Army I believe strongly in the fundamental concepts of our democratic system.

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"Mr. Preston: Your answer that you gave was directed to the question, 'Are you a member of the Communist Party?'"

"A. Yes, and solely to that. If you want a categorical answer to 'Are you a communist?' the answer is no.

"Mr. Preston: You gave us that.

"Mr. Sterling: That is your answer.

"A. By the Witness: No.

"Mr. Black: Would you care to state whether you have ever been a Communist?"

"A. Do you mean by that as he is making the distinction philosophically or a member of the Communist Party?"

"Mr. Black: I mean in the same sense you have just answered that you are not now a Communist.

"A. I would say my thinking has only been what I described a moment ago as being based on the elementary concepts of the American democracy, assuming that you mean do I think like a Communist; that is assuming we have some common understanding what you mean by that term.

"Mr. Sterling: We are not talking now about a membership in any party.

"A. Yes, philosophical views."

Mrs. Bennett, an ex-Communist Party member, then testified, in the presence of Konigsberg, that Konigsberg had attended in 1941 meetings of the party unit of which she had been a member.

The next hearing was on December 9, 1953, which was attended by Konigsberg's counsel, a Mr. Mosk. This hearing was devoted in part to the cross-examination of Mrs. Bennett by Mr. Mosk, the net of which was that Mrs. Bennett admitted that she recognized Konigsberg when she first came to the earlier hearing only after not seeing anyone else in the room with whom she was

familiar. After general colloquy as to some of the petitioner's writings, the questioning returned to Konigsberg's refusal to answer questions concerning his alleged membership in the Communist Party, this time with particular reference as to how petitioner reconciled his First Amendment claim with his willingness to answer ideological questions, but not questions as to whether he had ever been a member of the Communist Party. The record continues:

"Mr. Freston: May I ask a question of counsel?

"Mr. Sterling: Yes.

"Mr. Freston: One of the things that was bothering me, Mr. Mosk, is the general answer we have received to the question concerning present and past Communist affiliation, and I recognize the objection that counsel raises under the First Amendment.

"Mr. Mosk: The witness.

"Mr. Freston: The witness has raised. *The thing that troubles me is we have an affirmative duty under the statute to certify as to this applicant's good moral character. We have endeavored to point out to him that the burden of showing that character is upon him. It appeared to me that he wasn't being quite forthright with us in not giving us an answer to those questions. He stated in effect his reason, at least as I understood it, that he did not want to answer the questions because he might sometime be accused of or prosecuted for perjury. Now, that is the rationale as I remember it, and frankly I am left in a rather confused state. As a member of this Committee I have to take an affirmative act of certification as to a good moral character. I wonder if you could perhaps enlighten me or help clarify the situation so perhaps maybe I might understand it better.*

"Mr. Black: May I interpose another question directed to the same point, and you can answer them



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at one and the same time. Just to make sure that I understand the witness' position, at the last hearing—Mr. Konigsberg's position—as I understood he was perfectly willing to deny categorically he is a Communist and took that position, am I right on that?

"The Witness: I said philosophical Communist.

"Mr. Black: It seems to me that question we wouldn't have a right to ask you under your argument, but that we would very definitely have a right to ask you whether you are now a member of the Communist party as it is commonly understood. Now, am I right on that that you still take the position that there is no objection to your answering us categorically that you are not now a Communist, namely that you don't believe in the philosophical doctrines of communism, generally speaking, that is a matter of belief?

"The Witness: I think I understand your question.

"Mr. Black: But you do take the position that we do not have the right or you have no obligation to answer the question, 'Are you now a member of the Communist party?' and that you refuse to answer. I am not trying to argue. I just want to be sure I understand your position. Am I correct in that?

"Mr. Mosk: Either way. The first question was addressed to me. . . . [W]e are endeavoring to address ourselves to that issue which we feel most pertinent that is 'What has Mr. Konigsberg done as an individual with relation to the people with whom he has dealt, the occupations and professions that he has followed, what has he done to show affirmatively that he is of good moral character and would be a good member of the Bar?'

"Now, as I understood Mr. Konigsberg's position it is his feeling that one of the matters of principle

on which he has always stood is the principle that one may not inquire as to a person's belief, religious, political or otherwise, and that by answering such questions as they are being asked throughout the country in these days, and in all sorts of places and under all sorts of circumstances, as I understand Mr. Konigsberg's position that by answering such a question he is in effect giving way to and giving ground on the principle that one may not be asked these things, and that by his failure to answer he is neither affirming nor denying.

"Now as to the second question, which I think is most pertinent and certainly struck me at the moment when I read through the transcript for the first time, I was struck by exactly that same question, and I asked Mr. Konigsberg about it, and I think that perhaps he should answer this himself, but we did discuss this very matter, and I know that his position is now that if you were to ask the same question today he feels that it is a question he should not have answered, and that by way of principle in coming unprepared he did not think through the principle to that extent. I think I am answering correctly.

"The Witness: That is exactly what I told counsel. As you are aware I came in without counsel, without any preparation, without knowing exactly what I might be asked. I did have an indication since I had informed the Committee, I appeared before the Tenney Committee, that I might be asked about that. I came prepared with nothing. In the heat or in the tension of a meeting of this kind, as you are aware, very often one will say things that one regrets later or would have said later. If I were asked that today I think my answer would be the same as to the other

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question as to whether I am or am not a member of the Communist party, or whether I ever was.

"Mr. Black: I might say without expressing my own view on the thing that I think it must be obvious to you at least under popular conception there is a distinction between what a man believes in a doctrinaire's sense, which I think everybody agrees who at least tries to follow American principles is sacred ground as to his individual concepts. The belief of the doctrines on the one side, and at least in popular view, affiliation with a party that has its policies dominated by the Soviet Union is quite a different conception, and that the argument at least is that inquiry goes to the very essence of a man's loyalty to the country and has nothing to do with his individual beliefs in the matter of religion or political philosophy or a code of ethics, and that is the distinction that we are trying to get at here.

"The Witness: I think you are quite right, and the position you take is quite correct, and I confess that I was in error at the time again due to the tension of the moment, and as I was going to say I don't think Mr. Freston's recollection is correct. I did not say that I was giving the kind of answer, was giving or refusing to answer because I was afraid of a perjury charge, as I recall. That is not the basis of refusal or the type of answer I have given. The reason that perjury discussion came up, as I recall now—I haven't been thinking about it—was in connection with the nature of the hearing where a person does not have the opportunity to cross examine and confront witnesses or see documents or things of that nature, and it so happens in the case of Owen Lattimore, who faced a perjury charge, even though he denied a half dozen ways any association with subversive elements—I am recalling from memory—



it had to do with whether he expressed a certain opinion. How is a man to remember what opinions he expressed. His appeal is pending at the moment for his conviction of perjury. It is only with reference to that situation that I mentioned or commented upon the element of perjury, because that has nothing to do with the basis for my giving the kind of answer I am giving to the question as to my political affiliation, none whatsoever. You correct me on the record if I am wrong. That is my recollection of that discussion. At least I would like to say for the record that has nothing to do with the type of answer I have given.

"Mr. Wright: I would like to ask a question that perhaps in some stage of this proceeding you might enlighten at least this member of the Committee on, *whether you consider inquiry into present membership in the Communist party as at all relevant in the inquiries of this Committee as to moral character? In other words, is it a relevant factor? Does it have any bearing? Is it a proper scope of inquiry?*

"Mr. Mosk: I think you have to draw this distinction. It may be under some circumstances the Committee would feel that it would be a type of information that it would like to have to reach its conclusion, and to that extent perhaps it may be considered relevant, but many relevant matters are not inquired into in legal proceedings because for other reasons those matters are not competent testimony. And it is the position of Mr. Konigsberg here that inquiries into the realm of his political, religious or other beliefs are matters that are protected under the First Amendment to the Constitution, and therefore while it may be information which the Committee would feel it would like to have it is a field in which the Committee may not inquire by Mr. Konigsberg's

position, and I think therefore perhaps I am answering your question yes and no, but I think I make my point clear as to what position Mr. Konigsberg takes.

"Mr. Wright: *Having felt that we would like the information and being denied, now I won't argue with you that being denied that we have no way of compelling it, but are we therefore faced with going forward?*

"Mr. Mosk: I think that also is a fair question, and that is why we are approaching the hearing in the manner in which we do. . . .

". . . I could, I know, bring responsible social workers, other lawyers, persons at the universities with whom he has dealt, all of whom are prepared to come and say that they have known him in these various capacities, and that on the basis of the things that he has done himself, not what someone else has done, but what he, Raphael Konigsberg, has done that he is of good moral character to become a member of the legal profession, and these are things that as I say we will submit affirmatively, and it seems to me that this is the affirmative answer to what I can well understand the Committee feels is a void which Mr. Konigsberg, for reasons of principles he does not feel he wants to fill, but I think that even there one must always have respect for people who at recognizing the danger to him in standing on his principle is still prepared to do that in order to carry out things that he believes in so firmly.

"Mr. Wright: I commend his moral principle, let me say, but perhaps have a little doubt for his judgment.

"Mr. Mosk: If I may comment on that also I think that certainly—

"Mr. Wright: *He is making it extremely hard for the Committee.*"

The third, and last, hearing before the Subcommittee occurred on January 27, 1954. At this time the letters from character witnesses were presented, and there ensued general colloquy as to the scope of a memorandum to be filed by Mr. Mosk. The record shows the following as to the Subcommittee's concern over Konigsberg's refusal to answer:

"Mr. Wright: Thank you, Mr. Mosk. I was wondering *whether or not you in the course of your memorandum you had addressed yourself at all to the problem of the disinclination of the applicant to respond to questions proposed by the Committee.*

"Mr. Mosk: I have addressed myself to that. The memorandum, however, is not lengthy and if you wish I would like to say just a brief word in addition then on that point.

"Mr. Wright: *That is one thing that frankly bothers me that we discussed in our previous hearing.*

"Mr. Mosk: I can understand why that is a matter that does bother you. I think that I indicated at the previous hearing by analogy one of the answers that I feel is pertinent to this. I indicated, and I feel that in every judicial proceeding and every legal proceeding there are many matters that the tribunal would like well to know to assist it in reaching its conclusion.

. . . . .

"Now, it is implicit in what I have said up until now that matters of the political, economic and social nature, matters of the mind, cannot become the standards upon which the decision as to whether an applicant is of good moral character can be predicated. There are basic principles as to whether the Committee or any other tribunal may inquire into matters of the mind and thinking.



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"Now, Mr. Konigsberg is obviously, as indicated by many of these letters, and has always been a man of great principle, and I feel that the Committee, since it is our position that it may not inquire into these fields must not make its decision based on Mr. Konigsberg's principal refusal to answer questions in a field in which the Committee may not inquire. And this fundamentally is our answer that these are matters which can have no bearing on his moral fitness to practice law, and since they cannot I think it then becomes even a greater indication of the extreme principles upon which this man stands, and an even greater indication that as a lawyer he will be a credit to the legal profession."

The Subcommittee having reported unfavorably, a hearing to review its recommendation was held before the full State Bar Committee on March 13, 1954, at which Konigsberg read a prepared statement, following which the record shows the following:

"Mr. Fuller: What organizations do you presently belong to?

"Mr. Mosk: To which I object on the grounds that this is a violation of the witness's rights under the First Amendment of the Constitution.

"Mr. Fuller: You mean to say that he shouldn't tell us whether he belongs to the Elks or the Masons or things of that sort?

"Mr. Mosk: That would be my position.

"Mr. Fuller: We can't determine any organization he belongs to? He doesn't have to answer at all?

"Mr. Mosk: That would be my position that his beliefs and associations are not within the scope of this hearing.

"Mr. Fuller: It does not necessarily relate to beliefs. We all know many organizations are not

based on beliefs. I think we are entitled to know who he associates with.

"Mr. Konigsberg: I respectfully say that you are not entitled to know my associations and any person may refuse to answer on the basis of the rights of a citizen under the First Amendment which I have previously referred to in my testimony.

"Mr. Konigsberg: May I ask this question, Mr. Chairman: Is it the Committee's position (and I would sincerely like to know) that it has the power to ask such a question and that questions relating to opinions do have a bearing on the applicant's moral character?

"Mr. Fuller: I don't want to put it on that basis. It is my position, not necessarily the entire Committee's position, that *we have a rather general scope of inquiry to determine whether an applicant tells the truth, for one thing. I think that is a factor in determining whether or not he is morally qualified. He may state that he is not now a Communist, if he has been a Communist in the past, and if we believe he is telling the truth, that will have a bearing on our determination. I think we have the right to test the veracity of the applicant to the extent that if he denies that, I am influenced in the final conclusion I will come to, that I haven't determined yet. I do think that the applicant who wishes to afford us the facilities for determining his moral character to the utmost, should permit us to test his veracity.*

"Mr. Konigsberg: Mr. Chairman, in all sincerity I have attempted to show in my initial analysis that under Section 6064.1, that I think sets the limit to any inquiry that any body of Examiners has. Once you ask 'Do you now?,' does that person advocate

the overthrow by force, violence, or other unconstitutional means, and he answers, as I have answered, that he does not, you cannot ask any questions about his opinions. You are not empowered to ask any questions. There is some question as I pointed out in my statement whether this is constitutional even to allow it to this extent.

"Mr. Fuller: Do I understand that it is your position, and I think I understand your position, that we should not go ahead and find out whatever information we can obtain in order to make the best decision?

"Mr. Konigsberg: I make this point which I did not make before that I don't think constitutional such action, to draw inferences of the truth or falsity of any statements based on the position (whether of the First or any other Amendment) which the applicant takes. For the Bar to maintain the position, as the Chairman is doing, that it does have the right to ask about my opinions (at least as he is doing this afternoon), as I pointed out these opinions and beliefs which have been expressed coincide with those of prominent leaders of the Bar, which they are expressing today . . . . I am wondering if that is the position the Committee wishes to take.

"Mr. Fuller: There is no position of the Committee. I am only one member. We are conducting an impartial examination.

. . . . .

"A lady by the name of Bennett testified here. You heard her testimony. Is there any part of that testimony you wish to deny?

"Mr. Konigsberg: Well, again, Mr. Chairman, that is the same question. That is a question relating to opinions, beliefs, political affiliations.

"Mr. Fuller: It has nothing to do with beliefs.



"Mr. Konigsberg: It certainly is related to political organizations, political activity, however you choose to describe it.

"Mr. Fuller: Do you want to read it again?

"Mr. Konigsberg: I recall it.

"Mr. Fuller: Do you wish to deny any part?

"Mr. Konigsberg: I wish to say that any questions relating to such political affiliation, which the testimony dealt with . . .

"Mr. Fuller: You refuse to affirm or deny her testimony?

"Mr. Konigsberg: The Committee is not empowered to ask with regard to political affiliations or that type . . .

"Mr. Fuller: I am calling your attention to the fact part of it is not connected with political beliefs or associations.

"Mr. Konigsberg: Which part?

"Mr. Fuller: You are free to read it.

"Mr. Konigsberg: If you wish, I shall be glad to.

"Mr. Fuller: If you want you may either affirm or deny anything if you need to do that. We want to afford you the privilege. (Witness read the testimony referred to)

"Mr. Konigsberg: Mr. Chairman, I think I would recall all the questions relating to me. She answered a number of questions not relating to me. All relating to me are based on a matter of political affiliation or opinion and political association and I think that is amply covered under the protection of the First Amendment as I referred to a moment ago. The Committee's rights to inquire about this matter are limited to one, the present personal advocacy of the overthrow by force or violence or other means as set forth in 6064.1.

"Mr. O'Donnell: Are you a member of the Communist party now?

"Mr. Konigsberg: How does that differ from the questions asked before?

"Mr. O'Donnell: I would just like you to answer it.

"Mr. Konigsberg: The answer is the same I would give. The Committee is not empowered to inquire any more than they may inquire whether I am an Elk, a Freemason, a Democrat or a Republican. It might become incriminating to be a member of the Democratic party today, like saying all Democrats are traitors.

"Mr. O'Donnell: Have you ever been a member?

"Mr. Konigsberg: I would give the same answer.

"Mr. O'Donnell: You refuse to say whether you now are?

"Mr. Konigsberg: I refuse on the ground that the Committee is not empowered to question anyone about political opinions or affiliations, whether past affiliations or present ones. I say this can have no bearing on moral qualifications to practice law, unless the Committee is prepared, as I said in my statement, to take the position that it is now a crime in California to have opinions different than general popular opinions or conforming opinions.

"Mr. Fuller: *Of course, the Committee takes the position it is doing so affirmatively, when it goes before the Supreme Court and states you have the proper moral character and we feel we have the right to inquire very deeply into that because it is an affirmative obligation on our part.*

"Mr. Konigsberg: I think, Mr. Chairman, on that point the court has said—

"Mr. Fuller: We may be wrong. The Supreme Court may tell us otherwise but that is the way it appears at the moment."

Finally, the Committee put to Konigsberg these questions:

"Mr. Whitmore: *It is not your contention, is it, Mr. Konigsberg, that the only basis which the Committee may rely on in determining whether or not it can certify you under the provisions of 6064.1 is by asking you the questions and getting a yes or no answer. It is not your position that that is the extent of the right of this body in making its determination under 6064.1?*

"Mr. Konigsberg: *In essence, that is it.* My interpretation of that code section is simply that it sets the limit as to whatever questions relating to opinion—because that is obviously a political issue—there may be asked by the Bar Examiners. It sets the limit as I interpret it. I may be wrong, as I think the Subcommittee is wrong; because of the history of this act as I have related it the Committee can only ask 'Do you now personally advocate the overthrow of the government of the United States or of this State by force or violence or other unconstitutional means' and if I say 'No,' 'Yes' or whatever it may be, that is as far as you can go; that is without raising the question on this point (which I don't think is pertinent) as to whether that is even constitutional under the First Amendment.

"Mr. Whitmore: You are saying that the Committee is precluded under Section 6064.1 from considering acts or omissions of yours in the past with respect to that problem?

"Mr. Konigsberg: Yes, I think so. I am saying they can only ask do I advocate the overthrow by force or violence or other means.

"Mr. Whitmore: *You are contending that we are bound by your answer of yes or no which you give.*



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"Mr. Konigsberg: You can decide for yourselves whether I am telling the truth. You can use any means of determining the truth. You don't have to accept any individual's yes or no answer as the truth. I think that is understood.

"Mr. Maxfield: *Doesn't your answer right there defeat the only purpose if we can cross examine as to the truth or falseness of that statement? Why can't—*

"Mr. Konigsberg: *I didn't say you could cross examine me as to the truthfulness.* The question as I understand it was whether the Committee couldn't consider other things, records, past acts.

"Mr. Whitmore: Acts or omissions.

"Mr. Konigsberg: Anything in my record to evaluate whether I am telling the truth, certainly.

"Mr. Maxfield: *The general principles of cross examination testing the veracity of a statement, those you know under the rules of evidence are pretty broad. Do you deny us the right to ask these questions for that purpose?*

"Mr. Konigsberg: Again under the rules of evidence there might be many items of hearsay, fact or whatever it might be, which the court would like to know but the court prevents the prosecution or the other side from introducing because of a deep-seated public policy or other evidentiary rule or the First Amendment. The rule of search and seizure is something else of that nature. The information might be pertinent but the court says that the results of such act, as established over the years, may not be asked or introduced.

"It is my contention as I tried to make clear—(it might be unconstitutional, I am not questioning that now)—it may only go as far as this law permits you to go. The history of that act shows that the Legis-

lature tried to do other things but failed to because it failed of passage. And a person can be asked (such people as myself) 'Do you?' than [sic] the Committee must determine and evaluate as to the truth by what is in the individual's record.

"Mr. Maxfield: *We are not entitled to an evaluation of that truth or in an effort to evaluate it to cross examine you with respect to present or past associations?*

"Mr. Konigsberg: *That is right. That is my interpretation.*"

On February 8, 1954, the State Bar Committee refused to certify Konigsberg for admission, and the California Supreme Court denied review on April 20, 1955.

### III.

So ends the story. Whatever might be the conclusions to be drawn were we sitting as state judges, I am unable to understand how on this record it can be said that California violated the Federal Constitution by refusing to admit petitioner to the bar.

The members of the Committee before whom the petitioner appeared were under a statutory duty to inquire into his qualifications for admission. Among the matters into which they were obligated to inquire were moral character and the applicant's advocacy of forcible overthrow of the Government. Petitioner stated readily enough that he did not advocate overthrow of government by force, violence, or other unconstitutional means. But once that basic question was answered he took the position that the Committee's authority was exhausted; that it had no power to ask him about the facts underlying his conclusory denial or to test his response by cross-examination. The Court holds that the State's conclusion—that an applicant who so obstructs the

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Committee has not met his burden of proof in establishing his qualifications of good moral character and non-advocacy of forcible overthrow—violates the Fourteenth Amendment.

I think this position is untenable. There is no conceivable reason why the Committee should not attempt by cross-examination to ascertain whether the facts squared with petitioner's bare assertion that he was qualified for admission. It can scarcely be contended that the questions were irrelevant to the matter under inquiry, namely, whether petitioner advocated forcible overthrow of the Government. At least it seems apparent to me that Communist Party membership is relevant to the question of forcible overthrow. In fact petitioner himself admitted that the questions were relevant, relying entirely on his First Amendment privilege.<sup>11</sup> Yet the Court assumes, for the purposes of this case, that the questions did not invade an area privileged under the First Amendment. In other words, we have here a refusal to answer relevant and unprivileged questions.

We are not dealing with a case where the State excludes an applicant from the bar because of bare membership, past or present, in the Communist Party. The *Schwartz* case attests that that is a wholly different question. Nor are we dealing with a case where an applicant is denied admission because of his political views. We have here a case where a state bar committee was prevented by an applicant from discharging its statutory responsibilities in further investigating the applicant's qualifications. The petitioner's refusal to answer questions in order to dispel doubts conscientiously entertained by the Committee as to his qualifications under a valid

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<sup>11</sup> Cf. *Garner v. Board of Public Works*, 341 U. S. 716, 720; and see pp. 299-300, 301, *supra*.



statutory test can, it seems to me, derive no support from the Fourteenth Amendment.

The principle here involved is so self-evident that I should have thought it would be accepted without discussion. Can it really be said that a bar-admissions committee could not reject an applicant because he refused to reveal his past addresses, or the names of his former employers, or his criminal record? An applicant might state with the utmost sincerity that he believed that such information was none of the committee's business; yet it must be clear that his application could be rejected. And in such a case the committee would not have to point to "evidence" establishing either that the applicant had bad moral character or that he was asserting the constitutional privilege in bad faith. For the applicant is the moving party, and his failure to go forward is itself sufficient to support denial of admission.

For me it would at least be more understandable if the Court were to hold that the Committee's questions called for matter privileged under the First and Fourteenth Amendments. But the Court carefully avoids doing so. It seems to hold that the question of privilege is irrelevant as long as the applicant is "in good faith" and as long as there is other material in the record which the Court interprets as affirmatively attesting to his good moral character. I cannot agree. It is not only that we, on the basis of a bare printed record and with no opportunity to hear and observe the applicant, are in no such position as the State Bar Committee was to determine whether *in fact* the applicant was sincere and has a good moral character. Even were we not so disadvantaged, to make such a determination is not our function in reviewing state judgments under the Constitution. Moreover, resolution of this factual question is wholly irrelevant to the case before us, since it seems to me altogether beyond question that a

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State may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area. The opinion of the Court does not really question this; it solves the problem by denying that it exists. But what the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.

For these reasons I dissent.

Opinion of the Court.

OFFICE EMPLOYES INTERNATIONAL UNION,  
LOCAL NO. 11, AFL-CIO, *v.* NATIONAL  
LABOR RELATIONS BOARD.

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

No. 422. Argued March 28, 1957.—Decided May 6, 1957.

1. When a labor organization engaged in multistate activities takes on the role of an employer it is an "employer" within the meaning of § 2 (2) of the National Labor Relations Act, the Act applies to its operations the same as it would to those of any other employer, and the National Labor Relations Board has the same jurisdiction over labor disputes between such a labor organization and its employees as it would have in the case of any other employer. Pp. 313-318.
  2. In this case, the Board's refusal to assert jurisdiction over labor unions, as a class, when acting as employers was contrary to the intent of Congress, was arbitrary, and was beyond the Board's power. Pp. 318-320.
- 98 U. S. App. D. C. 325, 235 F. 2d 832, reversed and remanded.

*Joseph E. Finley* argued the cause and filed a brief for petitioner.

*Dominick L. Manoli* argued the cause for respondent. With him on the brief were *Solicitor General Rankin*, *Stephen Leonard* and *Fannie M. Boyls*.

*Samuel B. Bassett* and *Clifford D. O'Brien* filed a brief for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., as *amici curiae*, urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case concerns the attempt of the petitioner, Local 11 of the Office Employees International Union, AFL-CIO, to represent for collective bargaining purposes the office-clerical workers employed at the Teamsters



Building in Portland, Oregon. These office-clerical employees were engaged by the various local unions and affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL. Local 11 filed a series of unfair labor practice complaints with respondent, National Labor Relations Board, charging in substance that the Teamster group<sup>1</sup> had interfered with the Local's effort to organize the office-clerical workers in violation of § 8 (a) of the National Labor Relations Act.<sup>2</sup> The primary question is whether with respect to their own employees labor organizations are "employers" within the meaning of § 2 (2) of the Act.<sup>3</sup> Since we decide this question in the affirmative a subsidiary question is posed: Whether the Board may, by the application of general standards of classification, refuse to assert any jurisdiction over

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<sup>1</sup> The complaints were leveled at the International Brotherhood of Teamsters and its representative, Teamster Local No. 206, Teamster Local No. 223, the Teamsters' Joint Council of Drivers No. 37, the Oregon Teamsters' Security Plan Office and its administrator, and the Teamsters Building Association, Inc. The latter owns and operates an office building in Portland, Oregon. The office-clerical employees petitioner attempted to organize perform services for the various teamster organizations here involved. These organizations are the exclusive tenants of the building.

<sup>2</sup> 61 Stat. 140, 29 U. S. C. § 158 (a).

<sup>3</sup> 61 Stat. 137, 29 U. S. C. § 152 (2), provides in pertinent part: "SEC. 2. When used in this Act—

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but *shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or *any labor organization (other than when acting as an employer)*, or anyone acting in the capacity of officer or agent of such labor organization." (Emphasis supplied.)

labor unions as a class when they act as employers. The Board here refused to assert any jurisdiction, and the complaints were dismissed. 113 N. L. R. B. 987. The Court of Appeals affirmed, 98 U. S. App. D. C. 335, 235 F. 2d 832. The importance of the jurisdictional questions involved caused us to grant certiorari in the interest of the proper administration of the Act. 352 U. S. 906. We believe the Board erred when it refused to take jurisdiction and thus, in effect, engrafted a blanket exemption upon the Act for all labor unions as employers.

We shall not deal with the merits of the unfair labor practice complaints. As to the jurisdictional question, the findings indicate that there are 23 workers employed by the various Teamster organizations at the Teamsters Building. They are paid by the Teamster group which, excluding the Security Plan Office, forms "an integral part of a multistate enterprise."<sup>4</sup> The trial examiner

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<sup>4</sup> The annual payment of initiation fees and taxes from members of the Teamsters Union throughout the country to the International's headquarters in Washington, D. C., amounts to more than \$6,000,000. The minimum monetary jurisdictional requirement for a multistate enterprise such as the Teamsters, promulgated by the Board in *Jonesboro Grain Drying Corp.*, 110 N. L. R. B. 481 (1954), is \$250,000.

The Security Plan Office administers 18 trust funds and receives contributions provided for by collective bargaining agreements with some 2,000 employers located in four western States. Some of the funds are invested in health and welfare insurance policies on which over \$2,000,000 per annum in premiums is paid to a California insurance carrier. The minimum "direct outflow" requirement established for jurisdictional purposes in *Jonesboro*, *supra*, is \$50,000. The California insurance carrier remits 4% of the premiums to the Security Plan Office to defray the expense of maintaining an office and processing and paying claims under the health and welfare plan. The Security Plan Office employed and paid at various times from five to ten of the personnel at the Teamsters Building.

The Teamsters Building Association, Inc., is, as are the other Teamsters, a nonprofit corporation. Its stock is held by six Teamster

concluded that the Teamster group came within the term "employer" under § 2 (2) of the Act. He further found that their operation was well within the monetary jurisdictional standards set by the Board in *Jonesboro Grain Drying Cooperative*, 110 N. L. R. B. 481 (1954). While the Board agreed with the examiner's interpretation of § 2 (2) as to the term "employer," it held, by a divided vote,<sup>5</sup> that since the Teamster group was composed of unions, all engaged in a nonprofit business, the criteria applied to other nonprofit employers should govern. It further concluded "that labor organizations, which, when engaged in their primary function of advancing employee welfare, are institutions unto themselves within the framework of this country's economic scheme," should not "be made subject to any of the standards originated for business organizations." 113 N. L. R. B., at 991.

### I.

With regard to the jurisdiction of the Board the wording of § 2 (2) of the Act is clear and unambiguous. It says that the term "employer" includes any labor organization "when acting as an employer." It follows that when a labor union takes on the role of an employer the Act applies to its operations just as it would to any other employer. The Board itself recognized this fact as early

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locals including Local 206, one of the defendants charged with unfair labor practices in the complaint before the Board. The Association's sole function is the ownership and maintenance of the office building in Portland which is occupied by the various Teamster organizations.

<sup>5</sup> We treat the opinion of the Board, as did the Court of Appeals, as being that of members Farmer and Peterson. While Mr. Murdock's concurrence was on the "more limited grounds" that Congress never intended labor unions to be employers with respect to their own employees when engaged in union activities, he concurred in the dismissal by Messrs. Farmer and Peterson. The other two members dissented.



as 1951 in *Air Line Pilots Association*, 97 N. L. R. B. 929. There the Air Line Pilots Association was found to be an employer and the Board ordered that an election be held to determine the wishes of that union's own employees in regard to the selection of appropriate employee bargaining units and a collective bargaining representative. Section 9 of the Act <sup>6</sup> was therefore applied to the union as an employer.

The legislative history of § 2 (2) unequivocally supports our conclusion. The Act, before its adoption in 1935, was considered by both the 73d and 74th Congresses.<sup>7</sup> On each occasion the bill went into committee with labor unions excluded from the definition of an employer.<sup>8</sup> Twice the Senate Committee to which it was referred amended it to include within the category of an employer labor unions when dealing with their own employees. The Committee inserted the words "other than when acting as an employer" after the exclusion of labor organizations from the definition of an employer. The Senate Committee on Education and Labor to which the bill was referred stated in explanation of this alteration:

"The reason for stating that 'employer' excludes '*any labor organization, other than when acting as an employer*' is this: In one sense every labor organization is an employer, it hires clerks, secretaries, and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides." (Emphasis added.) S. Rep. No. 1184, 73d Cong., 2d Sess. 4.

<sup>6</sup> 61 Stat. 143, 29 U. S. C. § 159.

<sup>7</sup> S. 2926, 73d Cong., 2d Sess.; S. 1958, 74th Cong., 1st Sess.

<sup>8</sup> "(2) The term 'employer' . . . shall not include . . . any labor organization . . ." S. 2926, 73d Cong., 2d Sess. 3. This bill, while receiving committee approval as altered, was not enacted. When Senator Wagner resubmitted the bill the next year he did so in its original form.

The bill which became the Act in 1935, S. 1958, 74th Cong., 1st Sess., contained the identical language set forth in italics in the above Senate Report. It is inescapable that the Board has jurisdiction.

## II.

The question remains whether the Board may, nevertheless, refuse to assert jurisdiction over labor unions, as a class, when acting as employers. The Board in the face of the clear expression of the Congress to the contrary has exempted labor unions when acting as employers from the provisions of the Act. We believe that such an arbitrary blanket exclusion of union employers as a class is beyond the power of the Board. While it is true that "the Board sometimes properly declines to [assert jurisdiction] stating that the policies of the Act would not be effectuated by its assertion of jurisdiction *in that case*" (emphasis supplied), *Labor Board v. Denver Bldg. Council*, 341 U. S. 675, 684 (1951), here the Board renounces jurisdiction over an entire category of employers, *i. e.*, labor unions, a most important segment of American industrial life. It reasons that labor unions are nonprofit organizations. But until this case the Board has never recognized such a blanket rule of exclusion over all nonprofit employers. It has declined jurisdiction on an *ad hoc* basis over religious, educational, and eleemosynary employers such as a university library, a symphony orchestra, a research laboratory, and a church radio station.<sup>9</sup> When the Act was amended in 1947 the Congress was aware of the Board's general practice of

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<sup>9</sup> *Trustees of Columbia University*, 97 N. L. R. B. 424 (1951) (library); *Philadelphia Orchestra Association*, 97 N. L. R. B. 548 (1951) (orchestra); *Armour Research Foundation*, 107 N. L. R. B. 1052 (1954) (laboratory); and *Lutheran Church, Missouri Synod*, 109 N. L. R. B. 859 (1954) (radio station).

excluding nonprofit organizations from the coverage of the Act when these organizations were engaged in non-commercial activities.<sup>10</sup> The House of Representatives attempted to give these exclusions specific legislative approval.<sup>11</sup> However, the Senate draft of the bill excluded only hospital employers from the Act's coverage. The Senate version became a part of the Act and the language is the same as that involved here. The joint committee report on which the final enactment was based recited that the activities of nonprofit employers or their employees had been considered as coming within the Act only "in exceptional circumstances and in connection with purely commercial activities."<sup>12</sup> To place labor unions in this category is entirely unrealistic for the very nature of the excluded nonprofit employers is inherently different from that of labor unions and the reason for such exclusion has no applicability to union activity such as that found here. This is particularly true when we consider the pointed language of the Congress—repeated in Taft-Hartley in 1947—that unions shall not be excluded when acting as employers. As the dissenting judge in the Court of Appeals points out, "§ 2 (2)'s strikingly particular reference to labor unions sharply differentiates them from non-profit organizations generally . . . ." 98 U. S. App. D. C., at 337, 235 F. 2d, at 834. We do not, therefore, believe that it was within the Board's discretion to remove unions as employers from the coverage of the Act after Congress had specifically included them therein.

<sup>10</sup> H. R. Rep. No. 510, 80th Cong., 1st Sess. 32.

<sup>11</sup> H. R. 3020, 80th Cong., 1st Sess. 4. The exclusions would have included "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."

<sup>12</sup> See note 10, *supra*.



It is true that the dollar volume jurisdictional standards adopted by the Board to govern its jurisdiction, *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635 (1950), exclude small employers whose business does not sufficiently affect commerce.<sup>13</sup> But its exercise of discretion in the local field does not give the Board the power to decline jurisdiction over all employers in other fields. To do so would but grant to the Board the congressional power of repeal. See also *Guss v. Utah Labor Relations Board*, 353 U. S. 1, 4 (1957), where the Court refused to pass "upon the validity of any particular declination of jurisdiction by the Board or any set of jurisdictional standards."

We therefore conclude that the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary, and was beyond its power. The judgment is therefore reversed and the case is remanded to the Court of Appeals for remand to the Board for further proceedings in accordance with this opinion.

*It is so ordered.*

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<sup>13</sup> See also *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), where the Board declined jurisdiction over hotel employers. The Board's refusal was based on the local character of the hotel business. The District Court for the District of Columbia has held that such refusal is not arbitrary in *Hotel Employees Local No. 255 v. Leedom*, 147 F. Supp. 306 (1957).

In *Checker Cab Co.*, 110 N. L. R. B. 683 (1954), the Board declined jurisdiction of an action involving a purely local employer operating two taxicab companies in Baton Rouge, Louisiana. See also *Yellow Cab Company of California*, 90 N. L. R. B. 1884 (1950); *Skyview Transportation Co.*, 90 N. L. R. B. 1895 (1950); and *Brooklyn Cab Corp.*, 90 N. L. R. B. 1898 (1950). In these cases the declination of jurisdiction was based on the local character of the operations. We indicate neither approval nor disapproval of these jurisdictional declinations.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, concurring in part and dissenting in part.

I agree that labor organizations are "employers" under § 2 (2) of the Act with respect to their own employees. I dissent, however, from the Court's holding that the Board is without power to decline to assert jurisdiction over labor unions as a class. I am of the view that the Board has discretionary authority to decline to do so when the Board determines, for proper reasons, that the policies of the Act would not be effectuated by its assertion of jurisdiction. Cf. *Labor Board v. Denver Bldg. Council*, 341 U. S. 675, 684; *Hotel Association of St. Louis*, 92 N. L. R. B. 1388, aff'd, 147 F. Supp. 306; *Checker Cab Co.*, 110 N. L. R. B. 683. However, the declination to assert jurisdiction was rested upon the same grounds relied upon by the Board in declining jurisdiction over nonprofit organizations. These grounds, in my view, are not proper reasons for declining to assert jurisdiction over labor organizations. I would, therefore, remand the case to the Court of Appeals for remand to the Board for reconsideration.

CIVIL AERONAUTICS BOARD *v.* HERMANN ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT.

No. 540. Argued April 25, 1957.—Decided May 6, 1957.

1. The District Court's order in this case duly enforced the right of the Civil Aeronautics Board to call for documents relevant to the issues in a proceeding before the Board, with appropriate provision for assuring the minimum interference with the conduct of respondents' business. Pp. 322-324.
  2. The judgment of the Court of Appeals, reversing that of the District Court and establishing certain procedural requirements for the Board to follow before issuance of an enforcement order, is reversed; and the cause is remanded to the District Court with instructions to reinstate its enforcement order. Pp. 323-324.
  3. This enforcement order leaves open to respondents ample opportunities for objecting, on relevant grounds, to the admission into evidence of any particular document. P. 324.
- 237 F. 2d 359, reversed and remanded.

*Solicitor General Rankin* argued the cause for petitioner. With him on the brief were *Assistant Attorney General Hansen, Daniel M. Friedman, Franklin M. Stone* and *Robert Burstein*.

*Roland E. Ginsburg* argued the cause and filed a brief for respondents.

## PER CURIAM.

Petitioner had instituted an administrative enforcement proceeding against the respondents, a group of individuals and business entities operating as the "Skycoach" air travel system. The Board's complaint charged violation of its regulations as well as of the Civil Aeronautics Act and sought certain revocation and cease-and-desist orders against respondents. In the course of the proceedings, the Hearing Examiner issued a number of sub-



poenas *duces tecum* calling for the production of certain categories of documents of the respondent companies covering specified periods of time. On a motion to quash on the grounds, *inter alia*, that the subpoenas were vague, excessively broad in scope, and oppressive, both the Hearing Examiner and the Board found that the subpoenas described the documents to be produced with sufficient particularity, were reasonable in scope, and were not oppressive. Upon respondents' continued refusal to honor the subpoenas, petitioner filed this enforcement proceeding. Initially the trial judge continued the cause for 10 days "on condition that respondents . . . make the documents specified in the administrative subpoenas . . . available immediately to the representatives of the Civil Aeronautics Board for examination and copying at the usual places of business of the named respondents . . . ." Upon the expiration of this period, the court, on a showing that respondents had not complied with this condition, entered an order of enforcement allowing "a sufficient length of time between dates for the production of the documents . . . so that the respondents will not be deprived of all of their books and records at the same time." The court found that it could not say "that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board . . ." without an examination of each of the items ordered produced. The Court of Appeals reversed, establishing certain procedural requirements the Board must follow before an enforcement proceeding is in order. 237 F. 2d 359.

As we read the order of the District Court, it duly enforced the Board's right to call for documents relevant to the issues of the Board's complaint, with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents. The judg-

Opinion of the Court.

353 U. S.

ment of the Court of Appeals is reversed and the cause is remanded to the District Court with instructions to reinstate its enforcement order of May 16, 1955. See § 1004 (b), Civil Aeronautics Act of 1938, 52 Stat. 1021, as amended, 49 U. S. C. § 644 (b); *Brown v. United States*, 276 U. S. 134, 142-143 (1928); *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509 (1943). Of course this enforcement order leaves open to the respondents ample opportunities for objecting, on relevant grounds, to the admissibility into evidence of any particular document.

*It is so ordered.*

Syllabus.

BALTIMORE & OHIO RAILWAY CO. v. JACKSON.

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

No. 370. Argued March 28, April 1, 1957.—Decided May 13, 1957.

In this suit under the Federal Employers' Liability Act, a section foreman of a railroad was awarded damages for injuries sustained while operating a gasoline-powered motor track car pulling a hand car hauling material, tools and equipment. Each car had only four wheels. The cars were fastened together by a pin, not a coupler. The motor track car had only hand brakes and the hand car had no brakes. There was evidence that the accident resulted from want of adequate brakes for the use to which the cars were being put. The sole issue before this Court was whether such vehicles, when used in the manner here involved, are within the coverage of the Safety Appliance Acts. *Held:*

1. The motor track car and hand car, when used in the manner employed here, must be equipped in accordance with the requirements of the Safety Appliance Acts. Pp. 328-333.

(a) When a railroad puts a motor track car to locomotive use in pulling a hand car used to haul material, tools and equipment, the commands of the Acts must be obeyed. Pp. 329-330.

(b) That, for 60 years, the Interstate Commerce Commission had not required such cars to be equipped in accordance with the Acts is not a binding administrative interpretation that Congress did not intend these cars to come within the purview of the Acts when used in the manner here involved. Pp. 330-331.

(c) Whether the Safety Appliance Acts should apply to such cars is a matter of policy for Congress to decide, and it made the Acts applicable all-inclusively to "all trains, locomotives, tenders, cars, and similar vehicles." Pp. 331-333.

2. Though they had only four wheels each, these cars were not exempted from the Acts by § 6, which exempts certain "trains composed of four-wheel cars." P. 333.

98 U. S. App. D. C. 169, 233 F. 2d 660, affirmed.

*Stephen Ailes* argued the cause and filed a brief for petitioner.

*Milford J. Meyer* argued the cause for respondent. With him on the brief was *Irving L. Chasen*.



*Robert W. Ginnane and Charlie H. Johns* filed a brief for the Interstate Commerce Commission, as *amicus curiae*, urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a suit for damages arising from an injury suffered by a section foreman of the petitioner while operating a motor track car that was towing a push truck on petitioner's tracks. It was brought under the Federal Employers' Liability Act. The sole question is whether such vehicles when used in the manner here are within the coverage of the Safety Appliance Acts.<sup>1</sup> The petitioner contends that neither vehicle comes within the general coverage of the Acts; and, in the alternative if the vehicles are included, that they are exempted as "four-wheel cars" under § 6 of the Acts.<sup>2</sup>

Both the trial court and the Court of Appeals have decided that the vehicles involved here are included within the coverage of the Safety Appliance Acts and that neither falls within any exemption contained therein. The case reaches us on certiorari, 352 U. S. 889. We agree with the two-court interpretation of the Acts as applied to the facts here involved.

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<sup>1</sup> 27 Stat. 531, as amended, 45 U. S. C. §§ 1-16.

<sup>2</sup> 27 Stat. 532, as amended, 29 Stat. 85, 62 Stat. 909, 45 U. S. C. § 6, provides in part:

"That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty . . . : *Provided*, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

The respondent was injured over five years ago. For 39 years he had been a section foreman of track maintenance for petitioner. He and the crew over which he had supervision were responsible for the maintenance and repair of a section of track between Waring and Durwood, Maryland. They used in their work a gasoline-motor-powered track car equipped with belt drive and a hand brake. The car could carry as many as 12 men and their tools. At various times a push truck or hand car was coupled by a pin to the motor track car and was towed by it to the scene of the work. The hand car weighed about 800 pounds unloaded, had a 5-ton carrying capacity, and had no brakes. Sometimes it carried a load of material and other times only equipment and tools. Each of these cars was equipped with four wheels and was capable of being removed from the rails by a crew of men.

On the occasion in question respondent and a crew of two men, pursuant to orders, had hauled about a ton of coal via the motor track car and hand car from Gaithersburg to the stationmaster at Washington Grove, a station near the scene of their roadbed work on that day. The coal was placed on the hand car which was pulled along the tracks by the motor car. The two vehicles also carried tools, a wheelbarrow, and other equipment, as well as the respondent and his crew. After unloading the coal they proceeded a short distance beyond the Washington Grove station to work on a section of the westbound track. There they removed the vehicles from the track and worked that section of the rails until about 4 p. m. They then replaced the vehicles on the tracks, fastened them together, and began the return trip to the yards at Gaithersburg. On approaching the Washington Grove station at a speed of from 5 to 10 miles per hour the vehicles struck a large dog and derailed, throwing the respondent into a ditch and causing his injuries. The

uncontradicted evidence was that respondent applied the hand brake on the motor track car immediately upon seeing the dog and the cars skidded on wet tracks about 39 feet before the impact. Respondent further testified that the motor track car alone, without the hand car attached, could have been stopped under the same conditions within six to eight feet.

Respondent brought his action against the railroad claiming that (1) the petitioner was negligent in directing him to operate a motor track car and push truck without sufficient braking power, and in requiring him to pull the push truck over wet, slippery rails when the truck was not equipped with brakes, and (2) the injury was proximately caused by petitioner's noncompliance with the requirements of the Safety Appliance and Boiler Inspection Acts. The District Court ruled and instructed the jury that the provisions of the Safety Appliance Acts included within their coverage the vehicles in question. The issues in both causes of action were submitted to the jury, which returned with a verdict for respondent on "the issues aforesaid." The appeal in the Court of Appeals was directed only to the second cause of action concerning the applicability of the Safety Appliance Acts. That court affirmed, 98 U. S. App. D. C. 169, 233 F. 2d 660, and as has already been indicated, we are faced here only with the problem of the coverage of the Safety Appliance Acts.

The power or train brake provisions of the Safety Appliance Acts apply to the motor track car and the coupling and brake requirements to the hand car when they are employed in the manner here involved. If used separately, though we do not pass on the question, it may well be that entirely different sections of the Acts might apply to each of the vehicles. But here the hand car was not operated by hand as was originally intended.



On the contrary, it was fastened by a pin—not a coupler—to a motor track car, a self-propelled piece of equipment, and was hauled with its cargo to its destination on the tracks of petitioner. The hand car had no brakes, although the Acts specifically require “any car” to be equipped with a hand brake.<sup>3</sup> It was being used for hauling purposes. Furthermore, the motor track car, instead of being used solely to carry men and tools to their place of work, was used to pull or tow another car—albeit a hand car. It had no power or train brakes but was equipped with a simple hand brake designed for its individual operation. The brake was wholly insufficient for the use to which the railroad put the vehicles.

We believe that the controlling factor is the nature of the employment of the vehicles in the railroad’s service, that is the type of operation for which they are being used. Here at the time of the injury it is admitted that petitioner was putting the motor track car to locomotive uses in pulling a hand car used to haul material, tools, and equipment. In the light of the prime purpose of the Safety Appliance Acts, *i. e.*, “the protection of employees and others by requiring the use of safe equipment,” *Lilly v. Grand Trunk R. Co.*, 317 U. S. 481, 486 (1943), when the railroad uses this type of equipment in this manner—regardless of the label it places on the vehicles—the commands of the Acts must be obeyed. The operation as conducted when the respondent was injured, with a motor track car equipped with neither power nor train brakes pulling an attached hand car with neither an automatic

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<sup>3</sup> 36 Stat. 298, 45 U. S. C. § 11, provides in part:

“ . . . it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes . . . . ”

coupler nor hand brake, was in defiance of the requirements of the Acts. See 45 U. S. C. §§ 1-8. This is not to say that these vehicles, even when used as herein described, must be equipped with devices not adaptable to their safe operation. As was said in *Southern R. Co. v. Crockett*, 234 U. S. 725 (1914):

"We deem the true intent and meaning to be that the provisions and requirements respecting train brakes, automatic couplers, grab irons, and the height of draw-bars shall be extended to all railroad vehicles . . . so far as the respective safety devices and standards are capable of being installed upon the respective vehicles." *Id.*, at 737-738.

It is said that there is no place on the vehicles in question here for a grab iron or a handhold and that power brakes might well increase the hazards of their operation. This may be true, but if these vehicles are to be used in a manner such as here, the Commission through the promulgation of standards or regulations covering such equipment should adapt the safety requirements of the Acts to the safe use of such vehicles and thus protect employees and the public from the hazards of their operation.

It is contended that, since the Commission has for over 60 years considered maintenance-of-way vehicles not subject to the Acts, this consistent administrative interpretation is persuasive evidence that the Congress never intended to include them within its coverage. It is true that long administrative practice is entitled to weight, *Davis v. Manry*, 266 U. S. 401, 405 (1925), but here there has been no expressed administrative determination of the problem.<sup>4</sup> We believe petitioner overspeaks

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<sup>4</sup> We note that in 1953 the Interstate Commerce Commission, in a proceeding to prescribe rules governing inspection of electrically operated units and multiple-unit equipment, has itself declared a

in elevating negative action to positive administrative decision. In our view the failure of the Commission to act is not a binding administrative interpretation that Congress did not intend these cars to come within the purview of the Acts. See *Shields v. Atlantic Coast Line R. Co.*, 350 U. S. 318, 321-322 (1956).

The fact that the Commission has not sponsored legislation rather indicates that it thought the problem too insignificant for consideration. We think the Commission expresses this view in its *amicus curiae* brief when it says "the needs are for strict enforcement of sound operating rules and regulations rather than for air brakes, automatic couplers and the other devices specified in the Safety Appliance Acts." But this is a matter of policy for the Congress to decide and it wrote into the Safety Appliance Acts that their coverage embraced "all trains, locomotives, tenders, cars, and similar vehicles."<sup>5</sup> This plain language could not have been more all-inclusive. This Court has construed the language of the Act in its generic sense. In *Johnson v. Southern Pacific Co.*, 196 U. S. 1 (1904), with reference to the meaning of the word "car," the Court said: "There is nothing to indicate that any particular kind of car was meant. Tested by context,

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"self-propelled unit of equipment capable of moving other equipment" to be a locomotive under the Act. *Ex parte No. 179*, 297 I. C. C. 177, 192. While the proceeding did not involve motor track cars, the language of the Commission casts some light on that problem. The Commission pointed out that "The language in the act is all-inclusive, and considering its purpose . . . the words 'any locomotive' as used in section 2 must be construed as intended to encompass *all* of the *motive* equipment of any carrier subject to the act. . . . Appearance clearly cannot determine the classification into which this type of equipment should be placed." (Emphasis added.) *Id.*, at 191-192.

<sup>5</sup> 32 Stat. 943, 45 U. S. C. § 8.



subject matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives." *Id.*, at 15-16. See also *Spokane & Inland R. Co. v. Campbell*, 241 U. S. 497 (1916).

While there is a paucity of cases on the point, with none to the contrary of our holding here, as early as 1934 in *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227, the Court of Appeals for the Second Circuit held a hand car or push truck, identical with the one here involved, and a small gasoline tractor subject to the Acts. The hand car was attached to the gasoline tractor by means of a hook (though the engine had an automatic coupler on one end) and the petitioner was injured when the hook dislodged and he was pinned between the car and the locomotive. The court unanimously held that if a hand car "is to be operated by a locomotive [which it held the gasoline tractor to be], rather than by hand, we are not inclined to depart from the literal terms of the statute and dispense with the requirement of an automatic coupler." *Id.*, at 232. Three years later the requirement of the Acts as to power or train brakes was held applicable to other than standard equipment in *United States v. Ft. Worth & D. C. R. Co.*, 21 F. Supp. 916. There a trial court in the Northern District of Texas held that where a locomotive crane was "used to haul cars . . . it is being used for the purposes for which a locomotive is used and is a locomotive . . . regardless of whatever else it might also be." *Id.*, at 918. In 1955 the Supreme Court of Florida unanimously held in *Martin v. Johnston*, 79 So. 2d 419, that the same type motor track car as is involved here came within the terms of the Acts. There the motor track car was being used entirely separately and independently from any other vehicle. The Safety Acts require all cars to be equipped with "efficient hand brakes." The failure of the brakes was the cause of

the injury. The court commented: "There being as much reason for requiring the motor-car in question to be equipped with efficient handbrakes, to insure its safe operation when propelled under its own power, as there is for the requirement that such a car be equipped with automatic couplers, where it is to be used in connection with a train movement, we have the view that the Safety Appliance Acts are applicable and that we are not authorized to depart from the literal terms of the statute." *Id.*, at 420.

Nor do we find that § 6 of the Acts exempts these vehicles from the provisions of the Acts. Though it is true that the cars are of the four-wheel variety, they are used neither in coal trains nor as logging cars. As the Commission points out in its *amicus curiae* brief, the proviso of § 6 originally exempted "trains composed of four-wheel cars or . . . locomotives used in hauling such trains," and the legislative history shows that this provision was enacted specifically to exempt coal cars. 24 Cong. Rec. 1477. This language was incorporated in the phraseology of the present section which admittedly through error was thought to apply to the exemption of trains composed of logging cars. See H. R. Rep. No. 727, 54th Cong., 1st Sess. The legislative history of the section reveals beyond doubt that it has no application here.

In view of the history and purposes of the Safety Appliance Acts, and the literal language used by the Congress that they embraced "any car"<sup>6</sup> and "any locomotive engine . . . hauling . . . any car,"<sup>7</sup> together with the practical necessity of affording safety appliances to thousands of railroad maintenance employees, as well as the public, we conclude that the motor track car and hand car

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<sup>6</sup> 27 Stat. 531, 45 U. S. C. § 2.

<sup>7</sup> 27 Stat. 532, as amended, 45 U. S. C. § 6.

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when used by the petitioner in the manner employed here must be equipped in accordance with the requirements of the Safety Appliance Acts.

*Affirmed.*

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

In this Federal Employers' Liability Act suit, the District Court instructed the jury that the Safety Appliance Acts<sup>1</sup> required the railroad to equip a gasoline-driven motor track car with a train brake and a push truck with a hand brake, and that the railroad was liable if its failure to furnish this equipment contributed to the accident. The correctness of this instruction presents the issue whether the Safety Appliance Acts apply to these small maintenance-of-way vehicles—the successors to the familiar handcars of years ago. The Court approves the instruction, and, in doing so, it holds that a motor car is a "locomotive," that a push truck is a "car," and that the two combined are a "train" as those terms are used in the Safety Appliance Acts. I do not find in the language of the Acts, their background and legislative history, or in the long-standing administrative practice of the Interstate Commerce Commission justification for so holding.

On November 1, 1951, respondent Jackson, the foreman of a Baltimore & Ohio maintenance crew, was engaged with two of his men in railroad maintenance work near Washington Grove, Maryland. At quitting time, the three men lifted a motorized track car and a push truck onto the tracks, coupled them together by hand, and boarded the motor car for their return to the section house about one mile away. It had been raining lightly

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<sup>1</sup> 27 Stat. 531, as amended, 29 Stat. 85, 32 Stat. 943, 36 Stat. 298, 62 Stat. 909, 45 U. S. C. §§ 1-16.



and the tracks were wet. The motor car and push truck had traveled about 195 feet when Jackson, who was operating the motor car, saw a large dog about to cross the tracks in front of the car. He threw out the clutch and applied the hand brake with both hands. The brakes grabbed, the wheels locked and the vehicles slid "about 20 feet" on the wet tracks before striking the dog and overturning. Jackson was injured.

The motor track car on which Jackson and his crew were riding was a four-wheel maintenance-of-way vehicle weighing about 800 pounds. Powered by a gasoline motor and controlled with a throttle, clutch and hand brake, it was typical of the more than 60,000 vehicles of this type currently in use on American railroads to carry maintenance crews from section houses to places along the railroad where work is to be performed. The push truck was an even simpler vehicle. It consisted of four wheels, a chassis, and a flat wooden platform, and could be pushed along the tracks by hand.

At the time of the accident, the push truck was attached to the rear of the motor car by a simple non-automatic link and pin device, and carried no load except a few tools. Jackson testified that the use of a push truck in conjunction with a motor track car was customary; that neither vehicle carried an unusual or excessive load; that each was provided with the usual equipment of such vehicles; and that the hand brake of the motor car was in proper working order at the time of the accident.

The Safety Appliance Acts make it mandatory that specified equipment be used on railroad vehicles covered by the Acts. Criminal penalties are imposed for each violation.<sup>2</sup> Civil liability in damages under the

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<sup>2</sup> Section 6, 27 Stat. 532, 45 U. S. C. § 6; § 4, 36 Stat. 299, 45 U. S. C. § 13.

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Federal Employers' Liability Act follows as a matter of course if the violation is a proximate cause of an employee's injury.<sup>3</sup> The vehicles subject to the Acts must be equipped with such devices as power driving-wheel brakes, appliances for operating a train-brake system, automatic couplers of a standard height, sill steps, grab irons and handholds, and hand brakes. In determining whether motor cars and push trucks must be equipped with such appliances, the language of the Acts is the proper starting point.

The Safety Appliance Acts apply expressly to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith . . . ." 32 Stat. 943, 45 U. S. C. § 8. The term "similar vehicles" shows that all vehicles are not included. Motor cars and push trucks must come within the terms "locomotives," "cars," or "similar vehicles."

The statutory context demonstrates that the crucial terms—"locomotives" and "cars"—were used in their ordinary sense as referring to standard operating equipment rather than to small maintenance-of-way vehicles like those involved in this case. For example, § 1, 27 Stat. 531, 45 U. S. C. § 1, which requires "power driving-wheel brake[s]" and a "train-brake system," speaks in terms of a "locomotive engine," "engineer," "brakemen" and "train."<sup>4</sup> A small motor car used to haul section

<sup>3</sup> See, e. g., *Urie v. Thompson*, 337 U. S. 163; *Jacobson v. New York, N. H. & H. R. Co.*, 206 F. 2d 153.

<sup>4</sup> ". . . it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer

hands and their tools to and from work would not ordinarily be called a "locomotive engine" except in jest, nor would a motor car with a push truck attached be referred to as a "train." Much less would the section hand operating the motor car, who would ordinarily belong to a separate union—the Brotherhood of Maintenance of Way Employees—be referred to as an "engineer" or his crew as "brakemen." This is language appropriate to vehicles and employees used in standard freight and passenger operations but not to a motor car towing a push truck.

Other sections indicate that the word "car" refers to standard railroad cars. Section 2 makes it unlawful for any railroad "to haul or permit to be hauled or used on its line any car . . . not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531, 45 U. S. C. § 2. This section, as well as the detailed provisions of § 5 dealing with the prescribed height of drawbars on couplers, could not be applicable to cars of little more than a yard's height easily coupled by hand without danger to anyone.<sup>5</sup>

The background and legislative history of the three Safety Appliance Acts confirm this view. Their history reveals not only that it never was suggested that the Acts were applicable to small maintenance-of-way vehicles,

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on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." 27 Stat. 531, 45 U. S. C. § 1.

<sup>5</sup> The language of § 3 reinforces this conclusion. It provides that a railroad that has complied with § 1 "may lawfully refuse to receive from connecting lines of road or shippers any car not equipped sufficiently . . . with such power or train brakes as will work and readily interchange with the brakes in use on its own cars . . . ." 27 Stat. 531, 45 U. S. C. § 3. It is concerned with the transfer of standard freight or passenger cars from one railroad to another and is not applicable to maintenance-of-way vehicles.



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but also that the stated objectives of the Acts would not be served by subjecting these vehicles to the Acts.

The recognized purpose of each of the Safety Appliance Acts was the protection of operating employees of railroads from the hazards involved in the movement of standard trains and cars. The first Safety Appliance Act, 27 Stat. 531, 45 U. S. C. §§ 1-7, enacted in 1893, was preceded by a decade of concern, not with light maintenance equipment, but with the death toll caused by the two major hazards facing railroad trainmen: (1) the necessity for operating employees to work between freight cars in coupling them, and (2) the necessity for brakemen to operate hand brakes while standing on the tops of freight cars.<sup>6</sup> The Interstate Commerce Commission, the railroad Brotherhoods, and other groups advocated legislation which would reduce these hazards by requiring uniform automatic couplers and power brakes on freight trains.<sup>7</sup> Congress was concerned wholly with these hazards and the Act adopted relates entirely to them.<sup>8</sup>

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<sup>6</sup> See S. Rep. No. 1049, 52d Cong., 1st Sess. 2-3, 5; H. R. Rep. No. 1678, 52d Cong., 1st Sess. 1, 3; 1 Sharfman, *The Interstate Commerce Commission* (1931), 246, n. 4. Since passenger cars, by 1893, had generally been equipped with the required appliances—train brakes and automatic couplers—they did not present the same hazards to trainmen.

<sup>7</sup> The Commission recommended enactment of legislation in 1889 after completing a general investigation of railroad safety conditions. It continued to press for legislation until the enactment of the first Safety Appliance Act in 1893. See *Interstate Commerce Commission Activities, 1887-1937* (1937), 118-120; Third Ann. Rep., I. C. C., for 1889, 44-45, 84-101; Fifth Ann. Rep., I. C. C., for 1891, 337-340; Sixth Ann. Rep., I. C. C., for 1892, 69-70.

<sup>8</sup> The 1893 Act was entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." The only provision

The present significance of these specific objectives is that they do not relate to motor cars and push trucks. Unlike standard railroad cars and trains, motor cars and push trucks do not require power brakes to bring them safely to a stop, and they do not endanger the section hands who couple them by pushing them together by hand. Operated and used by maintenance workers rather than by operating employees, motor cars and push trucks move at comparatively slow speeds and present hazards quite different from those faced by trainmen on standard trains.

By 1900, the railroads were in substantial compliance with the original Act.<sup>9</sup> Nevertheless, the Interstate Commerce Commission, disturbed because some locomotives and standard cars were not required to be equipped with automatic couplers, recommended broadening amendments. These recommendations called for automatic couplers for all locomotives and for "all vehicles . . . which are ordinarily hauled or propelled by standard locomotives."<sup>10</sup> The second Safety Appliance Act, enacted in 1903, 32 Stat. 943, 45 U. S. C. §§ 8-10, incorporated these recommendations. It extended the first Act to "all trains, locomotives, tenders, cars, and *similar vehicles* used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, and *similar vehicles* used in connection therewith . . ." (Emphasis supplied.) Initially, the word "vehicles" in the bill was unqualified by the word "similar." S. Rep. No. 1930, 57th

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which might be thought to be unrelated to power brakes or automatic couplers was the requirement in § 4 of "secure grab irons or handholds in the ends and sides of each car" and this requirement was expressly stated to be "for greater security to men in coupling and uncoupling cars." 27 Stat. 531, 45 U. S. C. § 4.

<sup>9</sup> Fourteenth Ann. Rep., I. C. C., for 1900, 76.

<sup>10</sup> Fifteenth Ann. Rep., I. C. C., for 1901, 68; Sixteenth Ann. Rep., I. C. C., for 1902, 61.

Cong., 1st Sess. 16. However, a railroad representative objected to it on the ground that it was too broad and suggested the term "traffic cars." *Id.*, at 16-17. The legislative representative of the Brotherhoods opposed the suggested substitute because it might be thought inapplicable to "caboosees, steam shovels, snowplows, scale cars, and similar conveyances," which are used in connection with standard equipment. *Id.*, at 46. The result was that the word "vehicles" was qualified by the addition of "similar." This indicates that the term "similar vehicles" was used to cover special equipment, such as snowplows, used in connection with standard equipment. Maintenance-of-way vehicles have never been capable of such use.

The third Safety Appliance Act, 36 Stat. 298, 45 U. S. C. §§ 11-16, enacted in 1910, supplemented the existing Acts so as to require additional safety appliances, but did not extend the coverage. "Cars" were to be equipped with secure sill steps and efficient hand brakes; "cars" requiring secure ladders and running boards were to be so equipped; secure handholds or grab irons were to be installed on the roofs at the tops of such ladders; and the Commission was to designate the standards for these and certain other appliances, as well as to modify or change the standard height for drawbars. These additions grew out of recommendations made by the Commission and their history reveals an intent to secure *uniform* equipment on *operating* cars.<sup>11</sup> Uniformity was considered to be imperative because *trainmen* working on *trains* by day and by night would operate more safely if the appliances they needed—sill steps, ladders, running boards, grab irons and the like—were uniform in character and location on all *freight cars*. Most

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<sup>11</sup> Twenty-third Ann. Rep., I. C. C., for 1909, 40-41; S. Rep. No. 250, 61st Cong., 2d Sess. 2; H. R. Rep. No. 37, 61st Cong., 2d Sess.



of these appliances are not at all adapted to motor cars and push trucks. On these small vehicles there not only is little or no need for this equipment, but there is no suitable place to attach it.

The inapplicability of the Safety Appliance Acts to maintenance-of-way vehicles is confirmed by the long-standing administrative interpretation of the Interstate Commerce Commission and by numerous practical considerations. The Interstate Commerce Commission has administered these Acts for over half a century. During that time, it has, by its own statement, "never considered the small maintenance of way vehicles subject to those acts . . . ." <sup>12</sup> Its order of March 13, 1911, specifying the number, dimensions and location of the appliances required by the Acts, omits all mention of motor track cars and push trucks. <sup>13</sup> Motor cars are not subjected to the inspection required of "locomotives." Maintenance-of-way vehicles are not considered as trains, locomotives or cars for accident reporting purposes. <sup>14</sup>

Despite the Commission's consistent construction of the Acts since their inceptions, the Court today states

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<sup>12</sup> "For over half a century, the Commission has administered the Safety Appliance Acts, as well as the other acts relating to railroad safety. During this period, the Commission has never considered the small maintenance of way vehicles subject to those acts, and we submit that the foregoing contemporary and legislative histories furnish a sound foundation for its view. That legislation is concerned with locomotives, cars and similar vehicles which employees were formerly required to go between to couple, or to ascend to use the hand brake. The acts are designed primarily to reduce or eliminate those hazards. They should not be construed to apply to entirely different types of equipment whose operation does not involve such risks." Brief of Interstate Commerce Commission, as *amicus curiae*, 18-20.

<sup>13</sup> This order was amended in 1943 and republished in 1946. 49 CFR, 1949, Pt. 131.

<sup>14</sup> See I. C. C., Accident Bulletin No. 124 for 1955, 94.

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that "there has been no expressed administrative determination . . . ." *Ante*, p. 330. Not only was there no reason for the Commission to disclaim application, but its "negative" action in declining to subject these vehicles to the Acts is impressive because the Acts impose an affirmative duty on the Commission to enforce their provisions.<sup>15</sup> The Commission and the Department of Justice have been aware that motor cars and push trucks used by American railroads were not equipped with automatic couplers, power brakes and so on. Their failure to prosecute evidences their interpretation of the Acts. *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349, 351-352.

The contemporaneous and long-standing interpretation of any regulatory Act by the agency that administers it is entitled to great weight.<sup>16</sup> Here there are considerations entitling the Interstate Commerce Commission's views to special respect. See *Davis v. Manry*, 266 U. S. 401, 404-405. The Commission has played a predominant role in developing and perfecting the Acts, and Congress has given it broad discretionary powers in administering them. Its consistent interpretation of the Acts, known to Congress, the railroad industry and the railroad labor organizations, is persuasive evidence that the Acts never were intended to apply to motor cars and push trucks.<sup>17</sup>

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<sup>15</sup> Under § 6 of the original Safety Appliance Act, 27 Stat. 532, 45 U. S. C. § 6, and §§ 5 and 6 of the third Safety Appliance Act, 36 Stat. 299, 45 U. S. C. §§ 14 and 15, the Interstate Commerce Commission has the mandatory duty of informing United States District Attorneys of violations of the Acts; these attorneys have the mandatory duty to prosecute violators; and railroads are liable for a penalty of \$100 for each violation.

<sup>16</sup> See, e. g., *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 311-315; *Wisconsin v. Illinois*, 278 U. S. 367, 413.

<sup>17</sup> The two federal court decisions relied on by the Court are distinguishable. The 18-foot gasoline tractor which was held to be

It is also significant that the Brotherhood of Maintenance of Way Employees, whose members operate and maintain motor cars in their work, never has contended that the Safety Appliance Acts apply to these vehicles. However, the Brotherhood has been active in soliciting other legislation which it feels will add to the safety of its members.<sup>18</sup> It has sought legislation from Congress which would require strict enforcement of sound operating rules and regulations. Although supported by the Commission, these attempts thus far have failed.<sup>19</sup> The Brotherhood, however, has secured other safety legislation. Largely at its request, 26 States, in recent years, have adopted legislation requiring specific equipment, such as headlights, taillights, windshields, windshield wipers and canopies, on motor track cars.<sup>20</sup> This state legislation dealing expressly with the safety requirements of motor

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a "locomotive" in *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227, was equipped with an automatic coupler, was used to haul standard railroad cars and was capable of hauling 22 freight cars loaded with cement. Such a vehicle bears little resemblance to the motor track car involved here. *United States v. Fort Worth & D. C. R. Co.*, 21 F. Supp. 916, is even less in point. In that case it was held that a large Browning steam locomotive crane, engaged in hauling standard railroad cars, was a "locomotive" and the combination of cars a "train" within the meaning of the Acts. The Florida decision, *Martin v. Johnston*, 79 So. 2d 419, lends little support because the state court appears to have been unadvised of the above-stated purpose, legislative history, and administrative interpretation of the Acts.

<sup>18</sup> Hertel, *History of the Brotherhood of Maintenance of Way Employees* (1955), 212-213.

<sup>19</sup> See H. R. Rep. No. 1558, 81st Cong., 2d Sess. 3-4; Hearings before House Subcommittee on Interstate and Foreign Commerce on H. R. 378 and H. R. 530, 81st Cong., 1st Sess. 17-54.

<sup>20</sup> Hertel, *op. cit. supra*, 213. See, *e. g.*, Mass. Acts 1952, c. 430, and 1951, c. 174; Mich. Stat. Ann., 1955 Cum. Supp., §§ 22.965, 22.966, 22.968 (1) (2).



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track cars indicates that the Federal Acts have not been thought to apply to them. As to the question of preemption, see *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611.

Practical considerations, relating to the safety of railroad maintenance workers who use motor cars and push trucks, support the inapplicability of the Acts. The major hazard in the use of these vehicles is the risk of their collision with trains. It is important that maintenance-of-way vehicles be so light that three or four men can lift them quickly off the tracks. In contrast, most of the safety appliances required by the Acts have little or no relation to this or other safety requirements of these small vehicles. Whether it is feasible to equip them with power brakes, automatic couplers, and the other appliances specified in the Acts is highly conjectural. Motor cars and push trucks might, in fact, be rendered less safe by the addition of such appliances, not only because of the increased weight but because of the danger of sudden stops. A railroad brake expert in this case spoke of the danger of men being thrown from their open seats on a motor car by quick stops, and the Commission, in its *amicus* brief, states that "In the absence of tests showing otherwise, it would seem that power brakes on push trucks towed by a track motor car could well be about as dangerous a device to employees riding on such vehicles as one can imagine." P. 20. According to the Commission, protection against collision with trains is better assured by strict enforcement of rules designed to give warning of train movements than by the addition of the safety appliances named in the Acts. In any event, such matters are peculiarly within its competence.

The Court's decision is directly opposed to the Commission's practice and opinion. It imposes onerous requirements, unrelated to safety, on a large class of

vehicles never before considered subject to the Acts.<sup>21</sup> Nothing in the language of the Acts or in their history compels a disregard of the informed judgment of that expert authority which has the responsibility of their administration and enforcement.

I would sustain the view of the Interstate Commerce Commission and reverse the judgment of the Court of Appeals.

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<sup>21</sup> The Court also rejects the railroad's alternative contention that motor track cars and push trucks, if within the purview of the Acts, are excepted from the Acts by virtue of the proviso in § 6 exempting "trains composed of four-wheel cars or . . . locomotives used in hauling such trains." 27 Stat. 532, 29 Stat. 85, 45 U. S. C. § 6. This proviso confirms the view expressed in this dissent that power brakes, automatic couplers, and the other specified appliances are not required of motor track cars and push trucks. The exception, on its face, applies to them as four-wheel vehicles. And, although the legislative history indicates that Congress had four-wheel coal cars primarily in mind, the proviso is not expressly limited to coal cars and is thoroughly consistent with a purpose to exempt from the Acts maintenance vehicles that are not suited to the prescribed safety appliances.

## KREMEN ET AL. v. UNITED STATES.

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

No. 162. Argued March 6, 1957.—Decided May 13, 1957.

The three petitioners were arrested by federal officers, who had an arrest warrant for only one of them. Without search warrants, the officers searched the cabin where petitioners were found, seized the entire contents of the cabin and removed them some 200 miles away for purposes of examination. Some of the evidence so seized was introduced at the trial of petitioners in a federal court, and petitioners were convicted of certain federal offenses. *Held*: Objections to the search and seizure were adequately raised and preserved; the search and seizure were illegal; and admission into evidence against each of the petitioners of some of the items seized in the cabin rendered the guilty verdicts illegal. Pp. 346-348. 231 F. 2d 155, reversed.

*Norman Leonard* argued the cause and filed a brief for petitioners.

*Kevin T. Maroney* argued the cause for the United States. On the brief were *Solicitor General Rankin*, *Assistant Attorney General Tompkins*, *Harold D. Koffsky*, *Philip R. Monahan* and *Carl G. Coben*.

## PER CURIAM.

Of petitioners' various contentions we find the one relating to the validity of the search and seizure made by agents of the Federal Bureau of Investigation dispositive of this case, and we therefore need not consider the others.

The indictment charged the three petitioners with relieving, comforting, and assisting one Thompson, a fugitive from justice, in violation of 18 U. S. C. § 3, and with conspiring to commit that offense in violation of 18 U. S. C. § 371. In addition, it charged petitioners Kremen and



Coleman with harboring Steinberg, also a fugitive from justice, and with conspiring to commit that offense. Petitioners were found guilty, and on appeal their convictions were sustained, one judge dissenting. 231 F. 2d 155. Because of the unusual character of the search and seizure here involved, we granted certiorari, without, however, limiting the writ. 352 U. S. 819.

Thompson and Steinberg had been fugitives from justice for about two years when agents of the Federal Bureau of Investigation discovered them, in the company of Kremen, Coleman and another, at a secluded cabin near the village of Twain Harte, California. After keeping the cabin under surveillance for some 24 hours, the officers arrested the three petitioners and Thompson. Thompson and Steinberg were arrested outside the cabin; Kremen and Coleman, inside. The agents possessed outstanding arrest warrants for Thompson and Steinberg, but none for Kremen and Coleman. These four individuals were searched and documents found on their persons were seized. In addition, an exhaustive search of the cabin and a seizure of its entire contents were made shortly after the arrests. The agents possessed no search warrant. The property seized from the house was taken to the F. B. I. office at San Francisco for further examination. A copy of the F. B. I.'s inventory of the property thus taken is printed in the appendix to this opinion, *post*, p. 349.

The majority of the Court are agreed that objections to the validity of the search and seizure were adequately raised and preserved. The seizure of the entire contents of the house and its removal some two hundred miles away to the F. B. I. offices for the purpose of examination are beyond the sanction of any of our cases. While the evidence seized from the persons of the petitioners might have been legally admissible, the introduction against each of petitioners of some items seized in the

house in the manner aforesaid rendered the guilty verdicts illegal. The convictions must therefore be reversed, with instructions to grant the petitioners a new trial.

*Reversed.*

MR. JUSTICE BURTON and MR. JUSTICE CLARK dissent, believing that the items of evidence offered and admitted into evidence were legally seized. They are of the opinion that the validity of a seizure is not to be tested by the quantity of items seized. Validity depends on the circumstances of the seizure as to each of the items that is offered into evidence. Furthermore, only a fragmentary part of the items listed by the Court as seized was admitted into evidence and if any items were illegally seized their effect should be governed by the rule of harmless error since there was ample evidence of guilt otherwise.

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

## APPENDIX TO OPINION OF THE COURT.

## FBI INVENTORY OF PROPERTY TAKEN.

*Personal Property and Papers*

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| <ul style="list-style-type: none"> <li>1 Sleeping bag with tan air mattress</li> <li>1 Sleeping bag case, Kelly's of Oakland</li> <li>2 Brown canvas cover, Spiro's of San Francisco</li> <li>1 Skysleeper Kit bag</li> <li>1 Tan zipper shaving kit containing:             <ul style="list-style-type: none"> <li>1 Hair brush</li> <li>1 Tooth brush</li> <li>1 Bar soap wrapped, Ivory, hotel size bearing name Hotel Regis, corner 11th &amp; K Streets, Sacramento, California</li> <li>1 Shoelace</li> <li>2 Packages pipe cleaner</li> <li>1 Pencil flashlight battery</li> <li>4 Razor blades</li> <li>1 Package lighter flints—Ronson</li> <li>1 Spool fishing leader material</li> <li>1 Bar soap, hotel size, wrapped, with "Pearl" on one side and "Hotel Regis" on other</li> </ul> </li> <li>1 Plaid covered small size bag with zipper for pillow</li> <li>1 Pillow, cotton filled, small, white. No identifying marks</li> <li>1 Tin drinking cup with initial "W" cut in bottom</li> <li>1 Bottle 2 ounces Carters Blue Black Ink</li> <li>1 Small box "Swingline Tot Staples," with "150" written on cover</li> <li>1 Prince Albert tobacco—pocket size can</li> <li>1 Key—on ring—Master Lock Co., Milwaukee</li> <li>1 Calendar—Shell Oil Co., Billfold size</li> <li>1 Digest of Angling Regulations for State of California—1953</li> <li>1 Pair Tortoise Shell (dark brown) rimmed glasses with broken left lens</li> <li>1 Plastic yellow folding type tobacco pouch with some tobacco and pipe cleaners</li> <li>1 Man's metal expansion band 1/20 12K gold top—Stainless steel back</li> <li>1 Pencil sharpener—plastic—Vest pocket size</li> <li>1 Polychrome duplicating ink—pound size</li> <li>1 Padlock—"Master 77"—#5926</li> <li>1 Carters Rubber Cement</li> <li>1 Friction tape—1 roll—slipknot</li> <li>1 Rubber top—partially used</li> <li>1 Pair socks—men's grey—dirty</li> <li>1 Ink—Parkers Superchrome</li> <li>1 Ink eraser—partially used bottle</li> </ul> | <ul style="list-style-type: none"> <li>1 Key—"Ico" #1054K—by Independent Lock Co., Fitchburg, Massachusetts</li> <li>1 Handkerchief—dirty</li> <li>1 Pamphlet of "Tour"—California Hotels</li> <li>2 Bottles Solution of Hydrogen Peroxide by McKesson's, N. Y. (1 small)</li> <li>1 Roll cotton</li> <li>1 pair Sunglasses and leather case</li> <li>1 Can Briggs pipe tobacco</li> <li>1 Ronson cigarette lighter &amp; cigarette case combination (empty)</li> <li>1 Tin Prince Albert Pipe Tobacco</li> <li>1 Tin can containing change</li> <li>1 Jar scalp pomade, dark, by Ogelvie Sisters, N. Y.</li> <li>1 Pocket knife, red, Victoria Switzerland Armee Suisse</li> <li>1 Bottle Richard Hudnut Formula A-10 for men for hair and scalp treatment</li> <li>2 Cans band-aids</li> <li>1 Bottle Jergen's Lotion</li> <li>1 Box—empty, marked Craftsman 25</li> <li>2 Pair glasses, 1 light and 1 dark frames</li> <li>1 Tobacco pouch, red plaid</li> <li>1 Sponge, blue</li> <li>2 Bottles Alka-Seltzer</li> <li>2 Tubes toothpaste, Chlorodent (1 small &amp; 1 large size)</li> <li>1 Bottle Pepto Bismol, marked 98</li> <li>1 Can Sopronol for athletes foot</li> <li>1 Can Rise Shave Cream marked "59" on side</li> <li>1 Craftsman 25 Electric Shaver and cord in red plaid zipper bag</li> <li>12 Glass tubes with stoppers "List No. 2032 Procaine Hydrochloride 4% Epinephrine 1:50,000 Abbott Laboratories Lot 6243575" with "Cook Waite" on end of stopper</li> <li>1 Mirror, two sides, for shaving</li> <li>1 Sunbeam Electric Shaver &amp; plastic case with cord</li> <li>1 Jar</li> <li>1 Bottle Williams After Shave Lotion</li> <li>1 Toothbrush</li> <li>1 Debutante Hand Cream</li> <li>1 Bottle Squibb Mineral Oil</li> <li>1 Bottle Pacquins Hand Lotion</li> <li>1 Bottle brown pills—unmarked</li> <li>1 Small bottle Neohelamine Hydrochloride</li> <li>1 Bottle Eljay Aspirin with black marks "BY" on label</li> </ul> |
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- 1 Styptic pencil in plastic case marked with label "Handy-Spot Price 10¢"
- 1 Bottle McKesson's Boric Acid Crystals—4 ozs.
- 2 Packs Dill's pipe cleaners
- 1 Pack Kent cigarettes
- 1 Pack Kools—open & half empty
- 1 Pack Camel cigarettes
- 5 Pipes—smoking type
- 1 Tube Nupercainal Ointment—empty
- 1 Tube Barbasol Shave Cream—empty
- 1 Pack Gillette blue blades in dispenser, 20 each razor
- 1 Gillette razor
- 1 Metal pipe cleaning instrument manufactured by Rogers and made in England
- 1 Bottle Mercurochrome
- 1 Jar Vaseline Jelly—white
- 1 Bottle 6.12 Insect Repellent
- 1 Bottle Calamine Lotion
- 1 Brush (wire)
- 1 Pencil "Winx" black with metal cap
- 1 Plastic cup, orange
- 1 Bottle Avon Shave Lotion
- 2 Razors, 1 Gillette—1 single edge, no name
- 1 Bar Palmolive soap
- 2 Eveready batteries for small flashlight
- 1 Roll fishing leader
- 1 Tube Boyle Zinc Oxide Ointment
- 1 Eveready battery size 915 AA
- 1 Box Bayer Aspirin
- 1 Tube Ipana Toothpaste
- 1 Tube Chloresin Toothpaste
- 1 Fingernail clipper "La Cross"
- 1 Pack Blue Star Razor Blades
- 1 Brush, small, for shaver
- 1 Flashlight bulb 112
- 1 Plastic, brown zipper shaving kit
- 1 Sportsman's Guide with map  
Maps by Edward W. Pulver & Son,  
copyrighters of Calif. Los Padres Nat'l  
Forest
- 1 Book—Oregon Hunting Regulations 1952,  
marked in green ink "Peter Don's  
Sportsman Supply, Crescent Lake,  
Oregon"
- 1 Map of San Francisco by SF Chamber of  
Commerce
- 1 Map of Twain Harte locating cabin in  
ink, "1.6. Cabin" with route drawn in  
ink.  
Pasted on bottom card of James Morrow,  
Real Estate Broker, Twain Harte, Calif.
- 1 Map Summit District, Stanislaus Nat'l  
Forest
- 2 Plastic, brown glass cases marked on top  
"Polaroid"
- 1 Index to topographic mapping in Calif.  
with pencil marks on back
- 1 Map of Mendocino Nat'l Forest
- 1 Map "Chevron Co." of Nevada
- 1 Map of Burlingame and San Mateo,  
marked Hotel St. Matthew
- 1 Index to towns, mountains, meadows,  
misc., and Map of Stanislaus Nat'l  
Forest and note in ink re: Vernon  
Swamp, Gravel Lakes, hiking distance,  
etc. and Topez Lake cut throat trout
- 1 Map of Stanislaus Nat'l Forest, Calif.
- 1 Monkey wrench
- 1 Small bottle of Halazone
- 1 Can used saddle soap
- 1 Rod varnish—small bottle
- 1 Ferrule cement
- 1 Metal cap—"Egg lug"
- 1 Ever-Ready flashlight battery
- 1 Small can of bouillon cubes
- 14 Lead sinkers
- 1 Spinner
- 3 Bobbers
- 1 Pocket knife—3 blade
- 3 Split shots containers (empty)
- 8 Face cloths
- 1 Fish hook on short wire line
- 2 Brown canvas quilted sleeping bag
- 1 Sleeping bag mattress—made by Wilber  
& Sons, 590 Howard Street, San Fran-  
cisco
- 1 Cover for sleeping bag—Mfr.—Kelly's  
of Oakland, Calif.
- 1 Barclay play shirt—knit—green and  
yellow band
- 1 Yellow T shirt—man's type
- 1 Gantner, size 32, blue—swim trunks
- 1 Blue T shirt
- 1 Blue and white striped pajama bottom
- 1 Blue—long sleeved jersey
- 1 Health Gard white sweat shirt. Size 38
- 1 Blue men's shorts, size 36
- 1 Wilson Bro. size 42, men's undershirt
- 1 Health Gard, size 34, long underwear
- 1 Acetate—Nylon—gray men's shorts
- 1 White muslin bag
- 1 Grewe knitted sweater, V neck, maroon
- 2 White T shirts—Superior Brand—Me-  
dium size
- 1 White T shirt
- 1 Fruit of Loom blue men's shorts
- 1 Jambi—white T shirt—size 42-44
- 1 Ribbed T shirt—off white
- 1 Blue necktie—silver color feathers
- 1 Pair Navy blue knit gloves
- 4 Men's cotton handkerchiefs
- 1 Pair striped shorts
- 1 White cotton T shirt
- 1 Onesta T shirt—white
- 4 Neckties—miscellaneous colors
- 9 Pairs, men's socks

- 1 Brown knit sweater by "John Wana-maker"
- 1 Overseas bag—Army type, olive drab, with 3 small hooks on outside zipper—containing:
  - 9 Handkerchiefs marked
  - 1 Yellow T shirt "20" & "NL" (?)
  - 1 Bathrobe—Hale's Men Store
  - 1 Raincoat, plastic
  - 3 Christmas cards all ident.:
    - "To Daddy from Carol"
    - "To Daddy from Carol"
    - "To Carl from Marge"
  - 4 Keys on safety pin for locks on outside of bag
    - 2 ea. Slaymaker 62—for locks on outside of bag
    - 1 ea. Slaymaker 63—for locks on outside of bag
    - 1 very small—says "Made in USA"
  - 2 Keys loose for locks on outside of bag
    - 1 Slaymaker 61
    - 1 Slaymaker 63
  - 1 Pouch, brown
  - 1 Toothbrush
  - 1 Bottle Roux Rinse 105½ light auburn
  - 1 Bottle Petroleum Jelly—Vi Jon
  - 1 Toothbrush & case
  - 1 Package pencil lead
  - 1 Pocket & desk stone
  - 1½ Pipes
  - 1 Brush—"Solid Black, USA"
  - 1 Lipstick, Westmore
  - 1 Female plug
  - 1 Imitation leather small case
  - 1 Battery—Flashlight, Eveready
  - 1 Pencil—Loveliners brown
  - 1 Can Esquire Boot polish—mahogany
  - 1 Bottle Vaseline hair tonic
  - 1 Tube Ipana toothpaste
  - 1 Laundry paper wrap
  - 1 Sweater—sleeveless
  - 1 Scarf—plaid
  - 1 Pair brown crepe soled leather loafers (John Ward—Men's Shoes)
  - 1 Blue-gray woolen sweater, ½ sleeve with casting fisherman knit into garment. A "Barclay Playshirt"
  - 1 Purple wool imitation lambskin wrap around short coat with long sleeves—attached to coat:
    - 1 Wooden brown doe
    - 1 wooden fan
  - 1 Pair knit green wool socks
  - 1 Small ball, purple yarn
  - 1 Roll white wrapping string
  - 1 Roll #50 J & P Coats purple-gray thread
  - 1 Army Air Forces glass case, brown, no contents
  - 1 Pair gray knit socks, low
- 1 Sterling silver chain
- 1 Necklace with 3 turquoise pendants and Rhinestone backing
- 1 Brown leather belt on one pair of blue "Levi's" button fly
- 1 Pair blue "Levi's"—zipper fly (on side)
- 1 Pair white short socks
- 1 Return postage envelope
- 1 Newspaper, page 16, at bottom of bag, Los Angeles Examiner, Sunday, December 16, 1951
- Box of miscellaneous kitchen equipment as listed:
  - 4 Knives
  - 5 Forks
  - 1 Pancake turner
  - 1 Can opener
  - 2 Metal cups
  - 2 Pots
  - 1 Lid
  - 3 Pie tins
  - 1 Frying pan
  - 1 Can Sterno
  - 1 Can opener
  - 1 Beer can opener
  - 1 Large spoon
  - 1 Clove garlic
  - 1 Partially filled ½ lb. can of coffee
  - 1 Partially filled 1 lb. can of coffee
  - 2 Small bags of flour
  - 1 Gal. can of gasoline or kerosene
  - 1 Bottle insect repellent
  - 1 Can pepper
  - 1 Can paprika
  - 2 Shakers of salt
  - 1 Can Accent
  - 1 Can sugar
  - 1 Package bay leaves
  - 1 Package of paper plates
  - 1 Roll wax paper
  - 1 Grater
  - 1 Pot
  - 1 Kitchen pan lid
  - 1 Fire tong
- 2 Folders of Forty Finest Restaurants, San Francisco Bay Area
- 1 Miracle Mirol Fold Road Map, Eastern United States by Mobilgas
- 1 Issue of Everybody's Restaurant Guide
- 1 Khaki-colored drawstring bag containing:
  - 1 Hair comb in case
  - 1 Pair scissors
  - 1 Safety razor
  - 1 Partial tube Mentholatum
  - 1 Plastic soap dish
  - 1 Toothbrush
  - 1 Bottle LePage glue
  - 1 Box gauze
  - 1 Partial box aspirin
  - 1 Tie clip

- 1 Bottle Noxzema Skin Cream
- 1 Part bottle Stephan's Dandruff Remover
- 1 Partly filled bottle unidentified liquid—white in color
- 1 Robe—white, red, gray striped
- 1 Air mattress, rubber, olive drab
- 1 Mackinaw jacket, Malemute Brand
- 2 Nylon short-sleeve sport shirts, white and tan by MacMaster, size 15-15½
- 1 Topcoat—tan, soiled
- 1 Brown, man's overcoat
- 1 Short-sleeve sport shirt, terrycloth, faded blue with design on chest
- 1 Brown corduroy jacket
- 1 Blue single breasted man's jacket
- 1 Blue trousers
- 1 Green long-sleeved sport shirt, nylon, by Don Juan of California
- 1 Copy San Francisco "Chronicle," 8/17/53
- 1 Simplicity Fashion Preview
- 1 Magazine clipping re Steelhead fishing
- 7 Paper folders advertising "The New Harju Vertical Venetians" and all bearing statement "Manufactured by Harju Vertical Venetian Blind Co., 422 Douglas Avenue, Redwood City, California, call Emerson 8-4210"
- 1 Accordion type cardboard folder color guide of Flexalum Spring Tempered Slats with following stamped on front and back: "Harju Vertical Venetians, 422 Douglas Ave., Redwood City, California, Phone EM 8-4210"
- 1 Printed Craftsman Electric Shaver Guarantee, dated 6/26/53
- 12 White envelopes containing newspaper clippings of chess movements
- 43 Newspaper clippings of chess movements
- 1 Newspaper clipping captioned, "Drive Two Hours—Then Rest"
- 1 Yellow plastic toothbrush in case
- 1 Cash register receipt, dated 4/10 for \$1.88 to Palmer's Drug Store, Hayward, California
- 1 3 x 5 Spiral brown notebook with no writing
- 1 Blue Wool knit sweater, size 40, by "Wieboldt's"
- 2 Brown canvas sleeping bags, no identification marks, with zippers on 3 sides and 1 side being faded. Both are the same
- 1 Thin mattress for sleeping bags having tag #GAL-2652 and manufactured by Wilber and Son, 590 Howard Street, San Francisco
- 1 ½ plate
- 10 Budweiser beer cans
- 1 Old Taylor whiskey bottle
- 1 Mustard jar
- 1 Army napsack—empty
- 1 Army-type sleeping bag cover, contractor, Seattle Quiet Mfg. Company, stamped "Quartermaster, Seattle General Depot."
- 1 Dish rag
- 1 Air pillow in case
- 1 Sleeping bag with red air mattress, all around zipper on bottom and side
- 1 Metal music stand
- 1 Mandolin with pick, "Nick Lucas"
- 1 Violin, bow and case, leather, cloth package containing resin by the A. B. Rosin, and flexible cover made in England, W. E. Hill and Sons, 140 New Bond St., W. Violin bow has name "Tourte". Violin says "Copy of Antonin Stradivarius, made in Germany"
- 1 Langley 8' 6" fly rod
- 1 True Temper bait casting rod
- 1 Sportsman Rod
- 1 Cal Royal spinning rod
- 1 Open bag charcoal briquettes
- 1 Green metal fishing tackle box called "Union Utility Chest" containing miscellaneous fishing tackle including hooks, lures, sinkers, etc.
- 1 Fishing bag, cloth net
- 1 Green garden trowel
- 1 Small army knapsack containing additional fishing tackle, including flies, reel, salmon eggs, and miscellaneous first aid equipment, bandages, snake bite kit, etc.
- 2 Wood and wire coat hangers
- 1 Gallon can of gas
- 1 Brown fabric zipper handbag with following contents:
  - 1 Razor set, Eversharp
  - 1 Bottle aspirin
  - 1 Fishing guide book
  - 2 Decks playing cards
  - 1 Pair scissors
  - 1 Roll toilet paper
  - 1 Hair comb
  - 1 Cup
  - 1 Plastic refrigerator bag
- 1 Camouflage parka (incomplete)
- 1 Green portable cooking stove
- 1 Hand axe
- 1 Short handle spade
- 1 Ocean City brown reel
- 1 Brown cloth zipper handbag containing:
  - 1 Deck playing cards
  - 1 Soap box
- 1 Sal King fly rod reel
- 1 Bache-Brown Spinster reel



- 1 Water bag
- 1 Shoulder pack bag with stenciled "Orlando J. Perrett, 35392439"
- 2 Fishing dip nets "Sport King"
- 1 Cardboard carton, label on end reading "Tameroff Imperial Vodka" containing:
  - 1 Pair leather moccasins
  - 1 Pair Army type high work shoes
  - 1 Pair low white tennis shoes, size 8½
  - 1 Pair brown leather half boots with buckles "Wearmaster"
  - 1 Flashlight, Wing Star brand
- 1 Pine cone
- 1 Piece cotton clothesline
- 1 Minnow bucket containing:
  - 1 Papermate pen
  - 1 Ocean City reel
  - 1 Damaged flashlight
  - 1 Small stapler and staples
  - 1 Midget stapler
  - 1 Can Revelation tobacco
  - 1 Spring paper clip
  - 1 Partial package rubber bands
  - 1 Mimeograph stylus
  - 1 Plastic refrigerator bag
- 1 RCA portable radio, Model BX57
- 1 Sentinel portable radio with plastic case, Model 316P, serial 29004
- 1 Pair black rubber overshoes
- 2 Windshield wiper blades
- 1 Metal screen
- 1 Duck, greasy empty tool bag
- 1 Brown tweed reversible type overcoat—safety pin in sleeve
- 1 Match folder
- 1 Pair brown cloth gloves—man's
- 1 Orlon-nylon black and white check sport shirt (Jello match folder in pocket)
- 1 Clipping—"San Jose Evening News," 8/26/53 (Inside Labor)
- 1 Oakland Tribune—8/26/53
- 1 San Jose News—8/26/53
- 1 Sacramento Bee—7/3/53
- 1 Cylinder Polychrome stencil duplicating ink—1 pound
- 1 Impres duplicating ink—½ pint can
- 2 Expanding envelope—School wallet with pasted ink label Trials—Calif. H. A. W. GR—(?)
- 30 Sheets unused stencil paper
  - 1 Paper folder—initials N W
  - 1 Paper folder—dark brown—notation #II
  - 1 Broken package, approximately 450 blank Autograph Mimeo sheets
- 2 School wallets—brown—1 labeled ORE and 1 labeled MM&RM
- 1 Carton 8½ x 14 mimeo sheets from N. W. Paper Co., Cloquet, Minnesota, Carleton type
- 1 Broken carton (approximately 100 sheets) same as above
- 1 Pack matches—advertising Sniders Donuts
- 2 Packages unused polychrome stencil
- 1 Unopened box Roux oil shampoo tint with red marking 150
- 2 Bottles from Palm Pharmacy, 1730 Mission St., Santa Cruz—PH 7260, #1346 Dr. Koskela 8/17/53 Mrs. (cut off) prescriptions
- 1 Bottle Tincture of Merthiolate from Twain Harte Pharmacy, California
- 1 Pill box containing 2 small red pills and marked in ink on top: "Dienesteral .5 mg 50-145 Mrs. Kaplan on red—5 white"
- 1 Pillbox with numerous white pills on outside in ink: "Dunesteril 1 mg 50-115 Mrs. Kaplan one today, increase one daily"
- 1 Bottle from Palm Pharmacy, 1730 Mission St., Santa Cruz, #1347; Dr. Koskela 8/17/53, Mrs. (cut-off)"
- 1 Bottle Roux Oil Bleach "2 drab"
- 1 Bottle same shape & color but no label
- 1 White envelope with pencil writing on poker hands
- 2 Sanitary belts
- 1 Receipt, Krazen Auto Supply, 138 E. Santa Clara, San Jose, Total \$1.44—dated June 13
- 1 Receipt, Pay Less Drug Store, Reg. #51—dated June 13, Total \$2.38
- 1 Siskiyou County map, stamped distributed by Thomas Bros.
- 1 Blue wool sweater, size 40, long sleeve pullover, tag of Wieboldts in Evanston, Chicago and Oak Park
- 1 Leather men's belt, brown, with torn zipper compartment
- 1 Topographic map, California, Lodoga Quadrangle, 15-minute series
- 1 Index to maps of California by Geological Survey, Department of the Interior
- 1 Man's shirt, tan, long sleeve, button down flaps on both chest pockets, soiled, with tag in inside of neck marked "Game and Lake Sportswear, Expertly Tailored," and with the following laundry marks on inside of collar band: Q-5, HZ; 394B (the last character believed to be "B" is not clear and might be the number 1, 2, 3, or 4). Also two other laundry marks not discernible.

- 1 Blue long sleeve man's shirt, flap pockets on chest, tag inside back marked "Van Heusen, 16, 16½ (L), Vangas, completely washable," with following laundry marks inside collar: 3941 (maybe 63941—first digit somewhat smeared); 646855; 5\_\_\_\_ (faded)
- 1 Man's blue dress shirt with tan or gold stripe, bearing tag "Imperial trademark, Sanforized," with laundry marks in collar as follows: 05 W L60: Q5
- 1 Faded beige man's long sleeve sport shirt with label of "Marlboro, Jockey Club (1) Washable" with following laundry marks in collar: WL60; 394\_ (last digit either a "one" or an "A"); 05; 0-5; Q-5; 165; B918855
- 1 Brown man's jacket, single breasted, with inside label "Witty Bros., Craft," has the following marks: Inside breast inner pocket is tag "Witty Brothers, New York, A84630; near shoulder attached to lining of right sleeve is stapled cleaning tag 90,93371; several inches below shoulder in inside of right sleeve, written on lining are numbers 14/5. Has pipe cleaner in breast pocket and loose tobacco
- 1 Light tan corduroy man's jacket with label "Howard Sport Apparel," tag in collar marked size 40; with following marks: inside left sleeve on lining are written words "New Man SA (probably 8A); inside right sleeve on lining is number "1460"; inside in breast pocket, inner edge of lining are numbers "1832" or "1532"
- 1 Man's single-breasted blue suit coat, no label, inner lining of right sleeve contains lettering "27/99692"
- 1 Pair Men's tan or beige trousers with brown leather belt, worn and mended; left pocket has laundry mark 1/968
- 1 Pair Men's blue trousers with following marks: right pocket has laundry marks "4649" and "27/99269" and either "B-5" or "135"; also two circular marks (believed coin marks) about size of dime with marking in circle not discernible; inside waistband to right of zipper is the word "HERMES" stamped four times; rear right pocket has paper tag stapled to it with number "6503" thereon
- 1 Pair Man's tan trousers with tag sewn to rear left pocket marked "Test reg. U. S. Pat. Off. Best by Test Sanforized"; right pocket contained the following items:
  - 1 heavy black pocket knife
  - 1 black Ace pocket comb
  - 1 small metallic case with compartment on ends containing clear objects of glass or plastic
  - 1 small round pink box containing two small green objects
  - 1 box marked "Para-curve B & S"
 The above items have been removed from the trousers.
- 1 Coat hanger with name of Recca Cleaners, Ph. 1015, 1045 11th St.
- 1 Hanger with markings, The Temple, Bayview 9211, 5041 Geary St., Cleaning and Dyeing
- 1 Hanger with markings, Virginia Cleaners & Dyers, 2109 Virginia St., Berkeley, Calif., phone Ashberry 1345
- 1 Hanger with markings, Hastings, San Francisco, Oakland
- 1 Hanger with markings, White House Dyeing & Cleaning Works, 174 14th St., San Francisco, Phone HEMlock 0476
- 1 "Schermer's Library of Musical Classics, Vol. 833, Pleyel Op. 48," Six "Little Duets for Violin and Piano;" stamped on front cover is "Lloyd A. Wollmer Co., Music, Burlingame, Calif."
- 1 Mcbllgas Miracle Fold Road Map, Western United States
- 1 Registration holder removed from auto containing following item:
 

Automobile Insurance Service Card bearing name  
GILBERT BYRNES, 169 Inner Circle, Redwood City, Calif., policy #CA 377690, agent, David D. Bohannon Organization, 859 San Mateo Drive, San Mateo, Calif.,
- 1 Pair men's blue trousers with suspenders attached; have red stripes in weave; right pocket has laundry mark "H" card bears name of General Casualty Company of America, First National Insurance Company of America, General Insurance Company of America, nearest office at 206 Sansome St., San Francisco 4, California
- 1 Remington Noiseless typewriter, serial #X370531
- 1 Portable Royal typewriter, serial #0-431783
- 1 Mummy-type sleeping bag with U. S. stamped on outside of bag
- 1 Pair leather slippers—Cherokee
- 1 Pair worn plastic scuffs
- 1 Pair brown leather gloves
- 1 Newspaper clipping, paper unknown, begins "The—1953 date article Morse will back Democrats in '54"

- 1 Richfield Oil Company of California map
- 1 Shell Oil Company map of San Francisco-Bay area
- 1 Shell Oil Company directory map of Auto Courts, Hotels, Resorts and State Park Camp Sites in Northern California and Nevada
- 1 pkg. Dill's Best pipe cleaner
- 1 bag with writing paper and envelopes
- 1 Brown cloth zipper jacket, McGregor, size 42 with 1 small Howart single cell flashlight in pocket
- 1 Ted Trueblood's Fishing Handbook
- 1 Gray Adam hat, Executive Quality, size 7, men's
- 1 Tan all-weather man's hat, size 7 $\frac{3}{4}$
- 1 Tan zipper jacket, McGregor, size 42 with cloth bag in one pocket marked "Airex"
- 1 Cloth sweatshirt, size 38-40 "Double Play"
- 1 Red and black plaid fishing rod cover
- 1 Terrycloth white and red short-sleeve sweater, size medium, Gantner
- 1 Short-sleeve shirt, "Harper," medium, white and brown check with Eversharp Ballpoint Pen clipped to pocket
- 1 Box unused carbon paper
- 1 Partial box of Eaton's Berkshire Type-writer Paper with miscellaneous envelopes
- 1 Chess set
- 1 Shermer's Library of Musical Classics, Vol. 848, Sevcik Op. 8, for violin
- 1 Shermer's Library of Musical Classics, Vol. 297, for two violins
- 1 Shermer's Library of Musical Classics, Vol 230, for the violin
- 1 Book of violin music by Amsco Music Pub. House
- 1 Copy of Everybody's Favorite Album of Violin Pieces published by Amsco Music Pub. Co.
- 1 Copy of Everybody's Favorite Album of Violin Pieces, Series #6
- 1 Copy of Violino Principale
- 1 Spiral Warner's #4, Spiral Manuscript book
- 1 Nick Manoloff's Mandolin Method
- 6 Issues of "Chess Review" for months June, July, August, September, November, December, 1951
- 1 Copy Oregon Angling Regulations for 1952
- 1 Check board
- 1 Copy U. S. News, July 24, 1953
- 1 Copy of Hometown, The Rexall Magazine, August, 1953, bearing City of Santa Cruz, California, on back page
- 1 Thomas Bros. Map of the City and County of San Francisco and East Bay
- 1 Recipe box containing puppe<sup>1</sup>
- 1 Pair argyle socks
- 1 Pair brown socks
- 1 Pair blue socks
- 1 Cloth money belt—empty
- 1 Black ring notebook
- 1 Blue denim cap
- 1 Pair wine-colored woolen gloves
- 1 Woolen stocking cap
- 1 Pair Munsingwear, size 36, long underwear
- 1 Long-sleeve undershirt
- 1 Pair Gantner wikies, size 36, green shorts
- 1 Pair blue Fruit of the Loom shorts
- 1 Jacket—tan color, Essley Functional Jacket
- 1 Blue cloth zipper satchel
- 1 Pair brown men's shoes
- 5 Violin strings
- 1 Pair hair clippers
- 1 Pocket knife
- 1 Scripto Ballpoint pen
- 1 Canvas men's hat
- 1 Plastic raincoat
- 1 Pair white shorts, size 34, Patent 2231299
- 1 Brown plaid shirt, Penney's Towncraft
- 2 Leather belts, 1 brown, one cordovan
- 1 Rust-colored tie with tag "Ward & Ward"
- 1 Blue-grey tie with tag, "Pilgrim"
- 1 Blue tie with tag, "Van Heusen, Van Trevor"—all silk
- 1 Tie with tag, "El Denver, Los Wigwam Weavers, Denver, Colo."
- 1 Rust tie without label
- 1 Pair soiled gray flannel slacks
- 1 Canvas knapsack with stenciled "J. J. MILLER"
- 1 Pair socks, cotton argyle
- 1 Handkerchief with green and brown border
- 1 Green handkerchief with white border
- 6 Soiled white handkerchiefs
- 1 White undershirt
- 1 White T-shirt
- 1 Pair Healthguard medium white jockey shorts—soiled
- 1 Pair soiled gray slacks—men's
- 2 Mandolin picks
- 1 Envelope with "Mak-Ur-Own" celluloid index tabs
- 2 Maps of California—Chevron Map—points of interest and touring map
- 1 Richfield Street Guide, San Francisco Bay Area
- 1 Empty soiled white envelope
- 1 Nevada Map—Chevron



- 1 Richfield Street guide, Los Angeles
- 1 Map of San Jose and Santa Clara County
- 1 Blue or grey felt hat, man's size 7½, sweatband bearing name of Dobbs Cross County, Reg. U. S. Pat. Off. and Brey's, 1062 Wilson Ave., Chicago. Inside crown has marking of Dobbs Fifth Avenue, Cross Country. Attached to felt behind sweatband is tape marked "Reg. B82459 600" 5¾ 7½ size (Oval to duplicate block)
- 1 Cream-colored Panama with wine-colored band, man's, size 7. Sweatband with markings Stylepark, New York, Philadelphia and 1516 Chestnut St., Philadelphia. Innerside of crown marked 27320 (6) 14 7; innerside of sweatband is labeled: color—tan coal, style EC89, price—\$10.00, 7 size.
- 1 Tan Panama hat, men's, wine hat band. Sweatband bears marking Macy's Men's Store, New York. Inside of sweatband is marking 7½ and price tag marked Macy's D 39 H 2.98. Inside of crown is stamped number 8 and "IK"
- 1 Assembled Transvision television set #615935
- 1 Brown cardboard box for "Print-O-Matic Rotary Stencil Duplicator which contained the following:
  - 1 Model 4-A Print-O-Matic duplicator, serial #2670
  - 1 Used stencil on the roller of the duplicator from which a copy was run off which is also in the box
- 1 Light yellow sport-type man's shirt, laundry mark D-5, L-40
- 1 Van Huesen 15—15½ Air Weave sport shirt, laundry mark D5W L60 D5 L40
- 1 Citadel man's gr. and white striped shirt, laundry mark D5—4AH2
- 1 McGregor long sleeve, off-white, sport shirt, Medium Large, D5L . 22 41—18855 05 22
- 1 Ruggers BVD yellowish sport shirt, short sleeve, 8955 laundry mark
- 1 Brent sanforized grey and white striped man's short 15½—32, laundry mark: WL60-L60 . D5 . D5 05
- 1 Blue, long sleeve, sport shirt, laundry mark: D5 03441
- 1 Shirt—long sleeve—John Wanamaker—Wanatex Laundry Mark—039H 0-5 05 W WL60 L60—L60
- 1 Trousers—man's—herring bone, blue-gray, laundry mark on left pocket New Man SA, right pocket 27/9969 B5 1460 6247
- 1 Blue sport shirt—short sleeves, blue and white trim
- 1 Light blue denim jacket
- 1 Trousers—men's—solid blue, soft finish—appear to be home sewn
- 1 Green handkerchief
- 1 Papers from 1950 Chevrolet, exclusive of registration
- 1 Package of papers wrapped in tissue paper and found on dining room table
- 1 Brown cardboard box for "Sperry Pancake and Waffle Mix" containing papers and found on the floor at the foot of the bed in the bedroom above the living room side of the house
- 1 Unmarked brown cardboard box bearing the numbers "1952-43" on one end which contains papers and was found on the corner table in the bedroom above the living room side of the house
- 1 Brown cardboard box for "Rancho Soup" containing papers which was found at the foot of the bed in the bedroom above the living room side of the house
- 1 Brown cardboard box for "Burgermeister Beer" containing papers which was found on the floor of the hall closet at the head of the stairs on the second floor
- 1 Brown cardboard box for "First Call Dog Food" containing papers which was found on the floor at the foot of the bed in the bedroom above the living room side of the house
- 1 Tan leather "Flex Bilt" expansion, single-handled brief case containing papers which was found on the bed in the bedroom above the living room side of the house
- 1 Brown leather suitcase with two hasps and one lock containing papers which was found in the closet of the bedroom above the living room side of the house
- 1 Tan leather suitcase with two hasps but no lock containing papers which was found on the bed in the bedroom above the living room side of the house
- 1 Brown split cowhide zipper briefcase without handles containing papers which was found on the dresser in the bedroom above the living room side of the house

Papers, including wallet with papers for JOSHUA NEWBERG, found on and in desk located in living room

Billfold and papers for ROBERT E. NEUMAN, or NEWMAN, found in a pair of tan gaberdine trousers on a chair in the living room

Wallet with papers for WILLIAM GORDON and a brown leather money belt with money found in a pair of tan cotton pants on the straight-backed chair in the living room.

Miscellaneous papers for LEE KAPLAN and RICHARD KAPLAN found in a handbag in the possession of Defendant SHIRLEY KREMEN at the time of arrest. The handbag was returned to her

1 Wallet container papers for JOHN F. BRENNAN found on the person of ROBERT THOMPSON

### *Cash and Currency*

\$28.63 From envelopes in the brown leather, "Flex Bilt" expansion briefcase  
86.45 From envelopes in the brown leather, "Flex Bilt" expansion briefcase  
993.75 From envelopes in the brown leather, "Flex Bilt" expansion briefcase  
33.13 From the wallet with papers for William Gordon

520.00 From hidden money compartments in the leather belt on the trousers containing the wallet with papers for William Gordon  
5.45 From the purse with papers for Lee and Richard Kaplan  
236.28 From the wallet with papers for Robert E. Neuman or Newman  
383.36 From the Wallet in the possession of Robert Thompson with papers for John Brennan

The following items were identified by Shirley Kremen as her personal property and returned to her on September 25, 1953:

1 RCA Victor Album—Symphonies 1 & 9, 3 records  
1 Record Album—Capital Records by Sibelius, "Symphony #1 E minor, Op. 39"  
1 Remington record—"Bach Sonata"  
1 Remington record—"Caucasian Sketches"  
1 Columbia record—"Chansons Parisiennes"  
1 Parade record, Operatic library series—"Aida"  
1 Remington record—"Schumann Sonata in D Minor, Op. 121"  
1 Remington record—"Mendelssohn Violin Concerto"  
1 Remington record—"Prelude to the Afternoon of a Fawn"  
1 Remington record—"Paganini Violin Concerto in D Major"  
1 Remington record—"Sonata for Violin & Piano, C Minor"  
1 Columbia record—"Edith Piaf Encores"  
1 Remington record—"Op. 13 in C Minor"  
1 Remington record—"Concerto in D Major"  
1 Columbia record—"Beethoven Concerto in D Major"  
1 Mercury record—"Concerto for Violin & Orchestra"  
1 Royale record—"Brahms Violin Concerto D Major"  
1 2-Record album by Royale—"Choral OP. 125"

1 Album 5 ea RCA Victor—Symphony #7 in A, serial #18G11D  
1 Album, 4 records, RCA Victor—"Tschalkowsky Concerto #1 in B Flat Minor"  
1 Album, 2 records, RCA—"Grieg Concerto in A Minor"  
1 Album, 5 records, RCA Victor—Beethoven "Archduke Trio"  
1 Album, 2 records, RCA Victor—Classical Symphony  
9 Towels—various colors, cotton bath and face size—no identifying marks  
5 Wash cloths, small, various colors, no identifying marks  
1 Yellow bath towel made by "Cannon"  
1 White muslin cloth (looks like dish towel)—no identifying marks  
1 Muslin dish towel "Martex Dry-Me-Dry"—white, with red and brown stripes on sides  
1 White torn, burned sheet, used for ironing—no identifying marks  
1 Ping Pong net with 2 holders (no name)  
1 White plastic sunglass holder—"Hinge Patents Pending"  
1 Pins—package of DeLong sewing type  
1 Leather case for glasses  
1 Towel—face type—Cannon  
1 Towel—white muslin  
1 Plastic case of miscellaneous small items—razor, spools of thread, lipstick, paper clips, wire  
1 Seiberling Hot Water bottle & rubber hose

- 2 Jars Avon Cleansing Cream, 3½ ozs. & 1¾ ozs.
- 1 Plastic box with hair curlers and 1 tweezers
- 1 Foto-Flex Camera, empty
- 1 Mirror with green frame 3" x 5" approx.
- 1 Bottle Pinwave Pincurl Permanent in box
- 1 Eyelash curler
- 1 Plastic container, red, Maybelline Mascara with brush
- 1 Fuller hair brush
- 1 Card of Clinton Hooks & Eyes & Lcops
- 1 Soldering iron, electric—by Harmie Mfg. Co., Grove City, Pa., No. 86, 75 Watts, 115 Volts
- 1 Plastic shower cap—yellow
- 1 Box powder
- 1 Comb, white
- 1 Deputante Powder Shampoo
- 1 Bottle Avon Astringent
- 1 Bottle Breck Shampoo
- 1 Tube lipstick
- 1 Bottle NTZ Antihistamine Decongestant (to relieve nasal congestion)
- 1 Fuller brush
- 1 G. E. automatic toaster
- 1 Colombia 3 speed record player
- 1 Box of Meds—partially empty
- 1 Package of toilet tissue—4 rolls
- 1 Package napkins
- 1 Cotton flannel bed cover—grey
- 1 Hammer—Marion Tool Co.
- 8 Bath towels—various colors
- 1 Kleenex—full
- 1 Scott towels—paper
- 1 Crescent wrench
- 2 Sierra Pine soap
- 1 Box aspirin (4 aspirins)
- 5 Hand towels
- 7 Pillow cases
- 1 Bed sheet (small letter K sewed on; 2057 laundry mark)
- 3 Table cloths
- 1 Blanket—U. S. Navy—Med Department
- 1 Bed sheet—Initial K (laundry 2057 A81)
- 1 Bed sheet—unmarked
- 1 Dark blue—turtle neck—sweater, knit
- 1 Suitcase, black imitation leather:
  - 1 Package Nylmerate Jelly (used) with directions
  - 1 Red and blue polka-dot bra, self-supporting
  - 1 Pair (Bronco-ettes by Mallo-Maid of California) Woman's blue denim pedal pushers
  - 1 Pair white tennis shoes, canvas tops, rubber soles
  - 1 Size 6½ 100% wool red baseball cap made by Gortman Hat & Cap Co., Oakland, California
- 1 Spangled 5' x 6X evening bag with zipper
- 1 Roll of "Jumbo Ripple-Tie"—blue
- 1 Pair white net mitts
- 1 Pair white nylon evening gloves
- 3 Yards, ¼" elastic, yellow
- 1 Pair, nylon briefs
- 1 Pair saddle shoes, rubber soles. Top white with black saddles (female)
- 1 Large size red and white beanie hat with "LEE" sewed on front
- 1 Woman's green cotton waffle weave suit (Eisenhower type jacket)
- 1 Yellow blouse, woman's, Rhinestone buttons, ripple collar, ¾ sleeves
- 1 Woman's—Mode O'Day—White deep V neck blouse, no sleeves, one catch, no buttons
- 1 "Donig" white lace type woman's blouse, no sleeves
- 1 Rhinestone necklace with fixed pendant
- 1 Pair Rhinestone earrings, square, made by "Phyllis"
- 1 Pair star type Rhinestone earrings made by "Nemo"
- 1 String of seed pearls with rubber band on end (damaged)
- 1 Gray covered jewelry box, "Phyllis Originals"
- 1 Pair yellow "Moc Lucks" socks
- 1 Red and white breakfast coat, wool, red buttons, red collar
- 1 Flannel bed sheet—gray
- 1 Damaged Parker fountain pen with silver colored metal cap and wine or brown colored plastic pen
- 1 Woman's green overcoat with gold lining: has paper cleaning tag stapled to bottom edge of lining with number "25/940"
- 1 Infant dress, size 6 mo. made in Philippines
- 1 Kerchief—black and gold
- 1 White short sleeve Bermuda knit sweater—woman's type
- 1 White short sleeve sweater—woman's
- 1 Sweater—yellow—short sleeve—woman's Orbacks—made in England
- 1 Sweater—lavender—short sleeve—woman's
- 1 Sweater—green—knit—short sleeve—woman's
- 1 White sweater—turtle neck V Martin Knit Wear of California—woman's
- 1 Light blue—woman's briefs
- 3 White briefs—woman's
- 1 Bra—Silbra strapless
- 2 Bras, white
- 1 Pants—pink—woman's
- 1 Night gown, white—Dashing Deb



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| <ul style="list-style-type: none"> <li>1 Bathing suit, woman's—yellow, blue, white</li> <li>1 Night gown, size 38, Swank Shortie</li> <li>1 Pair gloves—white cotton, blue cuffs Pay Less Drug Store</li> <li>1 Undergown—top half—woman's</li> <li>1 Slip—white</li> <li>1 Breakfast Coat, Truzette of California</li> <li>1 Slip—black and white</li> <li>1 Pair of pajamas—flannel, blue and white</li> <li>1 Girdle—Slackies</li> <li>1 Bra—Alloette</li> <li>1 Garter belt—Olga, California</li> <li>1 Swim suit, red and white plaid, Gantner of California</li> <li>1 T-Shirt—yellow—short sleeve</li> <li>1 Sweat shirt—gray cuffs</li> </ul> | <ul style="list-style-type: none"> <li>1 Pair white work gloves</li> <li>1 Blouse—pink and white striped</li> <li>1 Bra—pink</li> <li>1 Scarf—woman's—multi-hued</li> <li>1 Blouse—pink—Cara Mae</li> <li>1 Blouse—jersey—pink—zipper</li> <li>1 Play shirt—knit—green, dark center strip</li> <li>1 Blouse—Blue and white striped</li> <li>1 Pair shorts—woman's—light tan</li> <li>1 Pair pedal pushers—light blue</li> <li>1 Pair shorts—woman's—blue denim</li> <li>1 Pair white bobby soxs</li> <li>1½ Pair stocking protectors</li> <li>1 Pair Paisley women's shorts</li> <li>1 Pair shorts—blue denim, woman's, with belt</li> </ul> |
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The following was returned to Attorney NORMAN LEONARD for the defendants January 26, 1954:

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| <ul style="list-style-type: none"> <li>1. 1950, two-door deluxe Chevrolet, Motor #HAA786026, 1953 Calif. plates #7B86733, with right door window broken, with registration certificate and following material:               <ul style="list-style-type: none"> <li>A. In Glove Compartment                   <ul style="list-style-type: none"> <li>4 2½ x 4½ memo book fillers</li> <li>1 pr. colored driving goggles in case</li> <li>1 spoon</li> <li>1 6-inch crescent wrench</li> <li>1 S-shaped screw driver</li> <li>1 6-inch yellow handled screw driver</li> <li>1 pr. cuticle scissors</li> <li>1 lead sinker</li> </ul> </li> <li>B. On Front Seat                   <ul style="list-style-type: none"> <li>1 Plaid Indian-style blanket</li> </ul> </li> <li>C. On Back Seat                   <ul style="list-style-type: none"> <li>1 yellow and brown fiber and plastic seat cushion</li> <li>1 blue and red fiber and plastic seat cushion</li> </ul> </li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>2 bow ties</li> <li>1 tin cup</li> <li>5 wire coat hangers</li> <li>1 aluminum suitcase coat hanger</li> <li>D. In Trunk               <ul style="list-style-type: none"> <li>1 1950 Chevrolet yearbook</li> <li>1 pamphlet entitled, "Goodhousekeeping in your car"</li> <li>1 bumper jack</li> <li>1 set tire chains in bag</li> <li>1 pair individual tire lug chains</li> <li>1 lug wrench</li> <li>1 spare tire and rim</li> </ul> </li> <li>2. 1950 tudor Ford sedan, Motor #BORH156413, 1953 California license #3G1606, with temporary registration and the following material:               <ul style="list-style-type: none"> <li>A. In trunk                   <ul style="list-style-type: none"> <li>1 lug wrench—4 headed</li> <li>2 lug wrenches—single headed</li> <li>2 bumper jacks</li> </ul> </li> </ul> </li> </ul> |
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ARNOLD v. PANHANDLE & SANTA FE  
RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE  
COURT OF CIVIL APPEALS OF TEXAS, SEVENTH  
SUPREME JUDICIAL DISTRICT.

No. 240. Argued April 24-25, 1957.—Decided May 13, 1957.

In this action brought in a Texas state court under the Federal Employers' Liability Act, the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury, and the judgment of the Texas Court of Civil Appeals reversing the trial court judgment for petitioner is reversed and the case is remanded. Pp. 360-361.  
283 S. W. 2d 303, reversed and remanded.

*James O. Bean* argued the cause for petitioner. With him on the brief was *Henry D. Akin, Jr.*

*Charles L. Cobb* argued the cause for respondent. With him on the brief was *Preston Shirley*.

PER CURIAM.

We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500; *Webb v. Illinois Central R. Co.*, 352 U. S. 512; *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521; *Shaw v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Deen v. Gulf, Colorado & Santa Fe R. Co.*, 353 U. S. 925; *Thomson v. Texas & Pacific R. Co.*, 353 U. S. 926. The jury's general verdict, that the respondent negligently contributed to the petitioner's injury, has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties. The special issues claimed to be in conflict with this finding concerned alleged negligence only in the

operation and presence of the truck on this passageway. But even if the rule announced by the Court of Civil Appeals controlled, as we see it these answers present no square conflict. The findings on these special issues do not exhaust all of the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based. Hence all of the findings in the case might well be true insofar as the record indicates. The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for ". . . the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U. S. 22, 24. See *Dice v. Akron, Canton & Y. R. Co.*, 342 U. S. 359; *Brown v. Western R. Co.*, 338 U. S. 294. The judgment of the Court of Civil Appeals is reversed and the case is remanded.

*Reversed and remanded.*

MR. JUSTICE FRANKFURTER, dissenting.

I would dismiss the writ as improvidently granted for the reasons set forth in my dissent in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 524. Insofar as review of the decision of the Texas court involves the question of an inconsistency between the general verdict and the special findings on the central issue of negligence, the inappropriateness of granting certiorari to re-examine the record is glaringly emphasized.

MR. JUSTICE HARLAN, whom MR. JUSTICE BURTON and MR. JUSTICE WHITTAKER join, dissenting.

As this case presents a different situation from that involved in other negligence cases which, in increasing numbers I regret to say, have been passed on by this Court



HARLAN, J., dissenting.

353 U.S.

during the current Term,<sup>1</sup> I am constrained to write a few words in explanation of my dissent, beyond the views expressed in my dissenting opinion in *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500, 559.

This case involves more than the problem of the sufficiency of the evidence to support a jury verdict. Under Texas procedure, the trial court in this case required the jury to bring in a general verdict on the issue of whether the respondent had negligently failed to furnish petitioner with a safe place to work, and, if so, whether such failure was a contributing cause to the accident. The jury was also asked to make findings on special issues put to it by the court. The jury's general verdict was favorable to the petitioner, but its findings on the special issues were in favor of the respondent, and, as I see them, were wholly inconsistent with the general verdict.<sup>2</sup> In these

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<sup>1</sup> *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500; *Webb v. Illinois Central R. Co.*, 352 U. S. 512; *Herdman v. Pennsylvania R. Co.*, 352 U. S. 518; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521; *Gibson v. Phillips Petroleum Co.*, 352 U. S. 874; *Johnson v. Union Pac. R. Co.*, 352 U. S. 957; *Shaw v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Deen v. Gulf, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson v. Texas & Pac. R. Co.*, 353 U. S. 926.

<sup>2</sup> Petitioner, respondent's car inspector, sued to recover for injuries sustained while he was inspecting railroad cars in a passageway ten feet wide, having been struck by a truck backing into the same passageway. He alleged that the respondent had negligently failed to provide him with a safe place to work by (1) not warning petitioner of the truck; (2) not protecting petitioner while he was working in the passageway; (3) allowing the truck to be driven into the passageway; and (4) failing to see that the truck was not driven negligently. As to the special issues the jury found: (1) there was no negligence in failing to warn the petitioner of the truck; (2) there was no negligence in allowing the truck to be driven onto the passageway while the petitioner was working there; (3) there was no negligent failure on the part of the respondent to keep a proper lookout; (4) there was no negligent failure on the part of the truck driver to keep a proper lookout; (5) there was no negligence in failing to give a warn-

circumstances the state appellate court, applying Texas law, held that the general verdict must yield to the inconsistent findings on the special issues, and that the trial court should have entered judgment for the respondent.

I am unable to see any valid basis for this Court's action in upsetting this state judgment. Clearly, it seems to me, the Texas procedural rule which the Court of Civil Appeals applied in resolving the head-on collision in the jury's verdict did not subvert assertion of the federal rights established by the Federal Employers' Liability Act. Compare *Brown v. Western R. Co.*, 338 U. S. 294. Nor, in my opinion, can it be said that resolving these inconsistencies, in accordance with this local rule of practice, deprived the petitioner of any substantive right given him by the federal statute. Compare *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359. Indeed, the procedural rule applied by the Texas court is identical with that which would have been applicable, in the same circumstances, had this case been tried in a federal court. See Fed. Rules Civ. Proc., 49 (b).

I would affirm.

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ing before backing up the truck; (6) there was no negligence in backing the truck into the passageway; (7) the truck did not back too close to the tracks, did not back up too fast, and was not negligently driven without adequate visibility; (8) petitioner did not move into the path of the truck "when such movement could not be made with safety"; and (9) petitioner failed to keep a proper lookout for the truck, and this failure was a cause of the accident, though not the sole cause.

I do not understand how it could be claimed that these findings were not inconsistent with the general verdict. Indeed, every specific allegation of negligence set forth in petitioner's complaint was rejected by the jury. And, as I see it, every factual basis on which a finding could be based that respondent had negligently failed to provide petitioner with a safe place to work was rejected by the jury. All that remains to show that the passageway was a dangerous spot is the fact that the accident occurred there—something which, until now, I have never supposed could be equated with negligence.

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.

No. 423. Argued April 29-30, 1957.—Decided May 13, 1957.

In an action brought to restrain the enforcement of a state statute on federal constitutional grounds, the federal court should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts; and the judgment of the District Court in this case is vacated and the cause is remanded to it with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted. Pp. 364-367.

146 F. Supp. 214, judgment vacated and cause remanded with directions.

*Milton I. Shadur* argued the cause for appellants. With him on the brief were *Arthur J. Goldberg*, *David E. Feller* and *Herbert S. Thatcher*.

*Gordon Madison*, Assistant Attorney General of Alabama, argued the cause for appellees. With him on the brief was *John Patterson*, Attorney General.

PER CURIAM.

In 1953, the Alabama Legislature enacted a statute (Ala. Laws 1953, No. 720) which provides that any public employee who joins or participates in a "labor union or labor organization" forfeits the "rights, benefits, or privileges which he enjoys as a result of his public employment." Section 1 defines a "labor union or labor organization" to include an organization of employees whose purpose is to deal with employers concerning grievances, labor disputes, or conditions of employment. Teachers,



certain employees of the State Docks Board and city and county employees, however, are exempted from the provisions of the Act.

Appellants are an organization composed of employees of governmental and civic agencies, and a member of the organization who is employed by a retail liquor store operated by the Alabama Alcoholic Beverage Control Board. They commenced this action in the United States District Court for the Northern District of Alabama to enjoin the enforcement of the state statute on the grounds that it abridged the freedoms of expression and association of public employees, and that the statute violated the Due Process, Privileges and Immunities, and Equal Protection Clauses of the Fourteenth Amendment.

The three-judge District Court, convened pursuant to 28 U. S. C. §§ 2281, 2284, withheld the exercise of its jurisdiction, retaining the cause "for a reasonable time to permit the exhaustion of such State administrative and judicial remedies as may be available." 116 F. Supp. 354, 359. We affirmed that judgment of the District Court. 347 U. S. 901.

Appellant union commenced an action in the Alabama courts to obtain an "authoritative construction" of the state statute. A bill in equity was filed in the Circuit Court of Montgomery County, Alabama, praying that the enforcement of the statute against the union or its members be enjoined, and for a declaratory judgment that the union was not a "labor union or labor organization" within the meaning of the statute. In its complaint, the union denied that the statute applied to it or its members. None of the constitutional contentions presented in the action pending in the United States District Court were advanced in the state court action. After hearing testimony, the Circuit Court of Montgomery County denied the union's prayer for relief, holding that the statute applied to the

union, its members and its activities. The Alabama Supreme Court affirmed. 262 Ala. 285, 78 So. 2d 646. It held that a local union operating under the appellant's rules and constitution would be subject to the provisions of the Act.

The case was resubmitted to the three-judge District Court for final decree. The District Court dismissed the action with prejudice, saying that the Alabama courts have not construed the Act "in such a manner as to render it unconstitutional, and, of course, we cannot assume that the State courts will ever so construe said statute." 146 F. Supp. 214, 216. We noted probable jurisdiction. 352 U. S. 905.

We do not reach the constitutional issues. In an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts. One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 105. Another policy served by that practice is the avoidance of the adjudication of abstract, hypothetical issues. Federal courts will not pass upon constitutional contentions presented in an abstract rather than in a concrete form. *Rescue Army v. Municipal Court*, 331 U. S. 549, 575, 584. The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner. Accordingly, the judgment of the District

Court is vacated, and this cause is remanded to it with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted.

*It is so ordered.*

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



SECURITIES AND EXCHANGE COMMISSION *v.*  
LOUISIANA PUBLIC SERVICE  
COMMISSION ET AL.

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

No. 466. Argued April 30, May 1, 1957.—Decided May 13, 1957.

The orders of the Securities and Exchange Commission made judicially reviewable by the last two sentences of § 11 (b) of the Public Utility Holding Company Act of 1935 are the directory orders mentioned in, and authorized by, subsection (b) of § 11 of the Act, and orders which may “revoke and modify” any such order previously made under that subsection; and the language referred to does not include an order merely denying a petition to reopen § 11 (b) proceedings. Pp. 368–372.

235 F. 2d 167, reversed.

*Thomas G. Meeker* argued the cause for petitioner. With him on the brief were *Solicitor General Rankin*, *David Ferber* and *Solomon Freedman*.

*Robert A. Ainsworth, Jr.* argued the cause and filed a brief for the Louisiana Public Service Commission, respondent.

*J. Raburn Monroe* argued the cause for the Louisiana Power & Light Co., respondent. With him on the brief were *J. Blanc Monroe* and *Monte M. Lemann*.

*Daniel James* filed a brief for Middle South Utilities, Inc., respondent.

PER CURIAM.

On January 29, 1953, the Securities and Exchange Commission, pursuant to § 11 (b)(1) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U. S. C. § 79k (b)(1), issued a notice and order for hearing directed

to Middle South Utilities, Inc., and its subsidiary, Louisiana Power & Light Company, upon the matter of "[w]hether Middle South and Louisiana [Power] should be required to take action to dispose of the gas utility assets and non-utility assets of Louisiana [Power] and, if so, what terms and conditions should be imposed in connection therewith." A copy of that notice and order for hearing was served upon those companies and also upon the Louisiana Public Service Commission by registered mail.

A full hearing was conducted by the S. E. C. at which Middle South and Louisiana Power appeared, adduced evidence, and presented arguments in support of their position that they should be permitted to retain Louisiana Power's gas properties as an additional integrated public utility system under the proviso to § 11 (b)(1) of the Act. The Louisiana Public Service Commission did not appear in that proceeding. On March 20, 1953, the S. E. C. issued its opinion, findings and order directing Middle South and Louisiana Power to divest themselves of all the non-electric assets of Louisiana Power "in any appropriate manner not in contravention of the applicable provisions of the Act," which gave them one year for compliance under the provisions of § 11 (c) of the Act, 49 Stat. 821, 15 U. S. C. § 79k (c). No petition to review that order was ever filed, and it ceased to be subject to judicial review with the expiration of the 60 days allowed to petition for that purpose by § 24 (a) of the Act, 49 Stat. 834, 15 U. S. C. § 79x (a), on May 19, 1953.

Thereafter, pursuant to § 11 (c) of the Act, the S. E. C. extended the time for compliance with its order to March 20, 1955. On November 10, 1954, Louisiana Power and its newly organized wholly owned subsidiary, Louisiana Gas Service Corp., filed a joint "application-declaration"

with the S. E. C., proposing the transfer by Louisiana Power of all its non-electric properties to Louisiana Gas as a step in compliance with the divestment order of March 20, 1953, and expressing the intention of Louisiana Power to effect divestment of the common stock of Louisiana Gas within 18 months from the date the latter might begin operations. Thereupon, the S. E. C. issued a notice advising interested persons, including the Louisiana Public Service Commission, of the filing of the "application-declaration" mentioned, and that they might request a hearing on that proposal. By telegram of December 22, 1954, the Louisiana Commission requested the S. E. C. to grant a hearing upon that "application-declaration" and to reopen the § 11 (b)(1) proceeding which had resulted in the divestment order of March 20, 1953. On December 27, 1954, it filed with the S. E. C. a formal petition accordingly, which it supplemented on January 3, 1955. Also, at the suggestion of the S. E. C., the Louisiana Commission submitted an offer of proof and a brief in support of its petition to reopen the divestment proceeding. The offer of proof did not indicate any change in conditions since the divestment order of March 20, 1953, but, rather, complained that the evidence in that proceeding had been incomplete and that the S. E. C. had acted, in part, upon an erroneous conception of the law. The S. E. C. heard oral argument upon the Louisiana Commission's petition to reopen. Thereafter, on September 13, 1955, it found that there were "no grounds for questioning . . . [its] earlier conclusion and no changed circumstances justifying a modification" of its divestment order of March 20, 1953, and it denied the petition to reopen that proceeding.

The Louisiana Commission then filed a petition in the Court of Appeals to review the order of September 13, 1955, denying its petition to reopen, and also therein



stated that it sought review of the divestment order of March 20, 1953. The S. E. C. moved the Court of Appeals to dismiss the petition for review upon the ground that the order of September 13, 1955, was not judicially reviewable and that the petition for review was in essence an attempt to appeal from the divestment order of March 20, 1953, long after the time allowed by law to do so had expired. The Court of Appeals held that the order of September 13, 1955, was reviewable, and it set aside that order. It also held that legal determinations made by the S. E. C. in its divestment order of March 20, 1953, were erroneous, and it, in effect, set aside that order too. 235 F. 2d 167. We granted certiorari. 352 U. S. 924.

The conclusion of the Court of Appeals that the order of September 13, 1955, was subject to judicial review was rested upon the last two sentences of § 11 (b) of the Act, 49 Stat. 820, 15 U. S. C. § 79k (b), reading: "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 79x of this title." It held that the Securities and Exchange Commission's order of September 13, 1955, denying the Louisiana Commission's petition to reopen the divestment proceeding was an "order" specifically made subject to judicial review by the quoted language.

We take a different view. We hold that the orders made judicially reviewable by the quoted language are the directory orders mentioned in, and authorized by, subsection (b) of § 11 of the Act, and orders which may "revoke or modify" any such order previously made under that subsection, and that the quoted language does not include an order merely denying a petition to reopen

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§ 11 (b) proceedings. It follows that the Securities and Exchange Commission's order of September 13, 1955, denying the Louisiana Commission's petition to reopen the divestment proceeding was not an order which was subject to judicial review, and the judgment of the Court of Appeals must accordingly be reversed.

*It is so ordered.*

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

Opinion of the Court.

## ACHILLI v. UNITED STATES.

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

Nos. 430 and 834. Argued May 2, 1957.—Decided May 27, 1957.

Petitioner was indicted, convicted and sentenced under § 145 (b) of the Internal Revenue Code of 1939 for the *felony* of willfully attempting to evade federal income taxes by filing false and fraudulent returns. *Held*: Section 3616 (a) of the Internal Revenue Code of 1939, which makes it a *misdemeanor* for a person to deliver to the Collector "any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made . . ." does not apply to this offense; and the felony conviction and sentence under § 145 (b) are sustained. Pp. 373-379.

234 F. 2d 797, affirmed.

*Peter B. Atwood* argued the cause and filed a brief for petitioner.

*Assistant Attorney General Rice* argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Philip Elman, Andrew F. Oehmann* and *Joseph M. Howard*.

Briefs of *amici curiae* supporting petitioner were filed by *Peyton Ford, Alan Y. Cole* and *James C. Herndon* for Davis, and *Jacob Kossman* and *Frederick Bernays Wiener* for Binion, in Nos. 430 and 834, and *Carl J. Batter, pro se*, in No. 430.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner was charged in a three-count indictment under § 145 (b) of the Internal Revenue Code of 1939 with the felony of wilfully attempting to evade federal



income taxes by filing a false return.<sup>1</sup> Upon conviction, he was sentenced to concurrent two-year prison terms and was fined \$2,000 on each count. The Court of Appeals for the Seventh Circuit reversed the conviction on count one, but affirmed the convictions on counts two and three. 234 F. 2d 797. We granted certiorari limited to a question of general importance in the enforcement of the income tax, namely, whether petitioner could be prosecuted and sentenced under § 145 (b) for an offense claimed by him to be punishable also under § 3616 (a) of the Internal Revenue Code of 1939. 352 U. S. 1023.<sup>2</sup>

The threshold question is whether the conduct for which petitioner was convicted was an offense under

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<sup>1</sup> "SEC. 145. PENALTIES.

"(a) FAILURE TO FILE RETURNS, SUBMIT INFORMATION, OR PAY TAX.—Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

"(b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." 53 Stat. 62-63.

<sup>2</sup> By the time certiorari was granted, petitioner's sentence had been reduced by the District Court to concurrent one-year prison terms and to a fine of \$1,000 on each of the two affirmed counts. For further details of the history of the case, see 352 U. S. 916 and 353 U. S. 909.

§ 3616 (a). That section made it a misdemeanor for any person to deliver to the Collector "any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made . . ." and provided maximum penalties of one year in prison and a \$1,000 fine, together with the costs of prosecution. 53 Stat. 440. If the wilful filing of a false income tax return was not embraced by § 3616 (a), petitioner's case falls, and discussion of other issues becomes unnecessary.

Unlike § 145 (b), which appeared in the income tax chapter of the 1939 Code and was specifically and restrictively designed to punish evasion of that tax, § 3616 (a) was placed among the Code's "General Administrative Provisions" and was general in scope. Failure explicitly to exclude evasion of the income tax from the scope of § 3616 (a) is urged as ground for its inclusion, thereby making it a misdemeanor to file a false return with intent to evade the income tax, despite the specific felony provision of § 145 (b).

As long ago as 1926 it was the Government's position that the predecessor of § 145 (b) effectively repealed § 3616 (a)'s applicability to income tax evasion. See brief for the United States in *United States v. Noveck*, 273 U. S. 202, pp. 16-19. To be sure, during the last five years, the Government prosecuted a small number of minor offenses, we are told less than seven per cent of the criminal income tax evasion cases involving the filing of false returns, as misdemeanors under § 3616 (a). More recently, a series of cases brought the relation of § 145 (b) to § 3616 (a) into focus and called for an interpretative analysis of the history of these sections in order to ascertain their respective functions. And so now, for the first time, has the Government made a detailed survey of the problem of alleged overlapping between § 3616 (a) and § 145 (b).

Section 3616 (a) goes back to the Act of 1798, 1 Stat. 580, 586, when excise taxes and customs duties were the main sources of federal revenue. Being general in scope, this section, as successively re-enacted, was applicable to the first federal taxes on income, from 1861 to 1871, and again in 1894; there were no separate provisions for punishing income tax evasions. See, *e. g.*, the Act of 1861, 12 Stat. 292, 309; the Act of 1894, 28 Stat. 509, 553.

A different story begins with the income tax legislation that followed the passage of the Sixteenth Amendment. Section II of the Revenue Act of 1913, 38 Stat. 114, 166, contained its own criminal sanction. Section II (F) proscribed the making of a false return with intent to evade the income tax, an act that would otherwise have been punishable under what was then § 3179 of the Revised Statutes of 1874, the immediate predecessor of § 3616 (a). The offense would have been a misdemeanor under either statute. But § II (F) provided a maximum fine of \$2,000 while § 3179 only permitted a fine of up to \$1,000. It seems clear that § II (F) displaced § 3179. Such implied repeal, *pro tanto*, is further demonstrated by the fact that §§ 3167, 3172, 3173 and 3176 of the Revised Statutes, related provisions in the enforcement of the revenue laws, were specifically incorporated, as modified, into § II, but § 3179 was not. Nor was it incorporated by reference; § II (L) made applicable only those administrative and general tax provisions "not inconsistent with the provisions of this section," and § 3179 was obviously inconsistent with § II (F).

The Revenue Act of 1916, 39 Stat. 756, 775, and the Act of 1917, 40 Stat. 300, 325, offer further evidence that Congress withdrew the income tax from the reach of the general provisions of § 3179. Both of those Acts imposed income taxes, proscribed the making of false returns as a misdemeanor, and punished that offense more severely



than did § 3179.<sup>3</sup> In addition to its specific prohibition of false returns, the 1917 Act made it an offense to evade or attempt to evade taxes imposed by it, thereby using for the first time language similar to that subsequently found in § 145 (b).

In an effort to escape the effect of the scheme for punishing income tax evaders set forth in the 1913, 1916, and 1917 statutes, petitioner claims that the Revenue Act of 1918 made § 3179 again applicable to the income tax. Section 253 of Title II, the income tax title, provided in pertinent part:

"Any individual . . . who willfully refuses to pay or collect such [required] tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than \$10,000 or imprisoned for not more than one year, or both . . . ." 40 Stat. 1057, 1085.

Despite § 253's addition of the words "in any manner" to the "attempts" clause of the 1917 Act, petitioner contends that the failure of § 253 to single out the making of false returns with intent to evade must be attributed to a congressional determination that this particular mode of income tax evasion should be punished under § 3179. Plainly enough, such a reading of the Act is untenable. We cannot hold that the classic method of evading the income tax, the filing of a false return, did not constitute an attempt "in any manner to defeat or evade" that tax. This would empty those words of their most obvious con-

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<sup>3</sup> The 1916 Act provided the same punishment as the Act of 1913. The 1917 Act provided, in addition to the maximum penalties set forth in § 3179, a penalty of double the tax evaded.

tent and would produce glaring incongruities. It would mean that Congress, having manifested its desire in the previous revenue laws to punish this offense more harshly than did § 3179, inexplicably reversed itself in an Act that heavily increased the punishment for all other forms of obstruction to the income tax. And it would mean that Congress provided a lesser penalty for the making of false returns with intent to evade than for either wilful refusal to file, which is usually considered to be a lesser offense, or refusal to file when combined with affirmative acts of evasion such as keeping a double set of books. An explanation of the omission more in harmony with the rational system of tax administration that was the congressional design is that Congress merely tried to speak economically in 1918 and, having prohibited "attempts in any manner" to evade the income tax, found it unnecessary also to proscribe the major kind of attempt.

This interpretation gains further support from the Act of 1924, 43 Stat. 253, 343, which made the last significant alteration of the statutory scheme prior to the 1939 codification. Section 1017 (a), subsequently § 145 (a) of the Code, continued the wilful failure to make returns, supply information or pay taxes as a misdemeanor carrying a penalty of up to one year in prison and a \$10,000 fine. Section 1017 (b), the future § 145 (b), made it a felony, with a maximum penalty of five years in prison and a \$10,000 fine, to attempt "in any manner to evade or defeat any tax imposed by this Act." And § 1017 (c), later § 3793 (b)(1) of the Code, created a new offense, which made it a felony, with a maximum penalty of five years in prison and \$10,000 fine, for any person wilfully to assist in the preparation of a false return. Thus the 1924 Act, by increasing the punishment for affirmative acts of evasion, made even more pronounced one of the indicated anomalies that petitioner's view would impose. In addition, § 1017 (c) requires petitioner to impute to Congress

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a desire to punish one who assisted in preparing a false return much more severely than one who actually made the return with intent to evade.

Our duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation. In *Spies v. United States*, 317 U. S. 492, the dominant consideration in the Court's unanimous decision relating § 145 (b) to § 145 (a) was the avoidance of incongruities analogous to those that would result from petitioner's reading of the sections before us. The evolution of those sections makes clear that by the time the unconfined language of § 3179 became § 3616 (a) of the 1939 Code, its scope had been shrunk by a series of specific enactments that had the potency of implied repeals. Due regard for appropriate statutory construction calls for such a conclusion in order to harmonize an earlier, generalized statute with later *ad hoc* enactments expressly directed to the collection of income taxes.

In view of our conclusion that § 3616 (a) did not apply to evasion of the income tax, it becomes unnecessary to consider other contentions advanced by petitioner.

*Affirmed.*

THE CHIEF JUSTICE and MR. JUSTICE CLARK concur in the result.

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

I do not see how we can say that Congress withdrew the income tax from the reach of § 3616 (a). In the 1939 Internal Revenue Code that section was part of Subchapter B, "Determination of Tax Liability," which was a part of Chapter 34, "Information and Returns," which in turn was part of Subtitle D, "General Administrative Provisions." Section 61 made applicable to the income tax



provisions "All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable . . . ." These administrative provisions include the chapter and subtitle of which § 3616 (a) is a part. And by its terms § 3616 (a) applies to "any" return. Plainly then, Congress in 1939 considered § 3616 (a) an instrument for enforcing the income tax.

It takes mental gymnastics to bring this crime out from under § 3616 (a) and to place it exclusively under § 145 (b). I would not make the penal consequences of an Act turn on a construction so tenuous. I rebel against it, especially because the construction now adopted sweeps the ground out from under dozens of criminal convictions which the Government has obtained under § 3616 (a). Between October 1952 and March 1957 (when the Government first suggested to this Court that § 3616 (a) was inapplicable to the income tax), it invoked § 3616 (a) in 175 cases of alleged income tax evasion. It chose § 3616 (a), rather than § 145 (b), where it appeared that the crime was a relatively minor one. Of these 175 cases, 38 remain undisposed of. Of the 133 that went to trial, 117 resulted in pleas of guilty and 9 in pleas of *nolo contendere*. Seven defendants went to trial, of whom 5 were acquitted and 2 convicted. Of the 128 convicted persons, 26 were sentenced to imprisonment, the rest being fined or given probation or suspended sentences. Seven of the convicted persons who were sentenced are still incarcerated.

Now it appears that the Government dealt unlawfully with this group of citizens. Those who were convicted on indictments might have to be resentenced. Those who were convicted on informations must be released.

It is no answer to say that the result is "a break" for these defendants. From the statistics submitted to us by the Government it appears that many of these cases

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were so minor it is difficult to imagine a grand jury returning indictments on them.

I would adhere to the administrative construction that § 3616 (a) applied to the income tax. Congress apparently was of that view. For when it came to the Internal Revenue Code of 1954, it re-enacted § 3616 (a) as § 7207, eliminating the words "with intent to defeat or evade" which had caused the overlap with § 145 (b). Congress acted, of course, prospectively.

The fact that Congress acted in 1954 to remove the ambiguity with which we deal today indicates that what we do is not within the judicial competence.

LIBSON SHOPS, INC., *v.* KOEHLER, DISTRICT  
DIRECTOR OF INTERNAL REVENUE.

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

No. 64. Argued January 15, 1957.—Decided May 27, 1957.

Under §§ 23 (s) and 122 of the Internal Revenue Code of 1939, as amended, a corporation resulting from a merger of 17 separately incorporated businesses which had filed separate income tax returns may not carry over and deduct the pre-merger net operating losses of three of its constituent corporations from the post-merger income attributable to the other businesses. Pp. 382-390.

229 F. 2d 220, affirmed.

*Henry C. Lowenhaupt* and *Owen T. Armstrong* argued the cause for petitioner. With them on the brief was *Abraham Lowenhaupt*.

*John N. Stull* argued the cause for respondent. On the brief were *Solicitor General Rankin*, *Assistant Attorney General Rice*, *Harry Baum* and *Grant W. Wiprud*.

*Louis Eisenstein* filed a brief for the Newmarket Manufacturing Co., as *amicus curiae*, urging reversal.

MR. JUSTICE BURTON delivered the opinion of the Court.

The issue before us is whether, under §§ 23 (s) and 122 of the Internal Revenue Code of 1939, as amended, a corporation resulting from a merger of 17 separate incorporated businesses, which had filed separate income tax returns, may carry over and deduct the pre-merger net operating losses of three of its constituent corporations from the post-merger income attributable to the other businesses. We hold that such a carry-over and deduction is not permissible.

Petitioner, Libson Shops, Inc., was incorporated on January 2, 1946, under the laws of Missouri, as Libson Shops Management Corporation, to provide management



services for corporations selling women's apparel at retail. Its articles of incorporation also permitted it to sell apparel. At about the same time, the same interests incorporated 16 separate corporations to sell women's apparel at retail at separate locations. Twelve were incorporated and went into business in Missouri; four in Illinois. Each of these 16 sales corporations was operated separately and filed separate income tax returns. Petitioner's sole activity was to provide management services for them. The outstanding stock of all 17 corporations was owned, directly or indirectly, by the same individuals in the same proportions.

On August 1, 1949, the 16 sales corporations were merged into petitioner under the laws of Missouri and Illinois. New shares of petitioner's stock were issued, pro rata, in exchange for the stock of the sales corporations. By virtue of the merger agreement, petitioner's name was changed, the amount and par value of its stock revised, and its corporate purposes expanded. Following the merger, petitioner conducted the entire business as a single enterprise. Thus, the effect of the merger was to convert 16 retail businesses and one managing agency, reporting their incomes separately, into a single enterprise filing one income tax return.

Prior to the merger, three of the sales corporations showed net operating losses. These were as follows:

<i>Corporation</i>	<i>Taxable Period</i>	<i>Amount</i>
Evanston Libson Shops, Inc..	Calendar year 1948.....	\$8,115.11
	Fiscal period begun Jan. 1, 1949, and ended July 31, 1949 .....	6,422.28
Lawrence Libson Shops, Inc..	Fiscal period ended July 31, 1948.....	245.03
	Fiscal year ended July 31, 1949 .....	2,770.42
Hampton Libson Shops, Inc..	Fiscal year ended July 31, 1949 .....	4,879.92
Total .....		<u>\$22,432.76</u>

In the year following the merger, each of the retail units formerly operated by these three corporations continued to sustain a net operating loss.

In its income tax return for the first year after the merger, petitioner claimed a deduction of the above \$22,432.76 as a carry-over of its pre-merger losses. Petitioner sought this deduction under §§ 23 (s) and 122 of the Internal Revenue Code of 1939, as amended. The Commissioner of Internal Revenue disallowed it and petitioner paid the resulting tax deficiency. In due course petitioner brought this suit for a refund in the United States District Court for the Eastern District of Missouri. That court dismissed petitioner's complaint and the Court of Appeals affirmed. 229 F. 2d 220. We granted certiorari to decide the questions of tax law involved. 351 U. S. 961.

Section 23 (s) authorizes a "net operating loss deduction computed under section 122."<sup>1</sup> Section 122 prescribes three basic rules for this calculation. Its pertinent parts provide generally (1) that a "net operating loss" is the excess of the taxpayer's deductions over its gross income (§ 122 (a)); (2) that, if the taxpayer has a net operating loss, the loss may be used as a "net operating loss carry-back" to the two prior years (§ 122 (b)(1)(A)) and, if not exhausted by that carry-back, the remainder may be used as a "net operating loss carry-over" to the three succeeding years (§ 122 (b)(2)(C)); and (3) that

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<sup>1</sup> As originally added to the 1939 Code by the Revenue Act of 1939, c. 247, 53 Stat. 862, 867-868, § 122 provided for the computation and carry-over of net operating losses without expressly relating them to a given taxpayer. Section 153 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 847-848, amended § 122 (b) not only to allow carry-backs for the first time, but also to provide, as to both carry-backs and carry-overs, that it was only the net operating losses of "the taxpayer" which could be so utilized.

the aggregate of the net operating loss carry-backs and carry-overs applicable to a given taxable year is the "net operating loss deduction" for the purposes of § 23 (s) (§ 122 (c)).

We are concerned here with a claim to carry over an operating loss to the immediately succeeding taxable year. The particular provision on which petitioner's case rests is as follows:

"If for any taxable year beginning after December 31, 1947, and before January 1, 1950, *the taxpayer* has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the three succeeding taxable years . . . ." (Emphasis supplied.) § 122 (b)(2)(C), 64 Stat. 937, 938, 65 Stat. 505, 26 U. S. C. § 122 (b)(2)(C).

The controversy centers on the meaning of "the taxpayer."<sup>2</sup> The contentions of the parties require us to decide whether it can be said that petitioner, a combination of 16 sales businesses, is "the taxpayer" having the pre-merger losses of three of those businesses.

In support of its denial of the carry-over, the Government argues that this statutory privilege is not available unless the corporation claiming it is the same taxable entity as that which sustained the loss. In reliance on *New Colonial Co. v. Helvering*, 292 U. S. 435, and cases following it,<sup>3</sup> the Government argues that sepa-

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<sup>2</sup> These words have been omitted from the new provisions of the Internal Revenue Code of 1954 relating to carry-backs and carry-overs after corporate acquisitions of assets of another corporation. See §§ 381, 382.

<sup>3</sup> *E. g.*, *Standard Paving Co. v. Commissioner*, 190 F. 2d 330; *Weber Flour Mills Co. v. Commissioner*, 82 F. 2d 764; *Pennsylvania Co. v. Commissioner*, 75 F. 2d 719; *Shreveport Producing & Refining Co. v. Commissioner*, 71 F. 2d 972; *Brandon Corp. v. Commissioner*, 71 F. 2d 762.



rately chartered corporations are not the same taxable entity. Petitioner, on the other hand, relying on *Helvering v. Metropolitan Edison Co.*, 306 U. S. 522, and cases following it,<sup>4</sup> argues that a corporation resulting from a statutory merger is treated as the same taxable entity as its constituents to whose legal attributes it has succeeded by operation of state law. However, we find it unnecessary to discuss this issue since an alternative argument made by the Government is dispositive of this case. The Government contends that the carry-over privilege is not available unless there is a continuity of business enterprise. It argues that the prior year's loss can be offset against the current year's income only to the extent that this income is derived from the operation of substantially the same business which produced the loss. Only to that extent is the same "taxpayer" involved.

The requirement of a continuity of business enterprise as applied to this case is in accord with the legislative history of the carry-over and carry-back provisions. Those provisions were enacted to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year.<sup>5</sup> There is, however, no indication in their legislative history that these provi-

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<sup>4</sup> *E. g.*, *Newmarket Manufacturing Co. v. United States*, 233 F. 2d 493; *E. & J. Gallo Winery v. Commissioner*, 227 F. 2d 699; *Stanton Brewery, Inc. v. Commissioner*, 176 F. 2d 573; *Koppers Co. v. United States*, 133 Ct. Cl. 22, 134 F. Supp. 290.

<sup>5</sup> See *Lewyt Corp. v. Commissioner*, 349 U. S. 237, 243-244 (dissenting opinion); *Manning v. Seeley Tube & Box Co.*, 338 U. S. 561, 566-567; *Stanton Brewery, Inc. v. Commissioner*, 176 F. 2d 573, 574; H. R. Rep. No. 855, 76th Cong., 1st Sess. 9-10; S. Rep. No. 1631, 77th Cong., 2d Sess. 51-52.

sions were designed to permit the averaging of the pre-merger losses of one business with the post-merger income of some other business which had been operated and taxed separately before the merger. What history there is suggests that Congress primarily was concerned with the fluctuating income of a single business.<sup>6</sup>

This distinction is recognized by the very cases on which petitioner relies. In *Stanton Brewery, Inc. v. Commissioner*, 176 F. 2d 573, 577, the Court of Appeals stressed the fact that the merging corporations there involved carried on "essentially a *continuing enterprise*, entitled to all . . . benefits [of the carry-over provisions] in ameliorating otherwise harsh tax consequences of fluctuating profits or expanding business." (Emphasis supplied.) And in *Newmarket Manufacturing Co. v. United States*, 233 F. 2d 493, 497, the court expressly distinguished the case before it from the instant case on the ground that there "one single business" was involved

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<sup>6</sup> The House Committee on Ways and Means, reporting on § 122 as it was originally added to the 1939 Code by the Revenue Act of 1939, c. 247, 53 Stat. 862, 867-868, stated that—

"The bill, together with the committee amendments, permits taxpayers to carry over net operating business losses for a period of 2 years. Prior to the Revenue Act of 1932, such 2-year carry-over was allowed. No net loss has ever been allowed for a greater period than 2 years. In the Revenue Act of 1932, the 2-year net loss carry-over was reduced to 1 year and in the National Industrial Recovery Act the net loss carry-over was entirely eliminated. As a result of the elimination of this carry-over, a *business* with alternating profit and loss is required to pay higher taxes over a period of years than a *business* with stable profits, although the average income of the two firms is equal. New enterprises and the capital-goods industries are especially subject to wide fluctuations in earnings. It is, therefore, believed that the allowance of a net operating business loss carry-over will greatly aid business and stimulate new enterprises." (Emphasis supplied.) H. R. Rep. No. 855, 76th Cong., 1st Sess. 9.

in the merger, while in this case there were "several businesses."<sup>7</sup>

This difference is not merely a matter of form. In the *Newmarket* case, *supra*, a corporation desiring to change the state of its domicile caused the organization of a new corporation and merged into it. The new corporation sought to carry back its post-merger losses to the pre-merger income of the old corporation. But for the merger, the old corporation itself would have been entitled to a carry-back. In the present case, the 16 sales corporations, prior to the merger, chose to file separate income tax returns rather than to pool their income and losses by filing a consolidated return. Petitioner is attempting to carry over the pre-merger losses of three business units which continued to have losses after the merger. Had there been no merger, these businesses would have had no opportunity to carry over their losses. If petitioner is permitted to take a carry-over, the 16 sales businesses have acquired by merger an opportunity that they elected to forego when they chose not to file a consolidated return.

We do not imply that a question of tax evasion or avoidance is involved. Section 129 (a) of the 1939 Code, as amended, does contain provisions which may vitiate

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<sup>7</sup> *Koppers Co. v. United States*, 133 Ct. Cl. 22, 134 F. Supp. 290, also involves a situation in which the corporation resulting from the merger carried on essentially the same taxable enterprise as before, since the merged corporations had been filing consolidated tax returns. *E. & J. Gallo Winery v. Commissioner*, 227 F. 2d 699, is inconclusive on this point since the opinion does not disclose whether or not a continuing enterprise was involved. Cf. § 382 (a) of the Internal Revenue Code of 1954 relating to the purchase of a corporation and change in its trade or business. Under circumstances there defined, that section precludes a carry-over by the same corporation, unless it continues to engage in "substantially the same" trade or business as before the change in ownership. § 382 (a) (1) (C).



a tax deduction that was made possible by the acquisition of corporate property for the "principal purpose" of tax evasion or avoidance.<sup>8</sup> And that section is inapplicable here since there was no finding that tax evasion or avoidance was the "principal purpose" of the merger. The fact that § 129 (a) is inapplicable does not mean that petitioner is automatically entitled to a carry-over. The availability of this privilege depends on the proper interpretation to be given to the carry-over provisions. We find nothing in those provisions which suggests that they should be construed to give a "windfall" to a taxpayer who happens to have merged with other corporations. The purpose of these provisions is not to give a merged

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<sup>8</sup> The Revenue Act of 1943, c. 63, 58 Stat. 21, 47, by § 128, added to the 1939 Code the following section:

"SEC. 129. ACQUISITIONS MADE TO EVADE OR AVOID INCOME OR EXCESS PROFITS TAX.

"(a) DISALLOWANCE OF DEDUCTION, CREDIT, OR ALLOWANCE.—If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clauses (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation."

See H. R. Rep. No. 871, 78th Cong., 1st Sess. 24, 49-50; S. Rep. No. 627, 78th Cong., 1st Sess. 26-27, 58-61.

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taxpayer a tax advantage over others who have not merged. We conclude that petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses.<sup>9</sup>

The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE DOUGLAS dissents.

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

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<sup>9</sup> We do not pass on situations like those presented in *Northway Securities Co. v. Commissioner*, 23 B. T. A. 532; *Alprosa Watch Corp. v. Commissioner*, 11 T. C. 240; *A. B. & Container Corp. v. Commissioner*, 14 T. C. 842; *W A G E, Inc. v. Commissioner*, 19 T. C. 249. In these cases a single corporate taxpayer changed the character of its business and the taxable income of one of its enterprises was reduced by the deductions or credits of another.

## Syllabus.

## GRUNEWALD v. UNITED STATES.

NO. 183. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.\*

Argued April 3-4, 1957.—Decided May 27, 1957.

1. The three petitioners were convicted in a federal district court of violating 18 U. S. C. § 371 by conspiring to defraud the United States by preventing the criminal prosecution of certain taxpayers for fraudulent tax evasion. They had succeeded in obtaining "no prosecution" rulings from the Bureau of Internal Revenue in 1948 and 1949, and their subsequent activities were directed at concealing the irregularities through which these rulings were obtained. They were not indicted until October 25, 1954. *Held*: If the main objective of the conspiracy was to obtain the "no prosecution" rulings, petitioners' prosecution was barred by the three-year statute of limitations, since no agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the record in this case to have been a part of the conspiracy. Pp. 399-406.

(a) After the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal the crime may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. *Krulewitch v. United States*, 336 U. S. 440; *Lutwak v. United States*, 344 U. S. 604. Pp. 399-402.

(b) On the record in this case, nothing more is shown than (1) a criminal conspiracy carried out in secrecy, (2) a continuation of the secrecy after accomplishment of the crime, and (3) attempts to cover up after the crime began to come to light. Pp. 402-404.

(c) The duration of a conspiracy cannot be lengthened indefinitely for the purpose of the statute of limitations merely because the conspiracy is kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished. Pp. 399, 404-405.

2. The judge's charge to the jury was not adequate to justify petitioners' conviction on the theory that the main objective of the conspiracy was not merely to obtain the initial "no prosecution"

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\*Together with No. 184, *Halperin v. United States*, and No. 186, *Bolich v. United States*, also on certiorari to the same court.



rulings but to obtain *final immunity* of the taxpayers from criminal prosecution by preventing their prosecution until after expiration of the six-year statute of limitations applicable to their tax-evasion offenses, which did not expire until less than three years before petitioners were indicted for conspiracy—since the judge's charge left it open for the jury to convict even though it found merely (1) that the central aim of the conspiracy was accomplished in 1949, and (2) that the subsequent acts of concealment were motivated exclusively by petitioners' fear of a conspiracy prosecution. Pp. 406–415.

3. Petitioner Halperin was also convicted on other counts of the indictment charging him with violating 18 U. S. C. § 1503 by endeavoring corruptly to influence certain witnesses before a grand jury which was investigating matters involved in the conspiracy. At his trial, he answered certain questions in a manner consistent with innocence and then, over his objection, was subjected to cross-examination which revealed that he had refused to answer the same questions, on grounds of possible self-incrimination, while he was appearing before a grand jury, under subpoena, without benefit of counsel, without the right to summon witnesses and without any opportunity to cross-examine witnesses testifying against him. *Held*: In the circumstances of this case, it was prejudicial error for the trial judge to permit cross-examination of Halperin on his plea of the Fifth Amendment privilege before the grand jury. *Raffel v. United States*, 271 U. S. 494, distinguished. Pp. 415–424.

233 F. 2d 556, reversed and remanded.

*Edward J. Bennett* argued the cause for petitioner in No. 183. With him on the brief was *Harold H. Corbin*.

*Henry G. Singer* argued the cause for petitioner in No. 184. With him on the brief was *Harry Silver*.

*Rudolph Stand* argued the cause for petitioner in No. 186. With him on the brief was *Frank Aranow*.

*John F. Davis* 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 HARLAN delivered the opinion of the Court.

The three petitioners were convicted on Count 1 of an indictment brought under 18 U. S. C. § 371<sup>1</sup> for conspiracy to defraud the United States with reference to certain tax matters. Petitioner Halperin was also convicted on Counts 5, 6, and 7 of the same indictment, charging him with violating 18 U. S. C. § 1503<sup>2</sup> by endeavoring corruptly to influence certain witnesses before a grand jury which was investigating matters involved in the conspiracy charged in Count 1 of the indictment. Each petitioner was sentenced to five years' imprisonment and fined under Count 1. On each of Counts 5, 6, and 7, Halperin was sentenced to two years' imprisonment and a fine of \$1,000, the prison sentences on these Counts and that on Count 1 to run concurrently. The Court of Appeals for the Second Circuit affirmed, with the late Judge Frank dissenting. 233 F. 2d 556. We granted certiorari, 352 U. S. 866, in order to resolve important questions relating to (a) the statute of limitations in conspiracy

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<sup>1</sup> This section provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

<sup>2</sup> 18 U. S. C. § 1503 provides, in relevant part: "Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." Grunewald and Bolich were acquitted on these Counts.

prosecutions, as to which the decision below was alleged to be in conflict with this Court's decisions in *Krulewitch v. United States*, 336 U. S. 440, and *Lutwak v. United States*, 344 U. S. 604; and (b) the use on Halperin's cross-examination of his prior claim of the Fifth Amendment's privilege against self-incrimination before a grand jury. For the reasons discussed hereafter, we conclude that these convictions must be reversed, and the petitioners granted a new trial.

On October 25, 1954, a grand jury returned an indictment, Count 1 of which charged petitioners and others with conspiring among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption . . . ." The indictment further charged that a part of the conspiracy was an agreement to conceal the acts of the conspirators.<sup>3</sup> Overt acts within three years of the date of the indictment were charged. Counts 5, 6, and 7 of the indictment charged petitioners with violating 18 U. S. C. § 1503 in the manner already indicated.

The proofs at the trial presented a sordid picture of a ring engaged in the business of "fixing" tax fraud cases

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<sup>3</sup> Paragraph 7 of the indictment alleged: "It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body . . . of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, [etc.] . . . ."

Paragraph 13 alleged: "It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy."



by the use of bribes and improper influence. In general outline, the petitioners' scheme, which is set forth in more detail in the Court of Appeals' opinion,<sup>4</sup> was as follows:

In 1947 and 1948 two New York business firms, Patullo Modes and Gotham Beef Co., were under investigation by the Bureau of Internal Revenue for suspected fraudulent tax evasion. Through intermediaries, both firms established contact with Halperin, a New York attorney, and his associates in law practice. Halperin in turn conducted negotiations on behalf of these firms with Grunewald, an "influential" friend in Washington, and reported that Grunewald, for a large cash fee, would undertake to prevent criminal prosecution of the taxpayers. Grunewald then used his influence with Bolich, an official in the Bureau, to obtain "no prosecution" rulings<sup>5</sup> in the two tax cases. These rulings were handed down in 1948 and 1949. Grunewald, through Halperin, was subsequently paid \$60,000 by Gotham and \$100,000 by Patullo.<sup>6</sup>

Subsequent activities of the conspirators were directed at concealing the irregularities in the disposition of the Patullo and Gotham cases. Bolich attempted to have the Bureau of Internal Revenue report on the Patullo case "doctored," and careful steps were taken to cover up the traces of the cash fees paid to Grunewald. In 1951 a congressional investigation was started by the King Committee of the House of Representatives; the conspirators felt themselves threatened and took steps to hide their traces. Thus Bolich caused the disappearance

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<sup>4</sup> 233 F. 2d, at 559-562.

<sup>5</sup> A "no prosecution" ruling is an internal decision by the investigative branch of the Bureau of Internal Revenue not to press criminal charges against a taxpayer.

<sup>6</sup> The payments were made in cash. In order to raise the money and leave no traces, the taxpayers made unrecorded sales, the profits of which were again unreported income. Further large fees were paid to Halperin and his associates.

of certain records linking him to Grunewald, and the taxpayers were repeatedly warned to keep quiet. In 1952 the taxpayers and the conspirators were called before a Brooklyn grand jury. Halperin attempted to induce the taxpayers not to reveal the conspiracy, and Grunewald asked his secretary not to talk to the grand jury. These attempts at concealment were, however, in vain. The taxpayers and some of Halperin's associates revealed the entire scheme, and petitioners' indictment and conviction followed.<sup>7</sup>

The first question before us is whether the prosecution of these petitioners on Count 1 of the indictment was barred by the applicable three-year statute of limitations.<sup>8</sup>

The indictment in these cases was returned on October 25, 1954. It was therefore incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date.<sup>9</sup> For where substantiation of a conspiracy charge

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<sup>7</sup> Petitioner Bolich was also convicted on Count 2 of the indictment, which charged him and two other Bureau of Internal Revenue employees with conspiracy in violation of 26 U. S. C. § 4047 (e) (4). He was sentenced to three years' imprisonment and a \$5,000 fine on this Count, the prison sentence to run concurrently with the five-year sentence on Count 1. The Court of Appeals held that both Counts related to the same conspiracy, and set aside the separate fine on Count 2.

<sup>8</sup> The governing statute was 18 U. S. C. § 3282, which provided: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within three years next after such offense shall have been committed."

<sup>9</sup> On September 1, 1954, the statute of limitations was amended to provide for a five-year limitation period. 68 Stat. 1145, 18 U. S. C. (Supp. III) § 3282. Since the amending statute was by its terms made applicable to offenses not barred on its effective date, that is,

requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period. Hence, in both of these aspects, the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.<sup>10</sup>

Petitioners, in contending that this prosecution was barred by limitations, state that the object of the conspiratorial agreement was a narrow one: to obtain "no prosecution" rulings in the two tax cases. When these rulings were obtained, in October 1948 in the case of Gotham Beef, and in January 1949 in the case of Patullo Modes, the criminal object of the conspiracy, petitioners say, was attained and the conspirators' function ended. They argue, therefore, that the statute of limitations started running no later than January 1949, and that the

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September 1, 1954, it would seem that in fact the crucial date here is September 1, 1951, rather than October 25; in other words, if the conspiracy was still alive after September 1, it was not barred. However, the case was tried on the theory that October 25 was the crucial date, and we so treat it in this opinion. The error, of course, was favorable to the petitioners and was therefore harmless. On the other hand, since we hold that petitioners must have a new trial, the error may be corrected.

<sup>10</sup> See, in general, *Lutwak v. United States*, 344 U. S. 604; *Krulewitch v. United States*, 336 U. S. 440; *Bollenbach v. United States*, 326 U. S. 607; *McDonald v. United States*, 89 F. 2d 128; *United States v. Manton*, 107 F. 2d 834; Cousens, Agreement as an Element in Conspiracy, 23 Va. L. Rev. 898; Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393; Note, 62 Harv. L. Rev. 276; Note, 56 Col. L. Rev. 1216.



prosecution was therefore barred by 1954, when the indictment was returned.<sup>11</sup>

The Government counters with two principal contentions: First, it urges that even if the main object of the conspiracy was to obtain decisions from the Bureau of Internal Revenue not to institute criminal tax prosecutions—decisions obtained in 1948 and 1949—the indictment alleged,<sup>12</sup> and the proofs showed, that the conspiracy also included as a subsidiary element an agreement to conceal the conspiracy to “fix” these tax cases, to the end that the conspirators would escape detection and punishment for their crime. Says the Government, “from the very nature of the conspiracy . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . each and every aspect of the conspiracy . . . .” It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal were performed well within the indictment period, the prosecution was timely.

Second, and alternatively, the Government contends that the central aim of the conspiracy was to obtain

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<sup>11</sup> In support of this theory, petitioners point to evidence showing that the administrative practice of the Bureau of Internal Revenue was that only recommendations to prosecute would be reviewed at a higher echelon, whereas a determination of no prosecution would, for all practical purposes, end the case. They also emphasize that payment to Grunewald was made under the terms of an escrow which released the money when the “no prosecution” rulings came down.

Petitioners further urge that the acts of concealment occurring after 1949 show at most that a new and separate agreement to conceal was entered into after 1949, an agreement which was not charged in the indictment. Cf. *United States v. Siebright*, 59 F. 2d 976. In view of our disposition of the case, we need not deal with this contention.

<sup>12</sup> See n. 3, *supra*.

for these taxpayers, not merely a "no prosecution" ruling, but absolute immunity from tax prosecution; in other words, that the objectives of the conspiracy were not attained until 1952, when the statute of limitations ran on the tax cases which these petitioners undertook to "fix." The argument then is that since the conspiracy did not end until 1952, and since the 1949-1952 acts of concealment may be regarded as, at least in part, in furtherance of the objective of the conspirators to immunize the taxpayers from tax prosecution, the indictment was timely.

For reasons hereafter given, we hold that the Government's first contention must be rejected, and that as to its second, which the Court of Appeals accepted, a new trial must be ordered.

### I.

We think that the Government's first theory—that an agreement to conceal a conspiracy can, on facts such as these, be deemed part of the conspiracy and can extend its duration for the purposes of the statute of limitations—has already been rejected by this Court in *Krulewitch v. United States*, 336 U. S. 440, and in *Lutwak v. United States*, 344 U. S. 604.

In *Krulewitch* the question before the Court was whether certain hearsay declarations could be introduced against one of the conspirators. The declarations in question were made by one named in the indictment as a co-conspirator after the main object of the conspiracy (transporting a woman to Florida for immoral purposes) had been accomplished. The Government argued that the conspiracy was not ended, however, since it included an implied subsidiary conspiracy to conceal the crime after its commission, and that the declarations were therefore still in furtherance of the conspiracy and binding on

co-conspirators. This Court rejected the Government's argument. It then stated:

"Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment. Thus the [Government's] argument is that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective.

"We cannot accept the Government's contention. . . . The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence."<sup>13</sup>

Mr. Justice Jackson, concurring, added:

"I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. . . .

"It is difficult to see any logical limit to the 'implied conspiracy,' either as to duration or means . . . . On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by

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<sup>13</sup> 336 U. S., at 443-444.



another's unauthorized and unknown commission of perjury, bribery of a juror or witness, [etc.] . . . .

"Moreover, the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue."<sup>14</sup>

The *Krulewitch* case was reaffirmed in *Lutwak v. United States, supra*. Here again the question was the admissibility of hearsay declarations of co-conspirators after the main purpose of the conspiracy had been accomplished; again the Government attempted to extend the life of the conspiracy by an alleged subsidiary conspiracy to conceal. Although in *Lutwak*, unlike in *Krulewitch*, the existence of a subsidiary conspiracy to conceal was charged in the indictment, the Court again rejected the Government's theory, holding that no such agreement to conceal had been proved or could be implied.

The Government urges us to distinguish *Krulewitch* and *Lutwak* on the ground that in those cases the attempt was to *imply* a conspiracy to conceal from the mere fact that the main conspiracy was kept secret and that overt acts of concealment occurred. In contrast, says the Government, here there was an *actual* agreement to conceal the conspirators, which was charged and proved to be an express part of the initial conspiracy itself.

We are unable to agree with the Government that, on this record, the cases before us can be distinguished on such a basis.

The crucial teaching of *Krulewitch* and *Lutwak* is that after the central criminal purposes of a conspiracy have

<sup>14</sup> *Id.*, at 455-456.

been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

A reading of the record before us reveals that on the facts of this case the distinction between "actual" and "implied" conspiracies to conceal, as urged upon us by the Government, is no more than a verbal tour de force. True, in both *Krulewitch* and *Lutwak* there is language in the opinions stressing the fact that only an *implied* agreement to conceal was relied on.<sup>15</sup> Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an "actual" agreement to conceal reveals nothing beyond that adduced in prior cases. What is this evidence?

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<sup>15</sup> See 336 U. S., at 444, 455-458; 344 U. S., at 616.

First, we have the fact that from the beginning the conspirators insisted on secrecy. Thus the identities of Grunewald and Bolich were sedulously kept from the taxpayers; careful steps were taken to hide the conspiracy from an independent law firm which was also working on Patullo's tax problems; and the taxpayers were told to make sure that their books did not reflect the large cash payments made to Grunewald. Secondly, after the "no prosecution" rulings were obtained, we have facts showing that this secrecy was still maintained. Thus, a deliberate attempt was made to make the above-mentioned independent law firm believe that it was *its* (quite legitimate) efforts which produced the successful ruling. Finally, we have the fact that great efforts were made to conceal the conspiracy when the danger of exposure appeared. For example, Bolich got rid of certain records showing that he had used Grunewald's hotel suite in Washington; Patullo's accountant was persuaded to lie to the grand jury concerning a check made out to an associate of the conspirators; Grunewald attempted to persuade his secretary not to talk to the grand jury; and the taxpayers were repeatedly told by Halperin and his associates to keep quiet.

We find in all this nothing more than what was involved in *Krulewitch*, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions.

In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In *Krulewitch* it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to



conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an "actual" agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment.<sup>16</sup> There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.

Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.<sup>17</sup> The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch v. United States*, *supra*. It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government,

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<sup>16</sup> One might cite as an example Grunewald's attempt at influencing his secretary not to talk to the grand jury, accompanied by an offer to "pay her expenses." Under the Government's *Krulewitch* theory, the argument would have been (in Mr. Justice Jackson's words) that the "law will impute to the confederates a continuing conspiracy to defeat justice," and that therefore the other confederates are "bound by another's unauthorized and unknown . . . bribery of a juror or witness." But no different result is achieved by saying that the attempted bribe of the witness is evidence from which one can infer an "actual" conspiracy to "defeat justice." In both cases the essential missing element is a showing that the act was done in furtherance of a prior criminal agreement among the conspirators.

<sup>17</sup> *Delli Paoli v. United States*, 352 U. S. 232; *Lutwak v. United States*, *supra*; *Krulewitch v. United States*, *supra*; *Bollenbach v. United States*, 326 U. S. 607.

faced by the bar of the three-year statute, is attempting to open the very floodgates against which *Krulewitch* warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. Thus the Government argues in its brief that "in the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So here, there can be no doubt that . . . all acts of concealment, whether to hide the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy . . . ." We do not think the analogy is valid. Kidnapers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment.<sup>18</sup> More closely analogous to our case would be conspiring kidnapers who cover their traces after the main conspiracy is finally ended—*i. e.*, after they have abandoned the kidnaped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by

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<sup>18</sup> See *Rettich v. United States*, 84 F. 2d 118; *McDonald v. United States*, 89 F. 2d 128.

themselves indicate nothing more than that the conspirators do not wish to be apprehended—a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord.

We hold, therefore, that, considering the main objective of the conspiracy to have been the obtaining of “no prosecution” rulings, prosecution was barred by the three-year statute of limitations, since no agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the evidence before us to have been part of the conspiratorial agreement.

## II.

In view of how the case was submitted to the jury, we are also unable to accept the Government’s second theory for avoiding the statute of limitations. This theory is (1) that the main objective of the conspiracy was not merely to obtain the initial “no prosecution” rulings in 1948 and 1949, but to obtain *final immunity* for Gotham and Patullo from criminal tax prosecution; (2) that such immunity was not obtained until 1952, when the statute of limitations had run on the tax-evasion cases which the petitioners conspired to fix;<sup>19</sup> (3) that the conspiracy therefore did not end until 1952, when this object was attained; (4) that the acts of concealment within the indictment period were overt acts in furtherance of this conspiracy; and (5) that the prosecution was thus timely.<sup>20</sup> In short, the contention is that the agreement

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<sup>19</sup> The tax evasion cases were governed by a six-year statute of limitations, 26 U. S. C. (1940 ed.) § 3748, which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers.

<sup>20</sup> The Government also suggests a further theory under which this conspiracy could be deemed to have lasted into the indictment period. Under this theory, the central aim of the conspiracy was not specifically to “fix” the tax troubles of Gotham and Patullo, but to engage in the continuing business of fixing any and all tax-fraud



to conceal was to protect the *taxpayers* rather than the *conspirators*, and as such was part of the main conspiracy rather than a subsidiary appendage to it, as under the Government's first theory.

The Court of Appeals accepted this theory of the case in affirming these convictions. It stated:

"What the fixers had to sell was freedom from criminal prosecution for tax frauds. What the taxpayers bargained for was protection from a tax evasion prosecution.

"This conspiracy is wholly unlike the ordinary illegal scheme in that the jury may well have inferred that the official announcement that there would be no criminal prosecution of the taxpayers

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cases. If this were the aim of the conspiracy, acts of concealment could have been in furtherance of this aim by enabling the ring to stay in business so that it could get new cases. Evidence supporting this theory, says the Government, is that in 1950, after the "no prosecution" rulings in the Patullo and Gotham cases, Halperin engaged in negotiations with another firm which was in tax difficulties. Although these negotiations came to nothing, due to disagreement about the fee to be paid to the conspirators, the incident is presented as evidence that the conspirators were actively soliciting future tax clients in 1950 and were thus still "in business."

We cannot accept this theory of the Government. The trouble is not only that the theory was never submitted to the jury, but that no overt act done to further the purpose of engaging in "new" business was charged or proved to have occurred after October 25, 1951. If one of the purposes of the conspiracy was to engage in the business of fixing tax cases generally, it must be deemed to have been abandoned in 1951, when investigations of the petitioners started in Congress, since the 1951 and 1952 activities of the conspirators consisted merely of covering up old ventures rather than seeking new ones, and since there is no indication that there was an intent to resume operations after the investigations had ended. Indeed, upon the oral argument the Government seemed to abandon this theory.

was merely the delivery of a substantial installment of what appellants agreed to deliver for the huge sums paid. The six-year Statute of Limitations . . . did not run in favor of the taxpayers until some time after the commission of the overt acts relied upon. In the interval there was no assurance, other than continuing efforts by Grunewald, Bolich and the others, that the whole nefarious business might not be brought to light, followed by the revocation of the decision not to criminally prosecute the taxpayers. This is a significant element in the proofs adduced by the government, as concealment of the conspiratorial acts was necessary not only to protect the conspirators from a conspiracy prosecution but also to protect the taxpayers from a tax evasion prosecution." 233 F. 2d, at 564-565.

We find the legal theory of the Court of Appeals unexceptionable. If the central objective of the conspiracy was to protect the taxpayers from tax-evasion prosecutions, on which the statute of limitations did not run until 1952, and if the 1948 and 1949 "no prosecution" rulings were but an "installment" of what the conspirators aimed to accomplish, then it is clear that the statute of limitations on the conspiracy did not begin to run until 1952, within three years of the indictment.<sup>21</sup>

Furthermore, we agree with the Court of Appeals that there is evidence in this record which would warrant submission of the case to the jury on the theory that the central object of the conspiracy was not attained in 1948 and 1949, but rather was to immunize the taxpayers completely from prosecution for tax evasion and thus continued into 1952. The many overt acts of concealment occurring after 1949 could easily have been motivated at

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<sup>21</sup> The indictment was clearly sufficient to cover submission of this theory to the jury. See n. 3, *supra*.

least in part by the purpose of the conspirators to deliver the remaining "installments" owing under the bargain—to wit, the safeguarding of the continued vitality of the "no prosecution" rulings.<sup>22</sup> Furthermore, there is evidence showing that from the beginning the aim of the scheme was not restricted to the merely provisional and necessarily precarious "fixing" of the taxpayers' troubles which was achieved in 1948 and 1949.<sup>23</sup> A jury might therefore

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<sup>22</sup> One might cite as a typical example an incident in the record occurring in November 1949, 10 months after the "no prosecution" ruling was handed down in the Patullo case. The Special Agent who had been working on the case wrote a final report on it, which stated that Patullo was not prosecuted solely because of Bolich's decision. This report was sent to Bolich, who thereupon called the Chief of the Conference Section and asked him to write an explanatory memorandum on the case so as to "take a little heat off the situation." This attempt to "doctor" the report might easily have been motivated not only by fear for himself, but by a purpose to safeguard the "no prosecution" ruling from change in order to maintain the immunity of the taxpayers.

<sup>23</sup> The negotiations between Halperin and his associates and the taxpayers were never very specific as to what exactly was to be accomplished. The tenor of the discussions was that if the taxpayers would hire the mysterious "influential" man in Washington, the matter "would be ended," the "prosecution end of the case" would be avoided, the matter would be settled "in a civil way without criminal prosecution." In the same tenor, the accountant of Gotham Beef testified that "nothing at all was to be paid unless the criminal prosecution had been eliminated. It was further understood that they were not at all concerned with the amount of the tax that might result by way of assessment, but it was either that they were completely successful in eliminating criminal prosecution . . . or there would be no fee at all." In other words, there is little indication that it was the specific and narrow end of obtaining the "no prosecution" rulings which was to be the *quid pro quo*.

This is further buttressed by the fact that the taxpayers were well aware of the precarious nature of the 1948 and 1949 rulings; it is quite clear that they realized that this did not "end" the danger of criminal prosecution. Thus the Patullo taxpayers were aware that the continued investigation of their books for the purposes of civil



fairly infer that it was part of the conspiratorial agreement that Grunewald and Bolich would make continuing efforts to safeguard the fruits of the partial victories won in 1948 and 1949 by trying to immunize the "no prosecution" rulings from change. In other words, we think a jury could infer from this evidence that the conspirators were prepared and had agreed to engage in further frauds and bribery if necessary in order to maintain in effect the tentative rulings obtained in 1948 and 1949.<sup>24</sup>

tax liability exposed them to constant danger of "tipping the apple-cart." They were warned to "keep their mouths shut," and a further payment of \$25,000 was made for the "boys in New York" so that no one would "raise a fuss about the phony deal that had been put through." Another Patullo officer testified that, after the "no prosecution" ruling, "we still were not at ease about the thing. We knew that we were elated over the results, but we still were worried about it. There was cooperation to take care of. We had to make this payoff for the New York boys. We were not through with it at that time. We never knew when something else was going to come up. We weren't through at all. . . . For two years after that we still weren't through with the thing." And, referring to the payment for the "New York boys" in 1949: "[W]e never felt too sure about anything because the civil settlement still had to be made and we knew there were people that had to go through it and pass on it and everything, and while this was going on we were told that we would have to get up some more money."

A jury could thus easily infer that the conspirators' function did not end in January 1949, and that the conspiratorial agreement contemplated further efforts to immunize the taxpayers from tax prosecution.

<sup>24</sup> It should be mentioned that the Court of Appeals was unanimous in finding that there was sufficient evidence in the record to warrant the submission of the case to the jury on the theory that the central objectives of the conspiracy were not achieved until the statute of limitations ran on the tax-evasion charges. Judge Frank, while dissenting on the ground that the charge to the jury was inadequate in putting the case to the jury on this basis—a view which we share, see *infra*, p. 413—agreed that under a proper charge the jury might infer that the conspiracy was still alive through 1951. See 233 F. 2d, at 592-596.

If, therefore, the jury could have found that the aim of the conspiratorial agreement was to protect the taxpayers from tax prosecution, and that the overt acts occurring in the indictment period were in furtherance of that aim, we would affirm. We do not think, however, that we may safely assume that the jury so found, for we cannot agree with the Court of Appeals' holding that this theory of the case was adequately submitted to the jury.

The trial judge's charge on the problem of the scope and duration of the conspiracy was as follows:

"You will recall that the indictment states, among other things, that it was part of the conspiracy that the defendants and co-conspirators would make 'continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative, and judicial of tax frauds perpetrated by the defendants and co-conspirators through the use of any means whatsoever including but not limited to . . . the influencing, intimidating, and impeding of prospective witnesses to refrain from disclosing the true facts.' In other words, the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate. This is an important element of the first count of the indictment which you must take into consideration, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954, and some overt act was performed within that three-year period, the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the

taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Congress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment. On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy was of the nature described in the first count of the indictment and comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy.

. . . . .

"To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo [*sic*] Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that



such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One."

We are constrained to agree with Judge Frank that this charge did not adequately enlighten the jury as to what they would have to find in order to conclude that the conspiracy was still alive after October 25, 1951. For the charge as given failed completely to distinguish between concealment in order to achieve the central purpose of the conspiracy (that is, the immunization of the taxpayers from tax-evasion prosecution), and concealment intended solely to cover up an already executed crime

(that is, the obtaining of the "no prosecution" rulings). The jury was never told that these overt acts of concealment could be taken as furthering the conspiracy only if the basic criminal aim of the conspiracy was not yet attained in 1949. On the charge as given, the jury might easily have concluded that the petitioners were guilty even though they found merely (1) that the central aim of the conspiracy was accomplished in 1949, and (2) that the subsequent acts of concealment were motivated exclusively by the conspirators' fear of a conspiracy prosecution. As far as we know, therefore, the present convictions were based on the impermissible theory discussed in the first part of this opinion—namely, that a subordinate agreement to conceal the conspiracy continued after the central aim of the conspiracy had been accomplished.

Furthermore, if the convictions were based on a finding that the overt acts of concealment were done with the single intention of protecting the conspirators' own interests, then it is irrelevant that these acts in fact happened to have the effect also of protecting the taxpayers against revocation of the "no prosecution" rulings. For overt acts in a prosecution such as this one are meaningful only if they are within the scope of the conspiratorial agreement. If that agreement did not, expressly or impliedly, contemplate that the conspiracy would continue in its efforts to protect the taxpayers in order to immunize them from tax prosecution, then the scope of the agreement cannot be broadened retroactively by the fact that the conspirators took steps after the conspiracy which incidentally had that effect.

We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. For the facts in this record are equivocal. The jury might easily have

concluded that the aim of the conspiracy was accomplished in 1949, and that the overt acts of concealment occurring after that date were done pursuant to the alleged conspiracy to hide the conspirators. As we have said, a conviction on such a theory could not be sustained. Under such circumstances, therefore, it was essential for the judge to charge clearly and unequivocally that on these facts the jury could not infer a continuing conspiracy to conceal the conspiracy, whether actual or implied. Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the *tax-payers* from tax prosecution, that this objective continued in being through 1951, and that the overt acts of concealment proved at trial were at least partly calculated to further this aim.

Since, under the judge's charge, the convictions on Count 1 might have rested on an impermissible ground, we conclude that they cannot stand, and the petitioners must be given a new trial as to this Count.

### III.

What we have held as to the statute of limitations disposes of the conviction of the three petitioners under Count 1, but does not touch Halperin's conviction on Counts 5, 6, and 7 for violating 18 U. S. C. § 1503.<sup>25</sup> As to those Counts, Halperin, who took the stand in his own defense at the trial, contends (a) that the Government was improperly allowed to cross-examine him as to the assertion of his Fifth Amendment privilege before a grand jury investigating this conspiracy, before which he had been called as a witness,<sup>26</sup> and (b) that the evidence did

<sup>25</sup> See n. 2, *supra*.

<sup>26</sup> Grunewald and Bolich also make this contention on their own behalf.



not justify his conviction on these Counts. For the reasons given hereafter we think that the first contention is well taken, but that the second one is untenable.

In 1952 Halperin was subpoenaed before a Brooklyn grand jury which was investigating corruption in the Bureau of Internal Revenue. Testimony had already been received by the grand jury from the Patullo and Gotham taxpayers, which linked Halperin with the tax-fixing ring. Halperin was asked a series of questions before the grand jury, including, among others, such questions as whether he knew Max Steinberg (an employee of the Bureau of Internal Revenue and a co-defendant in the charge under Count 1); whether he knew Grunewald; whether he had held and delivered escrow money paid to Grunewald by Gotham after the "no prosecution" ruling; and whether he had phoned Grunewald to arrange a meeting between one of his own associates and Bolich. Halperin declined to answer any of these questions, on the ground that the answers would tend to incriminate him and that the Fifth Amendment therefore entitled him not to answer. He repeatedly insisted before the grand jury that he was wholly innocent, and that he pleaded his Fifth Amendment privilege only on the advice of counsel that answers to these questions might furnish evidence which could be used against him, particularly when he was not represented by counsel and could not cross-examine witnesses before the grand jury.

When the Government cross-examined Halperin at the trial some of the questions which he had been asked before the grand jury were put to him.<sup>27</sup> He answered

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<sup>27</sup> The questions were: (1) Whether petitioner held escrow money which was subsequently delivered to Grunewald; (2) whether petitioner knew Grunewald; (3) whether petitioner made a telephone call to Grunewald relative to an appointment between Bolich and one Davis, a member of the conspiracy; (4) whether petitioner had

each question in a way consistent with innocence. The Government was then allowed, over objection, to bring out in cross-examination that petitioner had pleaded his privilege before the grand jury as to these very questions. Later, in his charge to the jury, the trial judge informed them that petitioner's Fifth Amendment plea could be taken only as reflecting on his credibility, and that no inference as to guilt or innocence could be drawn therefrom as to Halperin or any co-defendant.<sup>28</sup>

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filed a power of attorney in the Glover case; (5) whether he had ever met one Oliphant, an official in the Treasury; (6) whether he knew Steinberg; (7) whether he knew Tobias, the accountant of Gotham Beef; (8) whether he had ever met Grunewald in the Munsey Building in Washington.

<sup>28</sup> The charge as to this point was as follows:

"During the cross examination of one of the defendants, the government questioned the defendant as to his previous statements before the Brooklyn Grand Jury in which he refused to answer certain questions on the ground that answers to them might tend to incriminate him. These questions related to matters similar to those to which the defendant testified at this trial when he took the stand. No witness is required to take the stand or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may use this evidence of a defendant's prior assertions of the Fifth Amendment for the sole purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously invoked his privilege.

"The defendant had the right of asserting the Fifth Amendment when he appeared before the Grand Jury, and I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion. However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of

In thus allowing this cross-examination, the District Court relied on *Raffel v. United States*, 271 U. S. 494, where this Court held that a defendant's failure to take the stand at his first trial to deny testimony as to an incriminating admission could be used on cross-examination at the second trial, where he did take the stand, to impugn the credibility of his denial of the same admission. In upholding the District Court here, the Court of Appeals likewise relied on *Raffel*, and also on one of its own earlier decisions.<sup>29</sup> Halperin attacks these rulings on these principal grounds: (a) *Raffel* is distinguishable from the present case; (b) if *Raffel* permitted this cross-examination, then the trial court erred in refusing to charge, as Halperin requested, that "an innocent man may honestly claim that his answers may tend to incriminate him"; (c) in any case *Raffel* has impliedly been overruled by *Johnson v. United States*, 318 U. S. 189; and (d) compelling Halperin to testify before the grand jury, when he had already been marked as a putative defendant, violated his constitutional rights, so that, by analogy to the rule of *Weeks v. United States*, 232 U. S. 383, his claim of privilege could in no event be used against him. We find that in the circumstances presented here *Raffel* is not controlling, and that this cross-examination was not permissible.

It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evi-

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his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege. It is not to be considered in a determination of the guilt or innocence of any co-defendant."

<sup>29</sup> *United States v. Gottfried*, 165 F. 2d 360, 367.



dence, § 1040. And so the threshold question here is simply whether, in the circumstances of this case, the trial court erred in holding that Halperin's plea of the Fifth Amendment privilege before the grand jury involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes.<sup>30</sup> We do not think that *Raffel* is properly to be read either as dispensing with the need for such preliminary scrutiny by the judge, or as establishing as a matter of law that such a prior claim of privilege with reference to a ques-

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<sup>30</sup> When the trial court first ruled that the Government could cross-examine as to petitioner's Fifth Amendment plea, it did not do so on the grounds of inconsistency reflecting on credibility. In fact the implication to be drawn from the record is that the court at that time felt that the jury might use this evidence for any purpose at all, including the drawing of inferences as to guilt or innocence. When the Government first embarked on this method of cross-examination, the judge overruled objections in these words:

"The Court: I know the Government's position. As I see it, Mr. Corbin [a defense attorney], no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question it will incriminate me.

"Mr. Corbin: Tend to incriminate.

"The Court: Or tend to incriminate. A witness can make that statement. No witness has to take the witness stand, as I understand the law and if a witness has so stated, then he could not be compelled to take the stand here, but if a witness voluntarily takes the stand and is asked in a previous proceeding did you say any testimony on this subject would incriminate you, that can be considered by the jury for such benefit or such worth as the jury may want to give it."

When the defendants asked that at the very least the use of this evidence be restricted to the question of credibility, the judge contented himself with asking for a memorandum of law on the subject. Thus, although later, in the charge to the jury, the matter was specifically restricted to the issue of credibility, there was no inquiry by the judge at the time of the initial admission of this evidence as to whether a sufficient showing of inconsistency had been made.

tion later answered at the trial is always to be deemed to be a prior inconsistent statement, irrespective of the circumstances under which the claim of privilege was made. The issue decided in *Raffel* came to the Court as a certified question in quite an abstract form,<sup>31</sup> and was really centered on the question whether a defendant who takes the stand on a second trial can continue to take advantage of the privilege asserted at the first trial. This Court held, in effect, that when a criminal defendant takes the stand, he waives his privilege completely and becomes subject to cross-examination impeaching his credibility just like any other witness: "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." The Court, in *Raffel*, did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility. In other words, we may assume that under *Raffel* Halperin in this case was subject to cross-examination impeaching his credibility just like any other witness, and that his Fifth Amendment plea before the grand jury could not carry over any form of immunity when he voluntarily took the stand at the trial. This does not, however, solve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of Halperin's credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury.<sup>32</sup> As we consider that in the

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<sup>31</sup> The certified question was: "Was it error to require the defendant, *Raffel*, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?" 271 U. S., at 496.

<sup>32</sup> In *Raffel* this Court assumed that the defendant's failure to testify at the first trial could not be used as evidence of guilt in the second trial, 271 U. S., at 497. The Court further stated that "the

circumstances of the present case, the trial court, in the exercise of a sound discretion, should have refused to permit this line of cross-examination, we are not faced with the necessity of deciding whether *Raffel* has been stripped of vitality by the later *Johnson* case, *supra*, or of otherwise re-examining *Raffel*.

We need not tarry long to reiterate our view that, as the two courts below held, no implication of guilt could be drawn from Halperin's invocation of his Fifth Amendment privilege before the grand jury. Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men. Griswold, *The Fifth Amendment Today*, 9-30, 53-82. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann v. United States*, 350 U. S. 422, 426. See also *Slochower v. Board of Higher Education*, 350 U. S. 551, when, at the same Term, this Court said at pp. 557-558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

When we pass to the issue of credibility, we deem it evident that Halperin's claim of the Fifth Amendment privilege before the Brooklyn grand jury in response to questions which he answered at the trial was wholly consistent with innocence. Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless

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trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny." As already indicated, p. 418, *supra*, here the trial judge refused to charge that "an innocent man may honestly claim that his answers may tend to incriminate him."



would have provided the Government with incriminating evidence from his own mouth. For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach. There was, therefore, as we see it, no inconsistency between Halperin's statement to the grand jury that answering the question whether he knew Grunewald would tend to furnish incriminating evidence against him, and his subsequent testimony at trial that his acquaintance with Grunewald was free of criminal elements. And the same thing is also true, as we see it, as to his claim of privilege with respect to the other questions asked him before the grand jury and his answers to those same questions when they were put to him at the trial. These conclusions are fortified by a number of other considerations surrounding Halperin's claim of privilege:

First, Halperin repeatedly insisted before the grand jury that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel.

Second, the Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. See *Griswold, supra*, at 62. Innocent men are more likely to plead the privilege in secret proceedings, where they tes-

tify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.

Finally, and most important, we cannot deem Halperin's plea of the Fifth Amendment to be inconsistent with his later testimony at the trial because of the nature of this particular grand-jury proceeding. For, when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant. The taxpayers whose cases had been "fixed" by the conspiratorial ring had already testified before the grand jury, and they gave there largely the same evidence as they did later, at trial. The scheme was thus in essence already revealed when Halperin was called to testify. Under these circumstances it was evident that Halperin was faced with the possibility of an early indictment, and it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself. It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred.

We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as

it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. Cf. *McNabb v. United States*, 318 U. S. 332.

We hold that under the circumstances of this case it was prejudicial error for the trial judge to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury, and that Halperin must therefore be given a new trial on Counts 5, 6, and 7.

Finally, we find no substance to Halperin's contention that he was in effect convicted for advising, as a lawyer, some of the witnesses before the grand jury that they had a right to plead their Fifth Amendment privilege. The evidence against Halperin under these Counts was quite sufficient to make out a case for submission to the jury.

For the reasons given we hold that the judgments below must be reversed, and the cases remanded to the District Court for further proceedings consistent with this opinion.

*It is so ordered.*



MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, concurring.

I concur in the reversal of these cases for the reasons given in the Court's opinion with one exception.

In No. 184, the petitioner, Halperin, appeared before a grand jury in response to a subpoena. There he declined to answer certain questions relying on the provision of the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself."

Later, at his trial, Halperin took the stand to testify in his own behalf. On cross-examination the prosecuting attorney asked him the same questions that he had refused to answer before the grand jury. This time Halperin answered the questions; his answers tended to show that he was innocent of any wrong-doing. The Government was then permitted over objection to draw from him the fact that he had previously refused to answer these questions before the grand jury on the ground that his answers might tend to incriminate him.

At the conclusion of the trial the judge instructed the jury that Halperin's claim of his constitutional privilege not to be a witness against himself could be considered in determining what weight should be given to his testimony—in other words, whether Halperin was a truthful and trustworthy witness. I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly

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incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution. To the extent that approval of such a rule in *Raffel v. United States*, 271 U. S. 494, has vitality after *Johnson v. United States*, 318 U. S. 189, 196-199, I think the *Raffel* case should be explicitly overruled.

## Syllabus.

## RABANG v. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 403. Argued May 1, 1957.—Decided May 27, 1957.

Petitioner, born in 1910 in the Philippine Islands, has resided in the continental United States since 1930 when he was admitted for permanent residence. He was convicted in February 1951 of violating the federal narcotics laws. After administrative proceedings, he was ordered deported under the Act of February 18, 1931, as amended, which provides for the deportation of "any alien" convicted of violating a federal narcotics law. Petitioner's application for habeas corpus was denied by the Federal District Court and the Court of Appeals affirmed. *Held*: Petitioner was deportable under the 1931 Act, and the judgment is affirmed. Pp. 428-433.

(a) Under § 14 of the Philippine Independence Act of 1934, persons born in the Philippine Islands, and who thereby were nationals of the United States, became aliens on July 4, 1946, regardless of permanent residence in the continental United States on that date. Pp. 429-431.

(b) "Entry" from a foreign country was not a condition of deportability in the 1931 Act. *Barber v. Gonzales*, 347 U. S. 637, distinguished. P. 431.

(c) In the provision of the 1931 Act that deportation shall be accomplished "in manner provided in sections 19 and 20" of the Immigration Act of 1917, the reference to the "manner provided" in those sections draws into the 1931 Act not the requirement of "entry," but only the procedural steps for securing deportation set forth in those sections. Pp. 431-432.

(d) The requirement of "entry" cannot be said to be implicit in the 1931 Act on the ground that the power to deport depends upon the power to exclude, and the power to exclude did not extend to Filipinos. Congress not only had, but exercised, the power to exclude Filipinos in § 8 (a) (1) of the Independence Act. Pp. 432-433.

234 F. 2d 904, affirmed.



*John Caughlan* argued the cause and filed a brief for petitioner.

*J. F. Bishop* argued the cause for respondent. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner, born in 1910 in the Philippine Islands, has lived in the continental United States since 1930, when he was admitted for permanent residence. In February 1951, he was convicted upon a plea of guilty of violating the federal narcotics laws. He was taken into custody in March 1951, and, after administrative proceedings, was ordered deported under the Act of February 18, 1931, as amended, which provided for the deportation of "any alien" convicted of violating a federal narcotics law.<sup>1</sup>

Petitioner applied to the District Court for the Western District of Washington for a writ of habeas corpus and declaratory relief from the order of the Immigration and Naturalization Service deporting him to the Philippine

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<sup>1</sup> The Act of February 18, 1931, as amended, provided:

" . . . [A]ny alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after . . . [February 18, 1931], shall be convicted for violation of or conspiracy to violate any statute of the United States or of any State, Territory, possession, or of the District of Columbia, taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States.' " 46 Stat. 1171, as amended, 54 Stat. 673, 8 U. S. C. (1946 ed.) § 156a.

Islands. The District Court denied the petitioner's application, and the Court of Appeals for the Ninth Circuit affirmed.<sup>2</sup> We granted certiorari.<sup>3</sup>

The sole issue for decision is whether the petitioner is deportable as an alien within the meaning of the 1931 Act. The parties agree that the petitioner was a national of the United States at birth and when he entered the continental United States for permanent residence. Under the 1898 Treaty of Paris, Spain ceded the Philippine Islands to the United States.<sup>4</sup> Article IX of the Treaty provided that ". . . [t]he civil rights and political status of the native inhabitants . . . shall be determined by the Congress."<sup>5</sup> Pursuant to that Article, the Congress declared, *inter alia*, in the Act of July 1, 1902, that Filipinos born in the Islands after 1899 were to ". . . be citizens of the Philippine Islands and as such entitled to the protection of the United States . . . ." <sup>6</sup> The Filipinos, as nationals, owed an obligation of permanent allegiance to this country.<sup>7</sup>

Upon the proclamation of Philippine independence on July 4, 1946,<sup>8</sup> § 14 of the Philippine Independence Act of 1934 became operative. Section 14 provided:

"Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the

<sup>2</sup> 234 F. 2d 904.

<sup>4</sup> 30 Stat. 1754.

<sup>3</sup> 352 U. S. 906.

<sup>5</sup> *Id.*, at 1759.

<sup>6</sup> 32 Stat. 691, 692; compare 39 Stat. 545, 546.

<sup>7</sup> Compare § 101 of the Nationality Act of 1940, which defines the term "national" as follows:

"(a) The term 'national' means a person owing permanent allegiance to a state.

"(b) The term 'national of the United States' means . . . (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien." 54 Stat. 1137, 8 U. S. C. (1946 ed.) § 501.

<sup>8</sup> Presidential Proclamation No. 2695, 60 Stat. 1352, 11 Fed. Reg. 7517; Presidential Proclamation No. 2696, 60 Stat. 1353, 11 Fed. Reg. 7517.

immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." 48 Stat. 464, 48 U. S. C. (1946 ed.) § 1244.

The Court of Appeals held that the petitioner lost his status as a national when the United States relinquished its sovereignty over the Islands on July 4, 1946, and that this occurred regardless of his residence in the continental United States on that date.<sup>9</sup>

The petitioner argues that his status as a national, acquired at birth under the Treaty and the 1902 statute, bears such close relationship to the constitutionally secured birthright of citizenship acquired by the American-born, that its divestiture should rest only upon the most explicit expression of congressional intention. In the Independence Act, the Congress granted full and complete independence to the Islands, and necessarily severed the obligation of permanent allegiance owed by Filipinos who were nationals of the United States. Anything less than the severance of the ties for all Filipinos, regardless of residence in or out of the continental United States, would not have fulfilled our long-standing national policy to grant independence to the Philippine people. See *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 674-678, 692. Section 14 of the Independence Act in clear language applies "to persons who were born in the Philippine Islands." This language demonstrates, and we hold, as did the courts below, that persons born in the Islands, and who thereby were nationals of the United States,

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<sup>9</sup> The Court of Appeals for the Ninth Circuit has consistently followed this principle. *E. g.*, *Resurreccion-Talavera v. Barber*, 231 F. 2d 524; *Gonzales v. Barber*, 207 F. 2d 398, *aff'd* on other grounds, 347 U. S. 637; *Mangaoang v. Boyd*, 205 F. 2d 553; *Cabebe v. Acheson*, 183 F. 2d 795; *cf. Banez v. Boyd*, 236 F. 2d 934.



became aliens on July 4, 1946, regardless of permanent residence in the continental United States on that date.

The petitioner contends that, because he was admitted for permanent residence at the time the Islands were a territory of the United States, he did not enter from a foreign country and therefore cannot be an alien within the purview of the 1931 Act. He relies on *Barber v. Gonzales*, 347 U. S. 637, where this Court held that a Filipino admitted for permanent residence in 1930 was not deportable under § 19 (a) of the Immigration Act of 1917 as an alien sentenced for certain crimes "committed . . . after entry." (Emphasis added.) The word "entry" was held to be significant of a congressional purpose to limit deportation under § 19 (a) to aliens arriving "from some foreign port or place," a description which did not fit a territory belonging to the United States. But the 1931 Act differs from the 1917 Act because it is silent as to whether "entry" from a foreign country is a condition of deportability. By its terms, the 1931 Act applies to ". . . any alien . . . who, after . . . [February 18, 1931], shall be convicted . . ." of a federal narcotics offense. It follows that the holding in *Gonzales* is not applicable.

The petitioner argues that the requirement of "entry," as construed in *Gonzales*, was incorporated into the 1931 Act by the provision that deportation shall be accomplished "in manner provided in sections 19 and 20" of the Immigration Act of 1917.<sup>10</sup> We hold that the reference

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<sup>10</sup> The "manner provided" in § 19 of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. (1946 ed.) § 155, was "upon the warrant of the Attorney General." Section 20, 39 Stat. 890, as amended, 8 U. S. C. (1946 ed., Supp. IV) § 156, related to ports to which aliens are to be deported, costs of deportation and other details. The Attorney General is required by that section to deport "to the country specified by the alien, if it is willing to accept him into its territory." In the administrative proceedings the petitioner specified the Philippine Islands.

to the "manner provided" in those sections draws into the 1931 Act only the procedural steps for securing deportation set forth in those sections. *Bugajewitz v. Adams*, 228 U. S. 585. The Congress adopted these procedures by reference instead of spelling them out in the 1931 Act.<sup>11</sup>

The petitioner urges finally that the requirement of "entry" is implicit in the 1931 Act. Citing *Fong Yue Ting v. United States*, 149 U. S. 698, he argues that the bounds of the power to deport aliens are circumscribed by the bounds of the power to exclude them, and that the power to exclude extends only to "foreigners" and does not embrace Filipinos admitted from the Islands when they were a territory of the United States. It is true that Filipinos were not excludable from the country under any general statute relating to the exclusion of "aliens." See *Gonzales v. Williams*, 192 U. S. 1, 12-13; *Toyota v. United States*, 268 U. S. 402, 411.

But the fallacy in the petitioner's argument is the erroneous assumption that Congress was without power to legislate the exclusion of Filipinos in the same manner as "foreigners." This Court has held that ". . . the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be . . . ." *Downes v. Bidwell*, 182 U. S. 244, 279.<sup>12</sup> Congress not only had, but exercised,

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<sup>11</sup> It is not contended that the procedures specified in §§ 19 and 20 were not followed in this case.

<sup>12</sup> See *Magoon, Reports* (1902), 120:

"The inhabitants of the islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess the right of free entry into the United States. That right is appurtenant to citizenship. The rights of immigration into the United States by the inhabitants of said islands are no more than those of aliens of the same race coming from foreign lands."

Illustrative of the scope of the congressional power is the treatment afforded Puerto Ricans who were first nationals, 31 Stat. 77, 79, and

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the power to exclude Filipinos in the provision of § 8 (a) (1) of the Independence Act, which, for the period from 1934 to 1946, provided:

“For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. . . .” 48 Stat. 462, 48 U. S. C. (1934 ed.) § 1238.

The 1931 Act plainly covers the situation of the petitioner, who was an alien, and who was convicted of a federal narcotics offense. Cf. *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U. S. 521. We therefore conclude that the petitioner was deportable as an alien under that Act. The judgment is

*Affirmed.*

MR. JUSTICE DOUGLAS, dissenting.

The Act of February 18, 1931, 8 U. S. C. (1946 ed.) § 156a, provided for the deportation of “any alien” convicted of violating a narcotic law after the date of the Act. Petitioner is a citizen of the Philippines and is therefore an alien by virtue of the Philippine Independence Act, 48 Stat. 456, c. 84, § 8; and he was convicted of narcotics violation in 1951, which was after his status had been changed from a national to an alien. If the 1931 Act is to be read literally, the deportation of this Filipino is war-

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who later became citizens, 39 Stat. 951, 953. See also *Downes v. Bidwell*, 182 U. S. 244, 280, as to the status of the inhabitants of other territories acquired by the United States.



ranted. But to read the Act literally is, I think, to miss its real import.

*First.* In 1931 the only aliens here were those who had made an "entry" into this country. The condition of "entry" seems, therefore, necessarily implicit in the 1931 Act. Without that condition the Act would have had no application whatsoever at the time of its passage, for at that time every "alien" was a national of another country who had "entered" here. While the Philippine Independence Act later made Filipinos "aliens," that class of "aliens" who were resident here at the time never made an "entry" into this country. As *Barber v. Gonzales*, 347 U. S. 637, holds, they were nationals to whom the concept of "entry" was inapplicable.

*Second.* The 1931 Act provides that the offending alien shall be deported "in [the] manner" provided in §§ 19 and 20 of the 1917 Act, 8 U. S. C. (1946 ed.) §§ 155, 156. The words "in [the] manner" are said to refer to the means for securing deportation which, by § 19 (a) of the 1917 Act, are described as "upon the warrant of the Attorney General." *Bugajewitz v. Adams*, 228 U. S. 585, 591, construed the language of an earlier deportation Act in that way. It held that "in the manner provided" in that Act meant "the means for securing deportation." Yet it is difficult for me to say that by that ruling "in the manner" became words of art in legislative drafting. The *Bugajewitz* case involved a statute with a very special legislative history. The words "in the manner provided" had been substituted for "as provided." So it was apparent that Congress by the amendment had narrowed the meaning. There is no such special legislative history here. The words "in the manner" seem to me to be synonymous in this setting with "as provided" or "under the conditions of." And the condition of the 1917 Act most relevant here is a crime committed "after entry."

No matter how the case is viewed, the 1931 Act is applicable only to aliens who had made an "entry" in this country.

This Filipino came to the United States in 1930 and he has never left here. If the spirit of the 1931 Act is to be observed, he should not be lumped with all other "aliens" who made an "entry." The Filipino alien, who came here while he was a national, stands in a class by himself and should remain there, until and unless Congress extends these harsh deportation measures to his class.

PAN-ATLANTIC STEAMSHIP CORP. *v.* ATLANTIC  
COAST LINE RAILROAD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS.\*

No. 408. Argued April 23, 1957.—Decided June 3, 1957.

Section 311 (a) of the Interstate Commerce Act authorizes the Commission to grant "temporary authority" to operate as a common carrier by water when "there is an immediate and urgent need" for the service; but it provides that such temporary authority shall not be valid for more than 180 days. Section 9 (b) of the Administrative Procedure Act provides that, "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

*Held:* Where, pending action on an application for permanent authority, the Commission has granted temporary authority to operate as a common carrier by water for a period of 180 days, covering activities of a continuing nature, and timely and sufficient application for an extension of such authority has been made, the Commission, under § 9 (b) of the Administrative Procedure Act, may extend such temporary authority beyond the original 180-day period, but not beyond the time when the application for permanent authority has been finally determined. Pp. 437-440.

144 F. Supp. 53, reversed.

*David G. Macdonald* argued the cause for appellant in No. 408. With him on the brief were *Russell S. Bernhard* and *Warren Price, Jr.*

*James A. Murray* argued the cause for appellant in No. 424. With him on the brief was *Robert W. Ginnane*.

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\*Together with No. 424, *Interstate Commerce Commission v. Atlantic Coast Line Railroad Co. et al.*, also on appeal from the same court.



*Charles H. Weston* argued the cause for the United States, appellee. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Hansen*.

*William Q. Keenan* argued the cause for the Atlantic Coast Line Railroad Co. et al., appellees. With him on the brief were *Anthony P. Donadio*, *Charles T. Abeles*, *James A. Bistline*, *Carl Helmetag, Jr.* and *Prime F. Osborn, III*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 311 (a) of the Interstate Commerce Act, 49 U. S. C. § 911 (a), gives the Commission power to grant "temporary authority" to a common carrier by water or a contract carrier by water to institute service for which "there is an immediate and urgent need." And the section provides that the temporary authority "shall be valid for such time as the Commission shall specify, but not for more than an aggregate of one hundred and eighty days."

Section 9 (b) of the Administrative Procedure Act, 5 U. S. C. § 1008 (b), provides that "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

The question in the case is whether this provision of the Administrative Procedure Act authorizes the Commission to extend a temporary authority granted under § 311 (a) of the Interstate Commerce Act for more than 180 days.

On May 5, 1955, Pan-Atlantic filed with the Commission an application for a permanent certificate of public convenience and necessity as a common carrier by water.

The Commission, upon finding an immediate and urgent need for the service, issued on May 18, 1955, to Pan-Atlantic temporary authority to operate as a common carrier by water between various ports of the United States for a period of 180 days. The Commission did not conclude the proceedings on the application before the expiration of the 180-day period. Accordingly, prior to the expiration of the 180-day period and on application by Pan-Atlantic, it authorized Pan-Atlantic to continue to perform the water carrier service authorized by the temporary authority until further order of the Commission, but not beyond the time the application for a permanent certificate had been finally determined. The appellees, who are seven railroads, opposed this extension before the Commission and then instituted this suit in the District Court to vacate the Commission's order which authorized the continuance of the temporary authority beyond the 180-day period.

The District Court held for the appellees, 144 F. Supp. 53, feeling bound by the prior decision of that court in *Stone's Express, Inc. v. United States*, 122 F. Supp. 955,<sup>1</sup> though two of the three judges indicated that were *stare decisis* not to control, they would sustain the Commission. 144 F. Supp., at 54. The case is here by appeal. 28 U. S. C. § 1253. We noted probable jurisdiction. 352 U. S. 914.

We sustain the Commission in its assertion of authority to extend this temporary authority beyond 180 days.

"License" as used in the Administrative Procedure Act includes "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." § 2 (e). A temporary authority granted under § 311 (a) of the

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<sup>1</sup> That case became moot after probable jurisdiction had been noted by this Court. See 350 U. S. 906.

Interstate Commerce Act would seem to be a "permit" or "certificate" under the Administrative Procedure Act. "Licensee," as used in the sentence of § 9 (b) which we have quoted, would seem, therefore, to include one who holds a temporary permit under § 311 (a). It is argued that "license" in that section includes only those that are permanent. But we see no justification for that narrow reading. A permit for 180 days covers an "activity of a continuing nature."

Section 9 (b) of the Administrative Procedure Act is a direction to the various agencies. By its terms there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined.

Each of these conditions is satisfied in the present case; and we see no reason why the provisions of this later Act may not be invoked to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded. That has been the Commission's consistent construction of the law;<sup>2</sup> and we think it is the correct one. Section 9 (b) of the Administrative Procedure Act contains a new rule that supplements the prior authority granted by § 311 (a) of the Interstate Commerce Act. Initially, the Commission can do no more than issue a temporary authority good for 180 days. But once the conditions of § 9 (b) are satisfied, an extension in the interests of economy and efficiency is authorized.

The Commission advises us that the combined time required for the administrative proceedings on an appli-

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<sup>2</sup> See 13 Fed. Reg. 4150 for the rules of the Commission governing these extensions.



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cation for a certificate and for judicial review almost inevitably exceeds 180 days. Courts have no authority to issue these permits. See *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 489-490. Unless the authority is vested in the Commission by § 9 (b), the operation, no matter how essential or necessary, must be discontinued at the end of 180 days. We think such a reading of the law would mutilate the administrative system which Congress created by the two Acts. Where the remedy for an evil is clear, the remedial provisions of the Administrative Procedure Act should be given full effect. See *Wong Yang Sung v. McGrath*, 339 U. S. 33, 41. We conclude that an harmonious reading of § 311 (a) and § 9 (b) requires the latter to be read as supplementing the former and to be construed as applying to temporary as well as to permanent licenses.

*Reversed.*

MR. JUSTICE BURTON, whom MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

A major purpose of the Interstate Commerce Act is to prevent evils deemed to result from ease of entry and overcompetition in the transportation industry. *American Trucking Assns., Inc. v. United States*, 344 U. S. 298, 312-313. Accordingly, the Act prohibits new carrier operations except after notice to affected parties, an evidentiary hearing, administrative findings as to the public convenience and necessity of the proposed service, and court review of the administrative determination. See 49 U. S. C. §§ 306-308, 309. Sections 210a (a)<sup>1</sup>

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<sup>1</sup> 52 Stat. 1238, as amended, 49 U. S. C. § 310a (a). Section 210a was enacted in 1938 as an amendment to the Motor Carrier Act of 1935.

(applying to motor carriers), and 311 (a)<sup>2</sup> (applying to water carriers) of the Act are narrow exceptions to this fundamental policy. They permit the Interstate Commerce Commission, "in its discretion and without hearings or other proceedings," to grant temporary authority for carrier service for which there is "an immediate and urgent need" and within territory having no carrier service "capable of meeting such need." Any grant of temporary authority is expressly made subject to an unconditional maximum time limit of 180 days.

"Such temporary authority shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." 49 U. S. C. § 911 (a). See also, § 310a (a).

Congress was concerned with situations in which temporary authority might be needed on an emergency basis to meet specific transportation problems. However, it plainly was aware that the over-all purpose of the Act would be jeopardized unless the Commission's power to authorize temporary carrier operations was severely limited. The intent of Congress was unmistakable. In recommending the enactment of § 210a (a), the Interstate Commerce Commission itself said:

"Cases arise, and have been brought to our attention, where urgent need for interstate motor carrier service suddenly develops. The bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation are good examples, and there are others.

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<sup>2</sup> 54 Stat. 943, as amended, 49 U. S. C. § 911 (a). Section 311 was enacted in 1940 as part of the Water Carrier Act of that year. It is an almost exact counterpart of § 210a.

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"We believe that the Commission should have power to meet such emergencies by a grant of temporary operating authority, in its discretion and without hearings or other proceedings. *It is recognized that care would be necessary to protect the legitimate interests of other carriers . . . . [T]he authority granted would be strictly limited in time by the terms of the proposed amendment.*" (Emphasis supplied.) S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

Congress realized that in many of the situations qualifying for temporary authority under §§ 210a (a) and 311 (a) permanent authority might later be required. The "bringing in of oil wells in a new field," as well as other situations, might require the granting of permanent authority following the hearing required by the Act. In such situations, §§ 210a (a) and 311 (a) operated as an incentive to the Commission to reach its final decision with respect to the granting of permanent authority within 180 days.

Thus, two policies underlie §§ 210a (a) and 311 (a): (1) providing the Commission with discretionary power to handle emergency situations by granting a severely limited temporary authority; and (2) prodding the Commission to finish, within 180 days, its determination with respect to the granting of permanent authority for this service. The Court, by now holding that § 9 (b) of the Administrative Procedure Act, 60 Stat. 242-243, 5 U. S. C. § 1008, authorizes the Commission to extend a temporary authority for more than 180 days, eliminates the second policy and makes the 180-day limitation meaningless. I do not believe that Congress intended § 9 (b) of the Administrative Procedure Act to accomplish this result.

The Administrative Procedure Act, enacted in 1946, was designed to promote general fairness and regularity



in administrative action. Section 9 (b) partakes of this purpose by requiring administrative agencies to act on license applications with reasonable dispatch and "with due regard to the rights or privileges of all the interested parties or adversely affected persons." It also protects persons who have received licenses from their summary revocation, and from the hardships occasioned by expiration of a license before the licensing agency has been able to pass upon its renewal.<sup>3</sup> It makes no reference to emergency permits restricted to a specific number of days.

The third sentence of § 9 (b) merely provides that if a licensee has made timely application for "a renewal or a new license, no license with reference to any activity of a continuing nature" shall expire prior to final administra-

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<sup>3</sup> Section 9 (b) of the Administrative Procedure Act, in its entirety, reads as follows:

"Sec. 9. . . .

"(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, *made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire* until such application shall have been finally determined by the agency." (Emphasis supplied.)

tive action on such application. The word "renewal" obviously relates to the license already held and is inapplicable here. The legislative history indicates that the other words which might apply, "new license," refer to a new license of the same type or class as that already held.<sup>4</sup>

In this case, the expiration of appellant Pan-Atlantic's 180-day *temporary authority*, issued to cover an emergency situation while its application for *permanent authority* is pending, does not come within the terms of § 9 (b) since the permanent license sought is not of the same type and class as the old license. The Court's contrary conclusion can be reached only by reading the word "license" as used in the third sentence of § 9 (b) in two different senses—first, as referring to a temporary license, and, second, as referring to a permanent license. The improbability of this interpretation is emphasized by policy considerations stemming from both the Administrative Procedure Act and the Interstate Commerce Act.

The policy behind the third sentence of § 9 (b) is that of protecting those persons who already have regularly issued licenses from the serious hardships occasioned both

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<sup>4</sup> The third sentence of § 9 (b) was taken from a similar provision "contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154-167 of the General Code; Amended substitute Senate bill No. 36)." Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 35. The Ohio statute expressly applied only to "a new license of the same type or class, or renewal of an existing license . . . ." 120 Ohio Laws 1943-1944, Administrative Procedure Act, § 154-67. Cf. *Stone's Express, Inc. v. United States*, 122 F. Supp. 955.

The words "new license" were used in addition to the word "renewal" because some federal agencies issue licenses for a limited term. Licenses for operation of broadcasting stations, which cannot be granted "for a longer term than three years," are an example. See § 307 (d) of Communications Act of 1934, 48 Stat. 1084, as amended, 47 U. S. C. § 307 (d).

to them and to the public by expiration of a license before the agency finds time to pass upon its renewal. As the initial license was obtained after a hearing at which all interested parties had an opportunity to be heard, § 9 (b) operates to protect valuable existing rights and avoids unnecessary injury resulting from administrative delay. So applied, it does not prejudice the rights of others since they had a chance to be heard on the initial application, and can be heard on the renewal. However, the issuance of temporary authority to Pan-Atlantic in the instant case was done *ex parte* in order to meet an alleged emergency need. Affected parties had no opportunity to contest it. Moreover, Pan-Atlantic knew that the license was issued for a maximum period of 180 days and must have accepted it on that basis. To convert such temporary and limited rights into rights continuing until the Commission, without any time limit on doing so, finally acts on Pan-Atlantic's application for permanent authority deprives licensed competitors and other affected parties of their rights under the Interstate Commerce Act, without any hearing on the issues involved.

Temporary authorities are issued *ex parte* and without regard to their competitive effects. Yet, if permitted to be outstanding for prolonged periods, they may produce competitive changes comparable to those produced by a grant of permanent authority. In this case, as in a high proportion of the instances in which the Commission has extended a temporary authority beyond 180 days, Pan-Atlantic's "temporary" service already has been in effect for more than two years.

The Interstate Commerce Act, for tested reasons of public policy, prohibits new carrier operations unless the applicant obtains a certificate of public convenience and necessity in a proceeding in which those adversely affected have an opportunity to be heard in opposition. Grants of temporary operating authority for the maximum period



of 180 days constitute a narrow exception to these requirements. Section 9 (b) of the Administrative Procedure Act should not be interpreted as wiping out this time limitation when the result conflicts with a fundamental objective of the National Transportation Policy.

There is a further incongruity if § 9 (b) is interpreted to apply to temporary operating authorities issued by the Interstate Commerce Commission. Section 9 (b) provides that "no license . . . shall expire until such application shall have been finally determined by the agency." (Emphasis supplied.) This language is mandatory. Although §§ 210a and 311 of the Interstate Commerce Act place the initial granting of temporary authority entirely in the Commission's discretion, the Commission would be compelled by § 9 (b) to extend the temporary authority in every case involving activity of a continuing nature until it formally completes the proceeding on the application for permanent authority. The result is to require the Commission to extend the temporary authority even though, in a particular case, it might be convinced that the temporary emergency service was no longer necessary.

Even if § 9 (b) is interpreted as extending temporary licenses during the pendency of permanent license proceedings, it should not be applied to the temporary authorities issued by the Interstate Commerce Commission under §§ 210a and 311 of the Interstate Commerce Act. Those sections are special statutes dealing in precise terms with a specific subject.<sup>5</sup>

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<sup>5</sup> Repeals by implication are not favored. *United States v. Borden Co.*, 308 U. S. 188, 198-200; *United States v. Jackson*, 302 U. S. 628, 631. An earlier special statute controls over a later general statute. *Washington v. Miller*, 235 U. S. 422, 428; *Rodgers v. United States*, 185 U. S. 83, 87-88. Finally, § 12 of the Administrative Procedure Act, 60 Stat. 244, 5 U. S. C. § 1011, provides that "Nothing in this Act shall be held to . . . limit or repeal additional requirements imposed by statute or otherwise recognized by law."

In response to the claim that the Commission's construction of § 9 (b) should be given considerable weight, it must be noted that its interpretation was adopted largely as a matter of expediency rather than as a reasoned interpretation.<sup>6</sup> Cf. *Skidmore v. Swift & Co.*, 323 U. S. 134, 140. In any event, it is the duty of the Court to determine whether, as a matter of law, the general provisions of § 9 (b) of the Administrative Procedure Act override the express limitations placed by Congress upon the Commission by earlier provisions of the Interstate Commerce Act.<sup>7</sup>

For these reasons, I would affirm the judgment of the District Court.

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<sup>6</sup> The public announcement of the Commission's interpretation of § 9 (b), published in September 1947, admitted that its interpretation was subject to question:

"There is a divergence of legal opinion on the question. Some of the Commission's lawyers are of the opinion that an extension is authorized by Section 210a (a) of the Interstate Commerce Act; others are of the opinion that continuances of such operations are authorized by Section 9 (b) of the Administrative Procedure Act; while others doubt that either Section 9 (b) of the Administrative Procedure Act or Section 210a (a) of the Interstate Commerce Act or any other provision, either extends or authorizes the Commission to extend, these temporary authorities where they have been in effect for 180 days . . . ." CCH Fed. Carriers Reporter ¶ 23,040. In addition, the Commission has requested Congress to enact amendments to the Interstate Commerce Act which would be unnecessary if § 9 (b) of the Administrative Procedure Act meant what the Commission says it does. I. C. C., 61st Ann. Rep. (1947), 148; I. C. C., 69th Ann. Rep. (1955), 132.

<sup>7</sup> Nor can the solution be found in the fact that the Commission has extended about 19% of all temporary authorizations beyond 180 days. If in fact there exists "an immediate and urgent need" for service which no other carrier is capable of providing, 180 days is a sufficient time for final administrative determination of the question whether the service is required by public convenience and necessity. And even if it were not, the remedy would be legislative amendment of the Interstate Commerce Act, not administrative or judicial revision.

TEXTILE WORKERS UNION OF AMERICA *v.*  
LINCOLN MILLS OF ALABAMA.

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

No. 211. Argued March 25, 1957.—Decided June 3, 1957.

A union entered into a collective-bargaining agreement with an employer providing that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure, the last step of which was arbitration. Grievances arose and were processed through various steps in the grievance procedure until the union's demands were finally denied by the employer. The union requested arbitration, and the employer refused. Thereupon, the union sued in a Federal District Court to compel arbitration. *Held:*

1. Under § 301 (a) of the Labor Management Relations Act of 1947, the District Court properly decreed specific performance of the agreement to arbitrate the grievance dispute. Pp. 449–456.

2. The substantive law to be applied in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. Pp. 456–457.

3. As here construed, § 301 (a) is constitutional. P. 457.

4. Jurisdiction to compel arbitration of grievance disputes is not withdrawn by the Norris-LaGuardia Act. Pp. 457–459.

5. The employer in this case having ceased operations and contracted to sell its mill properties, the case is moot insofar as the union sought restoration of workloads and job assignments; but it is not moot to the extent that it sought a monetary award. P. 459.

230 F. 2d 81, reversed.

*Arthur J. Goldberg* argued the cause for petitioner. With him on the brief were *Benjamin Wyle* and *David E. Feller*.

*Frank A. Constangy* argued the cause for respondent. With him on the brief were *M. A. Prowell* and *Fred W. Elarbee, Jr.*



MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner-union entered into a collective bargaining agreement in 1953 with respondent-employer, the agreement to run one year and from year to year thereafter, unless terminated on specified notices. The agreement provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure. The last step in the grievance procedure—a step that could be taken by either party—was arbitration.

This controversy involves several grievances that concern work loads and work assignments. The grievances were processed through the various steps in the grievance procedure and were finally denied by the employer. The union requested arbitration, and the employer refused. Thereupon the union brought this suit in the District Court to compel arbitration.

The District Court concluded that it had jurisdiction and ordered the employer to comply with the grievance arbitration provisions of the collective bargaining agreement. The Court of Appeals reversed by a divided vote. 230 F. 2d 81. It held that, although the District Court had jurisdiction to entertain the suit, the court had no authority founded either in federal or state law to grant the relief. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and the contrariety of views in the courts. 352 U. S. 821.

The starting point of our inquiry is § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185, which provides:

(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as

defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

(b) "Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

There has been considerable litigation involving § 301 and courts have construed it differently. There is one view that § 301 (a) merely gives federal district courts jurisdiction in controversies that involve labor organizations in industries affecting commerce, without regard to diversity of citizenship or the amount in controversy.<sup>1</sup> Under that view § 301 (a) would not be the source of substantive law; it would neither supply federal law to resolve these controversies nor turn the federal judges to state law for answers to the questions. Other courts—the overwhelming number of them—hold that § 301 (a) is

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<sup>1</sup> *International Ladies' Garment Workers' Union v. Jay-Ann Co.*, 228 F. 2d 632 (C. A. 5th Cir.), *semble*; *United Steelworkers v. Galand-Henning Mfg. Co.*, 241 F. 2d 323, 325 (C. A. 7th Cir.); *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F. 2d 980, 983 (C. A. 10th Cir.).

more than jurisdictional<sup>2</sup>—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. Perhaps the leading decision representing that point of view is the one rendered by Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137. That is our construction of § 301 (a), which means that the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be specifically enforced.

From the face of the Act it is apparent that § 301 (a) and § 301 (b) supplement one another. Section 301 (b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301 (b) in other words provides the procedural remedy lacking at common law. Section 301 (a) certainly does something more than that. Plainly, it supplies the basis

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<sup>2</sup> The following decisions are to the effect that § 301 (a) creates substantive rights:

*Shirley-Herman Co. v. International Hod Carriers Union*, 182 F. 2d 806, 809 (C. A. 2d Cir.); *Rock Drilling Union v. Mason & Hanger Co.*, 217 F. 2d 687, 691-692 (C. A. 2d Cir.); *Signal-Stat Corp. v. Local 475*, 235 F. 2d 298, 300 (C. A. 2d Cir.); *Assn. of Westinghouse Employees v. Westinghouse Electric Corp.*, 210 F. 2d 623, 625 (C. A. 3d Cir.), affirmed on other grounds, 348 U. S. 437; *Textile Workers Union v. Arista Mills*, 193 F. 2d 529, 533 (C. A. 4th Cir.); *Hamilton Foundry v. International Molders & Foundry Union*, 193 F. 2d 209, 215 (C. A. 6th Cir.); *American Federation of Labor v. Western Union*, 179 F. 2d 535 (C. A. 6th Cir.); *Milk & Ice Cream Drivers v. Gillespie Milk Prod. Corp.*, 203 F. 2d 650, 651 (C. A. 6th Cir.); *United Electrical R. & M. Workers v. Oliver Corp.*, 205 F. 2d 376, 384-385 (C. A. 8th Cir.); *Schatte v. International Alliance*, 182 F. 2d 158, 164 (C. A. 9th Cir.).



upon which the federal district courts may take jurisdiction and apply the procedural rule of § 301 (b). The question is whether § 301 (a) is more than jurisdictional.

The legislative history of § 301 is somewhat cloudy and confusing. But there are a few shafts of light that illuminate our problem.

The bills, as they passed the House and the Senate, contained provisions which would have made the failure to abide by an agreement to arbitrate an unfair labor practice. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 20-21, 23; H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 21.<sup>3</sup> This feature of the law was dropped in Conference. As the Conference Report stated, "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

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<sup>3</sup> The Senate bill contained provisions which would have made it an unfair labor practice for either an employer or a union "to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration." The Senate Report indicated that these provisions would permit the Board to grant relief in the same instances where suit might be maintained under § 301. "While title III of the committee bill treats this subject by giving both parties rights to sue in the United States district court, the committee believes that such action should also be available before an administrative body."

The House bill defined the term "bargain collectively" so as to require "If an agreement is in effect between the parties providing a procedure for adjusting or settling such disputes, following such procedure." Commenting on this definition in § 2 of the House bill, the House Report stated: "When parties have agreed upon a procedure for settling their differences, and the agreement is in effect, they will be required to follow the procedure or be held guilty of an unfair labor practice. Most agreements provide procedures for settling grievances, generally including some form of arbitration as the last step. Consequently, this clause will operate in most cases, except those involving the negotiation of new contracts."

Both the Senate and the House took pains to provide for "the usual processes of the law" by provisions which were the substantial equivalent of § 301 (a) in its present form. Both the Senate Report and the House Report indicate a primary concern that unions as well as employees should be bound to collective bargaining contracts. But there was also a broader concern—a concern with a procedure for making such agreements enforceable in the courts by either party. At one point the Senate Report, *supra*, p. 15, states, "We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made . . .'"

Congress was also interested in promoting collective bargaining that ended with agreements not to strike.<sup>4</sup>

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<sup>4</sup> S. Rep. No. 105, 80th Cong., 1st Sess., pp. 17–18 states:

"Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.

"It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.

"This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.

"In any event, it is certainly a point to be bargained over and any union with the status of 'representative' under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious."

The Senate Report, *supra*, p. 16 states:

"If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

"Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."

Thus collective bargaining contracts were made "equally binding and enforceable on both parties." *Id.*, p. 15. As stated in the House Report, *supra*, p. 6, the new provision "makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts." To repeat, the Senate Report, *supra*, p. 17, summed up the philosophy of § 301 as follows: "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."



Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.

To be sure, there is a great medley of ideas reflected in the hearings, reports, and debates on this Act. Yet, to repeat, the entire tenor of the history indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement. And when in the House the debate narrowed to the question whether § 301 was more than jurisdictional, it became abundantly clear that the purpose of the section was to provide the necessary legal remedies. Section 302 of the House bill,<sup>5</sup> the substantial equivalent of the present § 301, was being described by Mr. Hartley, the sponsor of the bill in the House:

“Mr. BARDEN. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation.

“It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings

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<sup>5</sup> Section 302 (a) as it passed the House read as follows:

“Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.”

in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.

"Mr. HARTLEY. The interpretation the gentleman has just given of that section is absolutely correct." 93 Cong. Rec. 3656-3657.

It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes,<sup>6</sup> by implication rejecting the common-law rule, discussed in *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, against enforcement of executory agreements to arbitrate.<sup>7</sup> We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

The question then is, what is the substantive law to be applied in suits under § 301 (a)? We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. See Mendelsohn, *Enforceability of*

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<sup>6</sup> *Assn. of Westinghouse Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, is quite a different case. There the union sued to recover unpaid wages on behalf of some 4,000 employees. The basic question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer.

<sup>7</sup> We do not reach the question, which the Court reserved in *Red Cross Line v. Atlantic Fruit Co.*, *supra*, p. 125, whether as a matter of federal law executory agreements to arbitrate are enforceable, absent congressional approval.

Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L. J. 167. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. See *Board of Commissioners v. United States*, 308 U. S. 343, 351. Federal interpretation of the federal law will govern, not state law. Cf. *Jerome v. United States*, 318 U. S. 101, 104. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. See *Board of Commissioners v. United States*, *supra*, at 351-352. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

It is not uncommon for federal courts to fashion federal law where federal rights are concerned. See *Clearfield Trust Co. v. United States*, 318 U. S. 363, 366-367; *National Metropolitan Bank v. United States*, 323 U. S. 454. Congress has indicated by § 301 (a) the purpose to follow that course here. There is no constitutional difficulty. Article III, § 2, extends the judicial power to cases "arising under . . . the Laws of the United States . . . ." The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain. *Houston & Texas R. Co. v. United States*, 234 U. S. 342; *Labor Board v. Jones & Laughlin Corp.*, 301 U. S. 1. A case or controversy arising under § 301 (a) is, therefore, one within the purview of judicial power as defined in Article III.

The question remains whether jurisdiction to compel arbitration of grievance disputes is withdrawn by the



Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101. Section 7 of that Act prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of the power to enjoin are listed in § 4. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make "every reasonable effort" to settle the dispute by negotiation, mediation, or "voluntary arbitration." Though a literal reading might bring the dispute within the terms of the Act (see Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 602-604), we see no justification in policy for restricting § 301 (a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite<sup>8</sup> procedural requirements of that Act. Moreover, we held in *Virginian R. Co. v. System Federation*, 300 U. S. 515, and in *Graham v. Brotherhood of Firemen*, 338 U. S. 232, 237, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act. The mandates there involved concerned racial discrimination. Yet those decisions were not based on any peculiarities of the Railway Labor Act. We followed the same course in *Syres v. Oil Workers International Union*, 350 U. S. 892, which was governed by the National Labor Relations Act. There an injunction was sought against racial discrimination in application of a collective bargaining agreement; and we allowed the injunction to issue. The congressional policy in favor of the enforcement of agreements to arbitrate

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<sup>8</sup> See Judge Magruder in *Local 205 v. General Electric Co.*, 233 F. 2d 85, 92.

grievance disputes being clear,<sup>9</sup> there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act.

A question of mootness was raised on oral argument. It appears that since the date of the decision in the Court of Appeals respondent has terminated its operations and has contracted to sell its mill properties. All work in the mill ceased in March, 1957. Some of the grievances, however, ask for back pay for increased workloads; and the collective bargaining agreement provides that "the Board of Arbitration shall have the right to adjust compensation retroactive to the date of the change." Insofar as the grievances sought restoration of workloads and job assignments, the case is, of course, moot. But to the extent that they sought a monetary award, the case is a continuing controversy.

The judgment of the Court of Appeals is reversed and the cause is remanded to that court for proceedings in conformity with this opinion.

*Reversed.*

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

MR. JUSTICE BURTON, whom MR. JUSTICE HARLAN joins, concurring in the result.

This suit was brought in a United States District Court under § 301 of the Labor Management Relations Act of

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<sup>9</sup> Whether there are situations in which individual employees may bring suit in an appropriate state or federal court to enforce grievance rights under employment contracts where the collective bargaining agreement provides for arbitration of those grievances is a question we do not reach in this case. Cf. *Assn. of Westinghouse Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, 460, 464; *Moore v. Illinois Central R. Co.*, 312 U. S. 630; *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239; *Transcontinental Air v. Koppal*, 345 U. S. 653.

FRANKFURTER, J., dissenting.

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1947, 61 Stat. 156, 29 U. S. C. § 185, seeking specific enforcement of the arbitration provisions of a collective-bargaining contract. The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union. Cf. *Association of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U. S. 437. Having jurisdiction over the suit, the court was not powerless to fashion an appropriate federal remedy. The power to decree specific performance of a collectively bargained agreement to arbitrate finds its source in § 301 itself,<sup>1</sup> and in a Federal District Court's inherent equitable powers, nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce.<sup>2</sup>

I do not subscribe to the conclusion of the Court that the substantive law to be applied in a suit under § 301 is federal law. At the same time, I agree with Judge Magruder in *International Brotherhood v. W. L. Mead, Inc.*, 230 F. 2d 576, that some federal rights may necessarily be involved in a § 301 case, and hence that the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called "protective jurisdiction."

MR. JUSTICE FRANKFURTER, dissenting.\*

The Court has avoided the difficult problems raised by § 301 of the Taft-Hartley Act, 61 Stat. 156, 29 U. S. C.

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<sup>1</sup> See the opinion of Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137.

<sup>2</sup> See the dissent of Judge Brown in the Court of Appeals in this case, 230 F. 2d 81, 89.

\*[This opinion applies also to No. 276, *General Electric Co. v. Local 205, United Electrical, Radio & Machine Workers*, post, p. 547, and No. 262, *Goodall-Sanford, Inc. v. United Textile Workers*, post, p. 550.]



§ 185,<sup>1</sup> by attributing to the section an occult content. This plainly procedural section is transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining. I have set forth in my opinion in *Employees v. Westinghouse Corp.* the detailed reasons why I believe that § 301 cannot be so construed, even if constitutional questions

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<sup>1</sup>“SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

“(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

“(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

“(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

“(e) For the purposes of this section, in determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

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cannot be avoided. 348 U. S. 437, 441-449, 452-459. But the Court has a "clear" and contrary conclusion emerge from the "somewhat," to say the least, "cloudy and confusing legislative history." This is more than can be fairly asked even from the alchemy of construction. Since the Court relies on a few isolated statements in the legislative history which do not support its conclusion, however favorably read, I have deemed it necessary to set forth in an appendix, *post*, p. 485, the entire relevant legislative history of the Taft-Hartley Act and its predecessor, the Case Bill. This legislative history reinforces the natural meaning of the statute as an exclusively procedural provision, affording, that is, an accessible federal forum for suits on agreements between labor organizations and employers, but not enacting federal law for such suits. See also Wollett and Wellington, *Federalism and Breach of the Labor Agreement*, 7 *Stan. L. Rev.* 445.

I have also set forth in my opinion in the *Westinghouse* case an outline of the vast problems that the Court's present decision creates by bringing into conflict state law and federal law, state courts and federal courts. 348 U. S., at 454-455; see also Judge Wyzanski's opinion in *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 140. These problems are not rendered non-existent by disregard of them. It should also be noted that whatever may be a union's *ad hoc* benefit in a particular case, the meaning of collective bargaining for labor does not remotely derive from reliance on the sanction of litigation in the courts. Restrictions made by legislation like the Clayton Act of 1914, 38 Stat. 738, §§ 20, 22, and the Norris-LaGuardia Act of 1932, 47 Stat. 70, upon the use of familiar remedies theretofore available in the federal courts, reflected deep fears of the labor movement of the use of such remedies against labor. But a union, like any other combatant engaged in a particular fight, is ready to make an ally of an old enemy,

and so we also find unions resorting to the otherwise much excoriated labor injunction. Such intermittent yielding to expediency does not change the fact that judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes; nor are the conditions for its effective functioning thereby altered.

"The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award?" Shulman, *Reason, Contract, and Law in Labor Relations*, 68 *Harv. L. Rev.* 999, 1024.

These reflections summarized the vast and extraordinarily successful experience of Dean Harry Shulman as labor arbitrator, especially as umpire under the collective-bargaining contract between the Ford Motor Co. and the UAW-CIO. (See his *Opinions of the Umpire, Ford Motor Co. and UAW-CIO, 1943-1946*, and the review by E. Merrick Dodd in 60 *Harv. L. Rev.* 486.) Arbitration agreements are for specific terms, generally much shorter than the time required for adjudication of a con-



tested lawsuit through the available stages of trial and appeal. Renegotiation of agreements cannot await the outcome of such litigation; nor can the parties' continuing relation await it. Cases under § 301 will probably present unusual rather than representative situations. A "rule" derived from them is more likely to discombobulate than to compose. A "uniform corpus" cannot be expected to evolve, certainly not within a time to serve its assumed function.

The prickly and extensive problems that the supposed grant would create further counsel against a finding that the grant was made. They present hazardous opportunities for friction in the regulation of contracts between employers and unions. They involve the division of power between State and Nation, between state courts and federal courts, including the effective functioning of this Court. Wisdom suggests self-restraint in undertaking to solve these problems unless the Court is clearly directed to do so. Section 301 is not such a direction. The legislative history contains no suggestion that these problems were considered; the terms of the section do not present them.

One word more remains to be said. The earliest declaration of unconstitutionality of an act of Congress—by the Justices on circuit—involved a refusal by the Justices to perform a function imposed upon them by Congress because of the non-judicial nature of that function. *Hayburn's Case*, 2 Dall. 409. Since then, the Court has many times declared legislation unconstitutional because it imposed on the Court powers or functions that were regarded as outside the scope of the "judicial power" lodged in the Court by the Constitution. See, *e. g.*, *Marbury v. Madison*, 1 Cranch 137; *United States v. Ferreira*, 13 How. 40; *Muskraut v. United States*, 219 U. S. 346; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428.

One may fairly generalize from these instances that the Court has deemed itself peculiarly qualified, with due

regard to the contrary judgment of Congress, to determine what is meet and fit for the exercise of "judicial power" as authorized by the Constitution. Solicitude and respect for the confines of "judicial power," and the difficult problem of marking those confines, apply equally in construing precisely what duties Congress has cast upon the federal courts, especially when, as in this case, the most that can be said in support of finding a congressional desire to impose these "legislative" duties on the federal courts is that Congress did not mention the problem in the statute and that, insofar as purpose may be gathered from congressional reports and debates, they leave us in the dark.

The Court, however, sees no problem of "judicial power" in casting upon the federal courts, with no guides except "judicial inventiveness," the task of applying a whole industrial code that is as yet in the bosom of the judiciary. There are severe limits on "judicial inventiveness" even for the most imaginative judges. The law is not a "brooding omnipresence in the sky," (Mr. Justice Holmes, dissenting, in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 222), and it cannot be drawn from there like nitrogen from the air. These problems created by the Court's interpretation of § 301 cannot "be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another . . . ." *Connally v. General Construction Co.*, 269 U. S. 385, 394. But the Court makes § 301 a mountain instead of a molehill and, by giving an example of "judicial inventiveness," it thereby solves all the constitutional problems that would otherwise have to be faced.

Even on the Court's attribution to § 301 of a direction to the federal courts to fashion, out of bits and pieces

elsewhere to be gathered, a federal common law of labor contracts, it still does not follow that Congress has enacted that an agreement to arbitrate industrial differences be specifically enforceable in the federal courts. On the contrary, the body of relevant federal law precludes such enforcement of arbitration clauses in collective-bargaining agreements.

Prior to 1925, the doctrine that executory agreements to arbitrate any kind of dispute would not be specifically enforced still held sway in the federal courts. See, *e. g.*, Judge Hough's opinion in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006; Judge Mack's opinion in *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319; and Mr. Justice Brandeis' opinion in *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123, 125. Legislation was deemed necessary to assure such power to the federal courts. In 1925, Congress passed the United States Arbitration Act, 9 U. S. C. § 1 *et seq.*, making executory agreements to arbitrate specifically enforceable in the federal courts, but explicitly excluding "contracts of employment" of workers engaged in interstate commerce from its scope. Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for "contracts of employment," were available, the Court would hardly spin such power out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts. See *Amalgamated Association v. Pennsylvania Greyhound*



*Lines*, 192 F. 2d 310 (C. A. 3d Cir.); *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F. 2d 221 (C. A. 4th Cir.); *Lincoln Mills v. Textile Workers Union*, 230 F. 2d 81 (C. A. 5th Cir.); *United Steelworkers of America v. Galland-Henning Mfg. Co.*, 241 F. 2d 323 (C. A. 7th Cir.); and the legislative history set forth by the parties in the present cases. Congress heeded the resistance of organized labor, uncompromisingly led in its hostility to this measure by Andrew Furuseth, president of the International Seamen's Union and most powerful voice expressing labor's fear of the use of this remedy against it.<sup>2</sup>

Even though the Court glaringly ignores the Arbitration Act, it does at least recognize the common-law rule against enforcement of executory agreements to arbitrate. It nevertheless enforces the arbitration clause in the collective-bargaining agreements in these cases. It does so because it finds that Congress "by implication" rejected the common-law rule. I would add that the Court, in thus deriving power from the unrevealing words of the Taft-Hartley Act, has also found that Congress "by implication" repealed its own statutory exemption of collective-bargaining agreements in the Arbitration Act, an

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<sup>2</sup> At the Seamen's Union convention in 1923, at a time when the proposed Arbitration Act contained no exemptions, Furuseth, after referring to the effect of the Act on individual contracts, stated:

"So far we have dealt with the individual. What about those, who shall seek to protect themselves through mutual aid? Some organizations are very strong in their cohesiveness. Cannot those organizations save not only the individuals but themselves?"

"The Supreme Court has decided that voluntary organizations may be sued. If they shall enter into an agreement containing an arbitration clause, there can be little doubt that the organization will be bound." Proceedings of the 26th Annual Convention of the International Seamen's Union of America, p. 204 (1923).

The reference was to this Court's decision, the previous year, in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344.

exemption made as we have seen for well-defined reasons of policy.

The Court of Appeals for the First Circuit, which reached the conclusion that arbitration clauses in collective-bargaining agreements were enforceable under the Arbitration Act, nevertheless found that such clauses would not have been enforceable by virtue of § 301:

"A number of courts have held that § 301 itself is a legislative authorization for decrees of specific performance of arbitration agreements. . . . We think that is reading too much into the very general language of § 301. The terms and legislative history of § 301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947); H. R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting § 301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. . . . Thus it seems to us that a firmer statutory basis than § 301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements."

*Local 205 v. General Electric Co.*, 233 F. 2d 85, 96-97.

I would put the conclusion even more strongly because, contrary to the view of the Court of Appeals for the First Circuit, the rule that is departed from "by implication"

had not only been "judicially formulated" but had purposefully been congressionally formulated in the Arbitration Act of 1925. And it is being departed from on the tenuous basis of the legislative history of § 301, for which the utmost that can be claimed is that insofar as there was any expectation at all, it was only that conventional remedies, including equitable remedies, would be available. But of course, as we have seen, "equitable remedies" in the federal courts had traditionally excluded specific performance of arbitration clauses, except as explicitly provided by the 1925 Act. Thus, even assuming that § 301 contains directions for some federal substantive law of labor contracts, I see no justification for translating the vague expectation concerning the remedies to be applied into an overruling of previous federal common law and, more particularly, into the repeal of the previous congressional exemption of collective-bargaining agreements from the class of agreements in which arbitration clauses were to be enforced.

The second ground of my dissent from the Court's action is more fundamental.<sup>3</sup> Since I do not agree with the Court's conclusion that federal substantive law is to govern in actions under § 301, I am forced to consider the serious constitutional question that was adumbrated in the *Westinghouse* case, 348 U. S., at 449-452, the constitutionality of a grant of jurisdiction to federal courts over contracts that came into being entirely by virtue of state substantive law, a jurisdiction not based on diversity of citizenship, yet one in which a federal court would, as in

<sup>3</sup> In view of the course that this litigation has taken, I put to one side the bearing of the Norris-LaGuardia Act. It is not the first time that unions have conveniently disregarded, when it suited an immediate end, their vehement feelings that secured the restriction upon the federal courts in granting injunctions in labor disputes. Candor compels me to say that I do not think that the conclusion reached by Judge Bailey Aldrich in *Local 205 v. General Electric Co.*, 129 F. Supp. 665, has been persuasively met.



diversity cases, act in effect merely as another court of the State in which it sits. The scope of allowable federal judicial power that this grant must satisfy is constitutionally described as "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Art. III, § 2. While interpretive decisions are legion under general statutory grants of jurisdiction strikingly similar to this constitutional wording, it is generally recognized that the full constitutional power has not been exhausted by these statutes. See, *e. g.*, Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 160; Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 405, n. 47; Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob., 216, 224-225.

Almost without exception, decisions under the general statutory grants have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law. *E. g.*, *Gully v. First National Bank*, 299 U. S. 109. Although it has sometimes been suggested that the "cause of action" must derive from federal law, see *American Well Works Co. v. Layne & Bowler Co.*, 241 U. S. 257, 260, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.

In a few exceptional cases, arising under special jurisdictional grants, the criteria by which the prominence of the federal question is measured against constitutional requirements have been found satisfied under circumstances suggesting a variant theory of the nature of these

requirements. The first, and the leading case in the field, is *Osborn v. Bank of the United States*, 9 Wheat. 738. There, Chief Justice Marshall sustained federal jurisdiction in a situation—hypothetical in the case before him but presented by the companion case of *Bank of the United States v. Planters' Bank*, 9 Wheat. 904—involving suit by a federally incorporated bank upon a contract. Despite the assumption that the cause of action and the interpretation of the contract would be governed by state law, the case was found to “arise under the laws of the United States” because the propriety and scope of a federally granted authority to enter into contracts and to litigate might well be challenged. This reasoning was subsequently applied to sustain jurisdiction in actions against federally chartered railroad corporations. *Pacific Railroad Removal Cases*, 115 U. S. 1. The traditional interpretation of this series of cases is that federal jurisdiction under the “arising” clause of the Constitution, though limited to cases involving potential federal questions, has such flexibility that Congress may confer it whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question.<sup>4</sup>

The views expressed in *Osborn* and the *Pacific Railroad Removal Cases* were severely restricted in construing general grants of jurisdiction. But the Court later sustained this jurisdictional section of the Bankruptcy Act of 1898:

“The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, be-

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<sup>4</sup> *Osborn* might possibly be limited on the ground that a federal instrumentality, the Bank of the United States, was involved, see n. 5, *infra*, but such an explanation could not suffice to narrow the holding in the *Pacific Railroad Removal Cases*.

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tween trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

§ 23 (a), as amended, 44 Stat. 664.

Under this provision the trustee could pursue in a federal court a private cause of action arising under and wholly governed by state law. *Schumacher v. Beeler*, 293 U. S. 367; *Williams v. Austrian*, 331 U. S. 642 (Chandler Act of 1938, 52 Stat. 840). To be sure, the cases did not discuss the basis of jurisdiction. It has been suggested that they merely represent an extension of the approach of the *Osborn* case; the trustee's right to sue might be challenged on obviously federal grounds—absence of bankruptcy or irregularity of the trustee's appointment or of the bankruptcy proceedings. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 582, 611–613 (Rutledge, J., concurring). So viewed, this type of litigation implicates a potential federal question.

Apparently relying on the extent to which the bankruptcy cases involve only remotely a federal question, Mr. Justice Jackson concluded in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582, that Congress may confer jurisdiction on the District Courts as incidental to its powers under Article I. No attempt was made to reconcile this view with the restrictions of Article III; a majority of the Court recognized that Article III defined the bounds of valid jurisdictional legislation and rejected the notion that jurisdictional grants can go outside these limits.

With this background, many theories have been proposed to sustain the constitutional validity of § 301. In *Textile Workers Union of America v. American Thread Co.*, 113 F. Supp. 137, 140, Judge Wyzanski suggested,



among other possibilities, that § 301 might be read as containing a direction that controversies affecting interstate commerce should be governed by federal law incorporating state law by reference, and that such controversies would then arise under a valid federal law as required by Article III. Whatever may be said of the assumption regarding the validity of federal jurisdiction under an affirmative declaration by Congress that state law should be applied as federal law by federal courts to contract disputes affecting commerce, we cannot argumentatively legislate for Congress when Congress has failed to legislate. To do so disrespects legislative responsibility and disregards judicial limitations.

Another theory, relying on *Osborn* and the bankruptcy cases, has been proposed which would achieve results similar to those attainable under Mr. Justice Jackson's view, but which purports to respect the "arising" clause of Article III. See Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 744-747; Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.* 216, 224-225; *International Brotherhood v. W. L. Mead, Inc.*, 230 F. 2d 576. Called "protective jurisdiction," the suggestion is that in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer "true" federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law. Analysis of the "protective jurisdiction" theory might also be attempted in terms of the language of Article III—construing "laws" to include jurisdictional statutes where Congress could have legislated substantively in a field. This is but another way of saying that because Congress could have legislated substantively and thereby could give rise to litigation under a statute of the United States, it can provide a federal forum for state-

created rights although it chose not to adopt state law as federal law or to originate federal rights.

Surely the truly technical restrictions of Article III are not met or respected by a beguiling phrase that the greater power here must necessarily include the lesser. In the compromise of federal and state interests leading to distribution of jealously guarded judicial power in a federal system, see 13 Cornell L. Q. 499, it is obvious that very different considerations apply to cases involving questions of federal law and those turning solely on state law. It may be that the ambiguity of the phrase "arising under the laws of the United States" leaves room for more than traditional theory could accommodate. But, under the theory of "protective jurisdiction," the "arising under" jurisdiction of the federal courts would be vastly extended. For example, every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case. At least in *Osborn* and the bankruptcy cases, a substantive federal law was present somewhere in the background. See pp. 470-472, *supra*, and pp. 480-484, *infra*. But this theory rests on the supposition that Congress could enact substantive federal law to govern the particular case. It was not held in those cases, nor is it clear, that federal law could be held to govern the transactions of all persons who subsequently become bankrupt, or of all suits of a Bank of the United States. See Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 189.

"Protective jurisdiction," once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III. "Protective jurisdiction" is a misused label for the statute we are here considering. That rubric is properly descriptive of safeguarding some of the indisputable, staple business of the federal courts. It is a radiation of an existing jurisdiction. See *Adams v.*

*United States ex rel. McCann*, 317 U. S. 269; 28 U. S. C. § 2283. "Protective jurisdiction" cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined. The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of Article III.<sup>5</sup> That this "protective" theory was not adopted by Chief Justice Marshall at a time when conditions might have presented more substantial justification strongly suggests its lack of constitutional merit. Moreover, Congress in its consideration of § 301 nowhere suggested dissatisfaction with the ability of state courts to administer state law properly. Its concern was to provide access to the federal courts for easier enforcement of state-created rights.

Another theory also relies on *Osborn* and the bankruptcy cases as an implicit recognition of the propriety of the exercise of some sort of "protective jurisdiction" by the federal courts. Mishkin, *op. cit. supra*, 53 Col. L. Rev. 157, 184 *et seq.* Professor Mishkin tends to view the assertion of such a jurisdiction, in the absence of any

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<sup>5</sup> To be sure, the Court upheld the removal statute for suits or prosecutions commenced in a state court against federal revenue officers on account of any act committed under color of office. *Tennessee v. Davis*, 100 U. S. 257. The Court, however, construed the action of Congress in defining the powers of revenue agents as giving them a substantive defense against prosecution under state law for commission of acts "warranted by the Federal authority they possess." *Id.*, at 263. That put federal law in the forefront as a defense. In any event, the fact that officers of the Federal Government were parties may be considered sufficient to afford access to the federal forum. See *In re Debs*, 158 U. S. 564, 584-586; Mishkin, 53 Col. L. Rev., at 193: "Without doubt, a federal forum should be available for all suits involving the Government, its agents and instrumentalities, regardless of the source of the substantive rule."



exercise of substantive powers, as irreconcilable with the "arising" clause since the case would then arise only under the jurisdictional statute itself, and he is reluctant to find a constitutional basis for the grant of power outside Article III. Professor Mishkin also notes that the only purpose of such a statute would be to insure impartiality to some litigant, an objection inconsistent with Article III's recognition of "protective jurisdiction" only in the specified situation of diverse citizenship. But where Congress has "an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law." *Id.*, at 192. In such cases, the protection being offered is not to the suitor, as in diversity cases, but to the "congressional legislative program." Thus he supports § 301: "even though the rules governing collective bargaining agreements continue to be state-fashioned, nonetheless the mode of their application and enforcement may play a very substantial part in the labor-management relations of interstate industry and commerce—an area in which the national government has labored long and hard." *Id.*, at 196.

Insofar as state law governs the case, Professor Mishkin's theory is quite similar to that advanced by Professors Hart and Wechsler and followed by the Court of Appeals for the First Circuit: The substantive power of Congress, although not exercised to govern the particular "case," gives "arising under" jurisdiction to the federal courts despite governing state law. The second "protective jurisdiction" theory has the dubious advantage of limiting incursions on state judicial power to situations in which the State's feelings may have been tempered by early substantive federal invasions.

Professor Mishkin's theory of "protective jurisdiction" may find more constitutional justification if there is not

merely an "articulated and active" congressional policy regulating the labor field but also federal rights existing in the interstices of actions under § 301. See Wollett and Wellington, *Federalism and Breach of the Labor Agreement*, 7 *Stan. L. Rev.* 445, 475-479. Therefore, before resting on an interpretation of § 301 that would compel a declaration of unconstitutionality, we must, as was stated in *Westinghouse*, defer to the strong presumption—even as to such technical matters as federal jurisdiction—that Congress legislated in accordance with the Constitution. The difficult nature of the problem of construction to be faced if some federal rights are sought was set forth in *Westinghouse*, where the constitutional questions were involved only in their bearing on the construction of the statute. Now that the constitutional questions themselves must be faced, the nature of the problem bears repeating.

Legislation must, if possible, be given a meaning that will enable it to survive. This rule of constitutional adjudication is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language. *E. g.*, *United States v. Delaware & Hudson Co.*, 213 U. S. 366; *United States v. Jin Fuey Moy*, 241 U. S. 394, 401; *United States v. Rumely*, 345 U. S. 41. Here the endeavor of some lower courts and of this Court has resulted in adding to the section substantive congressional regulation even though Congress saw fit not to exercise such power or to give the courts any concrete guidance for defining such regulation.

To be sure, the full scope of a substantive regulation is frequently in dispute and must await authoritative determination by courts. Congress declares its purpose imperfectly or partially, and compatible judicial construction completes it. But in this case we start with a provision that is wholly jurisdictional and as such bristles with constitutional problems under Article III. To avoid

them, interpolation of substantive regulation has been proposed. From what materials are we to draw a determination that § 301 is something other than what it declares itself? Is the Court justified in creating all the difficult problems of choice within a sphere of delicate policy without any direction from Congress and merely for the sake of giving effect to a provision that seems to deal with a different subject? The somewhat Delphic wisdom of Mr. Justice Cardozo, speaking for the whole Court, pulls us here in the opposite direction: "We think the light is so strong as to flood whatever places in the statute might otherwise be dark. Courts have striven mightily at times to canalize construction along the path of safety. . . . When a statute is reasonably susceptible of two interpretations, they have preferred the meaning that preserves to the meaning that destroys. . . . 'But avoidance of a difficulty will not be pressed to the point of disingenuous evasion.' . . . 'Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power.'" *Hopkins Federal Savings & Loan Assn. v. Cleary*, 296 U. S. 315, 334-335.

Assuming, however, that we would be justified in pouring substantive content into a merely procedural vehicle, what elements of federal law could reasonably be put into the provisions of § 301? The suggestion that the section permits the federal courts to work out, without more, a federal code governing collective-bargaining contracts must, for reasons that have already been stated, be rejected. Likewise the suggestion that § 301 may be viewed as a congressional authorization to the federal courts to work out a concept of the nature of the collective-bargaining contract, leaving detailed questions of interpretation to state law. See 348 U. S., at 455-459.

Nor will Congress' objective be furthered by an attempt to limit the grant of a federal forum to certain types of



actions between unions and employers. It would be difficult to find any basis for, or principles of, selection, either in the terms of § 301 or in considerations relevant to promotion of stability in labor relations. It is true that a fair reading of § 301 in the context of its enactment shows that the suit that Congress primarily contemplated was the suit against a union for strike in violation of contract. From this it might be possible to imply a federal right to bring an action for damages based on such an event. In the interest of mutuality, so close to the heart of Congress, we might in turn find a federal right in the union to sue for a lockout in violation of contract. But neither federal right would be involved in the present cases. Moreover, it bears repetition that Congress chose not to make this the basis of federal law, *i. e.*, it chose not to make such conduct an unfair labor practice.

There is a point, however, at which the search may be ended with less misgiving regarding the propriety of judicial infusion of substantive provisions into § 301. The contribution of federal law might consist in postulating the right of a union, despite its amorphous status as an unincorporated association, to enter into binding collective-bargaining contracts with an employer. The federal courts might also give sanction to this right by refusing to comply with any state law that does not admit that collective bargaining may result in an enforceable contract. It is hard to see what serious federal-state conflicts could arise under this view. At most, a state court might dismiss the action, while a federal court would entertain it. Moreover, such a function of federal law is closely related to the removal of the procedural barriers to suit. Section 301 would be futile if the union's status as a contracting party were not recognized. The statement in § 301 (b) that the acts of the agents of the union are to be regarded as binding upon the union may be used in support of this conclusion. This provision,

not confined in its application to suits in the District Court under § 301 (a), was primarily directed to responsibility of the union for its agents' actions in authorizing strikes or committing torts. It can be construed, however, as applicable to the formation of a contract. So applied, it would imply that a union must be regarded as contractually bound by the acts of its agents, which in turn presupposes that the union is capable of contract relations.

Of course, the possibility of a State's law being counter to such a limited federal proposition is hypothetical, and to base an assertion of federal law on such a possibility, one never considered by Congress, is an artifice. And were a State ever to adopt a contrary attitude, its reasons for so doing might be such that Congress would not be willing to disregard them. But these difficulties are inherent in any attempt to expand § 301 substantively to meet constitutional requirements.

Even if this limited federal "right" were read into § 301, a serious constitutional question would still be present. It does elevate the situation to one closely analogous to that presented in *Osborn v. Bank of the United States*, 9 Wheat. 738.<sup>6</sup> Section 301 would, under this view, imply that a union is to be viewed as a juristic entity for purposes of acquiring contract rights under a collective-bargaining agreement, and that it has the right to enter into such a contract and to sue upon it. This was all that was immediately and expressly involved in the *Osborn* case, although the historical setting was

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<sup>6</sup> Enunciation of such a requirement could in fact bring federal law somewhat further to the forefront than was true of *Osborn*, the *Pacific Railroad Removal Cases*, or the bankruptcy cases in the few cases where an assertion could be made that state law did not sufficiently recognize collective agreements as contracts. But there appears to be no State that today possesses such a rule. Most and probably all cases arising under § 301—certainly the present ones—would never present such a problem.

vastly different, and the juristic entity in that case was completely the creature of federal law, one engaged in carrying out essential governmental functions. Most of these special considerations had disappeared, however, at the time and in the circumstances of the decision of the *Pacific Railroad Removal Cases*, 115 U. S. 1, see p. 471, *supra*. There is force in the view that regards the latter as a "sport" and finds that the Court has so viewed it. See Mishkin, 53 Col. L. Rev., at 160, n. 24, citing *Gully v. First National Bank*, 299 U. S. 109, 113-114 ("Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them."), and *Puerto Rico v. Russell & Co.*, 288 U. S. 476, 485; see also Mr. Justice Holmes, in *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 214-215 (dissenting opinion). The question is whether we should now so consider it and refuse to apply its holding to the present situation.

I believe that we should not extend the precedents of *Osborn* and the *Pacific Railroad Removal Cases* to this case, even though there be some elements of analytical similarity. *Osborn*, the foundation for the *Removal Cases*, appears to have been based on premises that today, viewed in the light of the jurisdictional philosophy of *Gully v. First National Bank*, *supra*, are subject to criticism. The basic premise was that every case in which a federal question might arise must be capable of being commenced in the federal courts, and when so commenced it might, because jurisdiction must be judged at the outset, be concluded there despite the fact that the federal question was never raised. Marshall's holding was undoubtedly influenced by his fear that the bank might suffer hostile treatment in the state courts that could not be remedied by an appeal on an isolated federal question. There is nothing in Article III that affirmatively supports the view that original jurisdiction over cases involving



federal questions must extend to every case in which there is the potentiality of appellate jurisdiction. We also have become familiar with removal procedures that could be adapted to alleviate any remaining fears by providing for removal to a federal court whenever a federal question was raised. In view of these developments, we would not be justified in perpetuating a principle that permits assertion of original federal jurisdiction on the remote possibility of presentation of a federal question. Indeed, Congress, by largely withdrawing the jurisdiction that the *Pacific Railroad Removal Cases* recognized, and this Court, by refusing to perpetuate it under general grants of jurisdiction, see *Gully v. First National Bank*, *supra*, have already done much to recognize the changed atmosphere.

Analysis of the bankruptcy power also reveals a superficial analogy to § 301. The trustee enforces a cause of action acquired under state law by the bankrupt. Federal law merely provides for the appointment of the trustee, vests the cause of action in him, and confers jurisdiction on the federal courts. Section 301 similarly takes the rights and liabilities which under state law are vested distributively in the individual members of a union and vests them in the union for purposes of actions in federal courts, wherein the unions are authorized to sue and be sued as an entity. While the authority of the trustee depends on the existence of a bankrupt and on the propriety of the proceedings leading to the trustee's appointment, both of which depend on federal law, there are similar federal propositions that may be essential to an action under § 301. Thus, the validity of the contract may in any case be challenged on the ground that the labor organization negotiating it was not the representative of the employees concerned, a question that has been held to be federal, *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18, or on the ground that subsequent change in the representa-

tive status of the union has affected the continued validity of the agreement. Perhaps also the qualifications imposed on a union's right to utilize the facilities of the National Labor Relations Board, dependent on the filing of non-Communist affidavits required by § 9 (h) and the information and reports required by § 9 (f) and (g), might be read as restrictions on the right of the union to sue under § 301, again providing a federal basis for challenge to the union's authority. Consequently, were the bankruptcy cases to be viewed as dependent solely on the background existence of federal questions, there would be little analytical basis for distinguishing actions under § 301. But the bankruptcy decisions may be justified by the scope of the bankruptcy power, which may be deemed to sweep within its scope interests analytically outside the "federal question" category, but sufficiently related to the main purpose of bankruptcy to call for comprehensive treatment. See *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 582, 652, n. 3 (concurring in part, dissenting in part). Also, although a particular suit may be brought by a trustee in a district other than the one in which the principal proceedings are pending, if all the suits by the trustee, even though in many federal courts, are regarded as one litigation for the collection and apportionment of the bankrupt's property, a particular suit by the trustee, under state law, to recover a specific piece of property might be analogized to the ancillary or pendent jurisdiction cases in which, in the disposition of a cause of action, federal courts may pass on state grounds for recovery that are joined to federal grounds. See *Hurn v. Oursler*, 289 U. S. 238; *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175; but see *Mishkin*, 53 Col. L. Rev., at 194, n. 161.

If there is in the phrase "arising under the laws of the United States" leeway for expansion of our concepts of jurisdiction, the history of Article III suggests that the area is not great and that it will require the presence of

some substantial federal interest, one of greater weight and dignity than questionable doubt concerning the effectiveness of state procedure. The bankruptcy cases might possibly be viewed as such an expansion. But even so, not merely convenient judicial administration but the whole purpose of the congressional legislative program—conservation and equitable distribution of the bankrupt's estate in carrying out the constitutional power over bankruptcy—required the availability of federal jurisdiction to avoid expense and delay. Nothing pertaining to § 301 suggests vesting the federal courts with sweeping power under the Commerce Clause comparable to that vested in the federal courts under the bankruptcy power.

In the wise distribution of governmental powers, this Court cannot do what a President sometimes does in returning a bill to Congress. We cannot return this provision to Congress and respectfully request that body to face the responsibility placed upon it by the Constitution to define the jurisdiction of the lower courts with some particularity and not to leave these courts at large. Confronted as I am, I regretfully have no choice. For all the reasons elaborated in this dissent, even reading into § 301 the limited federal rights consistent with the purposes of that section, I am impelled to the view that it is unconstitutional in cases such as the present ones where it provides the sole basis for exercise of jurisdiction by the federal courts.<sup>7</sup>

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<sup>7</sup> In No. 276, respondent's motion in the Court of Appeals to amend its complaint to show diversity of citizenship was denied on alternate grounds of possible mootness and Rule 17 (b)'s reference of questions of capacity to sue to state law. The view of § 301 that I have set forth would permit that section to be applied constitutionally to situations, such as diversity of citizenship, where there is jurisdiction in the federal courts apart from § 301. I would therefore remand this case to permit the amendment alleging diversity of citizenship.



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## APPENDIX—LEGISLATIVE HISTORY.

### I. THE CASE BILL (H. R. 4908, 79th Cong., 2d Sess.). (The Federal Mediation Act of 1946.)

#### A. *Legislative history in the House:*

1. Hearings before the Committee on Labor on H. R. 4908, 79th Cong., 1st Sess.:
  - a. H. R. 4908, as considered by committee, provided for fact-finding boards. It had no provision concerning suits on collective-bargaining contracts.
  - b. During these hearings, there was, however, some concern with breach of such contracts. Despite the filing of two memoranda detailing the problems of enforcement of agreements against a union (pp. 89, 96), there was no elucidation of the problem. The prevalence of violation was noted and the desire to do something to promote enforceability expressed. (Pp. 15, 27, 28, 38, 41, 68, 73, 84, 88, 97, 101, 113.)
2. The House Report contained no comment on the problem. (H. R. Rep. No. 1493, 79th Cong., 2d Sess.)
3. The bill, as introduced on the House floor (92 Cong. Rec. 765):

“Sec. 10. Binding effect of collective-bargaining contracts: All collective-bargaining contracts shall be mutually and equally binding and enforceable either at law or in equity against each of the parties thereto, any other law to the contrary notwithstanding. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then, in addition to any other remedy or remedies existing either in law or equity, a suit for damages for such breach or for

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injunctive relief in equity may be maintained by the other party or parties in any United States district court having jurisdiction of the parties. If the defendant against whom action is sought to be commenced and maintained is a labor organization, such action may be filed in the United States district court of any district wherein any officer of such labor organization resides or may be found."

4. House debate:

- a. General comment on the desirability of mutual enforceability of contracts: 92 Cong. Rec. 662, 668, 677, 679, 684, 686, 753, 767.
- b. Representative Francis Case's only comments were not pertinent. *Id.*, at 680, 765.
- c. Representative Vorys, in offering corrective amendments to Section 10, stated:

"We do create, if there is any doubt about its present existence, an action for damages for breach of contract against a labor organization or an employer, which means that either party, the labor organization or the employer, may have the benefit of a trial by jury in any such action.

". . . Since we are attempting to create no new right in the equity side, there is no reason to refer to the equity side . . . .

". . . It will take away any particular benefits or advantages of one party or the other that now exist under other laws which keep the obligations from being equal and mutual; will not give any new rights by way of injunction to either party but will specifically provide for an action at law for damages to enforce any act of violation of the contracts."  
(*Id.*, at 853.)

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d. Representative Thom, opposing Section 10 as an incursion on States' rights, appears to have been the only member to have felt that collective bargaining contracts already were enforceable in state and federal courts. *Id.*, at 847.

5. As it finally passed the House, Section 10 read:

"SEC. 10. BINDING EFFECT OF COLLECTIVE-BARGAINING CONTRACTS.—All collective-bargaining contracts shall be mutually and equally binding and enforceable against each of the parties thereto, any other law to the contrary notwithstanding. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then, in addition to any other remedy or remedies existing, a suit for damages for such breach may be maintained by the other party or parties in any State or United States district court having jurisdiction of the parties."

B. *Legislative history in the Senate:*

1. Hearings before Senate Committee on Education and Labor on S. 1661:

- a. Hearings were held on a companion bill to the fact-finding bill on which House hearings were held. The Case bill had not yet passed the House.
- b. As in the House, however, concern was expressed over a general impression that unions were not subject to suits for damages for breach of contract to the same extent as employers. (Pp. 138, 168, 354, 383, 400, 554, 623, 662, 740.) For the first time, however, oral testimony directed the legislators to the primary source of the problem. This testimony, with a supporting memorandum, indicated that the problem lay in the status of the union



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as an unincorporated association. This memorandum, however, also pointed out that in some jurisdictions the union was viewed as acting as agent of the individual employees in negotiating the collective agreement, and thus was not viewed as having, even in theory, any rights or obligations on the contract. (P. 411.)

2. Hearings before a Subcommittee of the Senate Committee on Education and Labor on H. R. 4908 (as it had passed the House):

a. "Mr. CASE. Section 10, opening the miscellaneous provisions of the bill, is very brief, and I would like to read it because I think it speaks for itself.

"It almost would seem unnecessary to say that contracts entered into between two parties call for mutual obligations and mutual observance. That is implicit in all contracts, whether expressed or not, by statutory provisions saying they are equally binding and enforceable; but because of some interpretations or some theories that they are not binding where labor organizations are involved, I thought in harmony with what the President said here—recognizing a practical situation for which we have to find methods not only of peaceful negotiation but also of insuring that the contracts once made must be lived up to—we should have a section in the bill on that subject.

"This section was modified somewhat in the consideration in the House. Originally I think we had in a provision authorizing restraining orders, but that was eliminated . . . with the consent of myself and others who had been studying the bill, with the thought that this possibly met the situation by authorizing a suit for damages for breach of contract.

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"Senator TAFT. Mr. Case, there are one or two minor questions on that. It says:

"All collective-bargaining contracts shall be . . . enforceable by a suit in a State or a United States district court having jurisdiction of the parties.

"Would you intend to give jurisdiction to the United States district court in purely local collective-bargaining contracts not dealing with interstate commerce? Ought not that be limited in some way?

"Mr. CASE. That may be. There are other places in the bill where we worked in, first of all, a declaration of public interest, and my thought there was that resting on the general welfare clause, it was clearly within the authority of Congress where substantial public interest was involved to take cognizance—

"Senator TAFT . . . I would think that probably the jurisdiction of the United States court should be confined to the type of dispute which is interstate in character and under the jurisdiction of the National Labor Relations Board.

"Mr. CASE. I certainly would have no objection to a clarification on that point. . . .

"Of course, the Senator is aware of the fact that the interpretation of the Supreme Court recently, on the subject of interstate commerce, has been so broad that anything which affects interstate commerce, which is technically interstate commerce has been ruled to be interstate commerce.

"Senator TAFT. On the other hand, there is still a field of intrastate commerce. It doesn't destroy it, although it goes a long way.

"Mr. CASE. As far as I am concerned, I would be glad to protect that vanishing field of intrastate

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commerce, and if the Senators wanted to clarify that I would have no objection.

"Senator TAFT. The other question relating to that section which occurs to me is the effect of this 'binding and enforceable,' as related to the incorporation of unions. As I understand it, a collective-bargaining agreement is already mutually and equally binding and enforceable. I can't think of any circumstance where it would not be. But the problem seems to be a practical problem, in many States, of successfully suing a union which is not incorporated. I don't take it that this section would change the requirements in a State, we will say, to make every member of the union a party. It doesn't really meet that particular difficulty, which seems to be the chief difficulty in enforcing collective-bargaining agreements.

"Mr. CASE. I think that what this would do would be to make the officers of a collective-bargaining agent suable. I do not think it would extend to individual members of the union, because the language is that the contract is made 'mutually and equally binding and enforceable against each of the parties thereto' and under the Wagner Act the party to the contract is the recognized bargaining agent.

"Senator TAFT. No; the recognized bargaining agent is the union, not the officers of the union; it is the union, and the union is usually an unincorporated association. The point I was trying to make is that if you want to sue an unincorporated association in many States it is almost impossible to get them into court, because they have requirements that you have to serve every member, and you can't reach them, you can't find them in many cases. So



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the whole thing is delayed, and it is a long and tedious problem, if it can be done at all. In some States that is not so. You can sue an unincorporated association by serving the officers. But we have before us a bill from Senator Byrd requiring that unions be incorporated for the purpose of carrying out, as I see it, the same purpose you have here, at least partially, and I just wondered whether this really was effective to meet the actual difficulty today in enforcing collective-bargaining agreements.

"Mr. CASE. Well, the intent of it is to make it possible to bring the action against the union in the common name of the association.

"Senator TAFT. I don't say it doesn't have that effect, but I don't think it does. I don't think that 'other law to the contrary notwithstanding' would affect the method by which you had to bring a suit against an unincorporated association.

"Senator BALL. Would that make it possible to sue the union as an entity in the Federal court by simply serving the officers?

"Senator TAFT. I don't think so, unless you said so. You might conceivably say so.

"Senator BALL. Then the other question is: Could we, in effect, waive State laws and make the same provision apply in State courts?

"Senator TAFT. No; I don't think you can. But this would authorize suit to be brought in the Federal court and I thought that should be confined to interstate cases.

"Mr. CASE. Following the procedure probably, however, of the law of the State in which the action was brought.

"Senator TAFT. I don't know; that is a complicated question, as you know, in a Federal court as

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to when you have to comply with the State law and when you do not.

"Mr. CASE. The Senator is probably more familiar than I with what is called the Second Coronado case. I am not familiar with the details of it, but as I have read references to it I think there the Supreme Court held that an injunction could be obtained against a union as such where the United States was the party. Now of course, this section doesn't carry any injunctive procedure; but there, at least, the Supreme Court seemed to recognize that a union might be made the object of an action as an association without reaching the individual members.

"Senator TAFT. This would carry to a civil injunction process if it were one generally usable under laws of equity, I think, when you say it is binding and enforceable; whatever the equitable remedies might be in that State, or might be considered proper by the court, could be used.

"Senator SMITH. I would like to ask Mr. Case one question on section 10. I have difficulty in seeing how that changes what the situation would be if it just wasn't in there at all. I don't quite see why we need to put that in this bill.

"Let me say first that I have not studied this carefully, so I am raising the question as it comes to me.

"Mr. CASE. The intent primarily was to meet the technical legal difficulty that at the present time the union isn't suable or actionable as an association unless it is incorporated, and to avoid the necessity of joining all members of the union as parties.

"Senator TAFT. I would suggest if that is your purpose it ought to say so in so many words.

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"Mr. CASE. I appreciate the Senator's suggestion.

"Senator SMITH. That was my difficulty. It didn't seem to me it did make that clear, if that is the intent." (Pp. 8-11.)

- b. The technical, procedural nature of the problem was also stressed in testimony of some other witnesses. See pp. 175-179; 198-200; 248-249.
- c. Other less discerning discussion: pp. 34, 47, 48, 110, 125, 129, 135, 144, 148, 157, 225, 237, 240, 266, 371, 372, 378, 385, 409.

3. Senate Report (No. 1177, 79th Cong., 2d Sess.):

a. Majority:

"Your committee has also considered and rejected section 10 of H. R. 4908, as passed by the House, which would explicitly declare that all collective-bargaining contracts shall be mutually binding and enforceable by the parties thereto. In the first place, this proposal appears to be based upon a misapprehension as to the legal responsibility of the parties under such contracts. Collective-bargaining agreements are at present legally enforceable in the courts, and in the Federal courts, if jurisdiction is otherwise established according to applicable law, unions may be sued in their own names under the doctrine of the first Coronado case (*United Mine Workers v. Coronado Coal Company*, 259 U. S. [344]). Legally, therefore, the proposed provision is unnecessary. Practically, it presents serious dangers. By offering easy access to the courts in cases where a breach of a collective-bargaining agreement is alleged, it would act as an inducement to litigate every alleged grievance, and would result in a flood of litigation making the courts again the battlefield



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for industrial disputes, increasing rather than eliminating the acrimony and conflict between the parties. In addition, your committee wishes to point out the fallacy of a widely held notion that breaches of contract are most often committed by labor organizations and employees. On the contrary, most breaches of contract are by employers. As has been elsewhere stated at greater length in this report your committee feels that labor disputes should be settled by conference, negotiation, and compromise, and not by the use of mandatory judicial processes. . . ." (Pp. 8-9.)

- b. Minority (Senators Ball, Taft, and H. Alexander Smith):

"AMENDMENT No. 3 [the minority proposal] would make unions suable as legal entities in the Federal courts for violation of contract, with liability limited to union assets and not enforceable against individual members or their property. A subsection would provide that where individual employees participated in a 'wildcat' strike in violation of contract, not sanctioned or approved by the union, the union itself would not be liable but such employees would lose their legal status as employees under the Wagner Act, leaving the employer free to discharge them or not. While collective-bargaining agreements theoretically are legally enforceable contracts, as a practical matter, because of the many obstacles to suits against unions imposed by most States, they are actually binding on only one party, the employer. The minority believes this provision, imposing equal responsibility on both parties to such contracts, is absolutely essential to the stability of labor relations. The only argument so far advanced against it is that some employers might embarrass

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unions by suits for enforcement of contract. This hardly is a valid ground for continuing to regard such contracts as one-way arrangements, wherein one party receives benefits and assumes no binding obligations whatsoever." (Pp. 3-4.)

"TEXT OF AMENDMENT No. 3

"Amend H. R. 4908 by inserting at the proper place the following new section:

"SEC. —. (a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of this section district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of summons, subpoena or other legal process upon such officer or agent shall constitute service upon the labor organization.

"(d) Any employee who participates in a strike or other stoppage of work in violation of an existing collective-bargaining agreement, if such strike or stoppage is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights for such employee, shall lose his status as an employee of the em-

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ployer party to such agreement for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: *Provided*, That such loss of status for such employee shall cease if and when he is reemployed by such employer.

“The purpose of this amendment is simple: to make collective-bargaining contracts equally binding and enforceable on both parties to them. The courts have held that the purpose of the Wagner Act was—

“to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made. (*H. J. Heinz & Co.*, 311 U. S. 514—1941.)

“But neither the Wagner Act nor any other Federal statute makes labor unions legally responsible for carrying out their agreements.

“The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process (see testimony of Raymond S. Smethurst before committee, February 25, 1946). Despite these practical difficulties in the collection of a judgment against a union, the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective agreement.

“President Truman, in opening the management-labor conference in November 1945, took cognizance of this condition. He said very plainly that collec-



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tive agreements should be mutually binding on both parties to the contract:

"We shall have to find methods not only of peaceful negotiation of labor contracts, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

"If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The main reason for an employer to sign a collective labor agreement is to assure uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to enter into an agreement.

"Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements dealing with interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce (as defined by sec. 2 (a)(1) of this act).

"The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgment against it. The property of the individual members of the organization would become absolutely free from any liability under such a judgment. Thus the members of the union would

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secure all the advantages of limited liability without incorporation of the union.

"The proposed amendment relative to union liability specifically provides that a labor organization would be bound by the acts of its authorized agents only. Thus a labor organization would not be liable for damages arising as a result of an unauthorized strike carried on in violation of a contract. If a union or an officer thereof did not authorize the strike or participate in it, or support it, or subsequently approve it, no liability would be imposed on the union as a consequence of the work stoppage. To protect the employer against work stoppages in violation of an agreement but not approved by the union, employees who take part in such strikes would lose their status as employees under sections 8, 9, and 10 of the National Labor Relations Act. The employer could refuse to rehire them after the strike. Besides providing a remedy for the employer for irresponsible interruptions of production, such a provision would tend to strengthen sound union discipline.

"The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations and at common law voluntary associations are not suable as such (*Wilson v. Airline Coal Company*, 215 Iowa 855; *Iron Molders' Union v. Allis-Chalmers Company*, C. C. A. 7, 166 F. 45). As a consequence the rule in all jurisdictions, in the absence of statute, is that unincorporated labor unions cannot be sued in their common name (*Grant v. Carpenters' District Council*, 322 Pa. St. 62). Accordingly, the difficulty or impossibility of enforcing the terms of a collective

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agreement in a suit at law against a union arises from the fact that each individual member of the union must be named and made a party to the suit.

"Some States have enacted statutes which subject unincorporated associations to the jurisdiction of law courts. These statutes are by no means uniform; some pertain to fraternal societies, welfare organizations, associations doing business, etc., and in some States the courts have excluded labor unions from their application.

"On the other hand, some States, including California and Montana, have construed statutes permitting common name suits against associations doing business to apply to labor unions (*Armstrong v. Superior Court*, 173 Cal. 341; *Vance v. McGinley*, 39 Mont. 46). Similarly, but more restrictive, in a considerable number of States the action is permitted against the union or representatives in proceedings in which the plaintiff could have maintained such an action against all the associates. Such States include Alabama, California, Connecticut, Delaware, Maryland, Montana, Nevada, New Jersey, New York, Rhode Island, South Carolina, and Vermont.

"In at least one jurisdiction, the District of Columbia, the liberal view is held that unincorporated labor unions may be sued as legal entities, even in the absence of statute (*Busby v. Elec. Util. Emp. Union*, U. S. Court of Appeals for the District of Columbia, No. 8548, January 22, 1945).

"In the Federal Courts, whether an unincorporated union can be sued depends upon the procedural rules of the State in which the action is brought (*Busby v. Elec. Util. Empl. Union* [323 U. S. 72], U. S. Supreme Court, 89 Law. Adv. Op. 108, December 4, 1944).



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"The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing, or boycotting, when carried on in breach of a collective agreement, involve a 'labor dispute' under the act so as to make the activity not enjoyable [*sic*] without a showing of the requirements which condition the issuance of an injunction under the act (*Wilson & Co. v. Birl*,] 105 F. 2d 948, C. C. A. 3).

"A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act, and the courts of many of these jurisdictions have held that a strike in violation of a collective agreement is a 'labor dispute' and cannot be enjoined (*The Nevins v. Kasmach*, 279 N. Y. 323; *Bulkin v. Sacks*, 31 Pa. D & C 501).

"There are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no 'substantive right' to enforce, in order to make the union suable as such in Federal courts.

"Even where unions are suable, the union funds may not be reached for payment of damages and any judgments or decrees rendered against the association as an entity may be unenforceable. (See *Aalco Laundry Co. v. Laundry Linen Union*, 115 S. W. 2d 89 Mo. App.) However, only where statutes provide for recognition of the legal status of associations do association funds become subject to judgments (*Deeney v. Hotel & Apt. Clerks' Union*, 134 P. 2d 328 (1943), California).

"Financial statutory liability of associations is provided for by some States, among which are Alabama, California, Colorado, Connecticut, Delaware,

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New Jersey, North Dakota, and South Carolina. Even in these States, however, whether labor unions are included within the definition of 'association' is a matter of local judicial interpretation.

"It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements. The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.

"Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.

"It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.

"This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.

"In any event, it is certainly a point to be bargained over and any union with the status of 'representative' under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to

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live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." (Pp. 10-14.)

4. Senate debate:

a. Senator Taft:

"Mr. President, this amendment is the third and last of the amendments which attempt to strengthen the collective-bargaining process. I do not know of anything for which there has been greater demand than recognition that labor unions shall be responsible on their collective-bargaining contracts exactly as the employer is responsible. The United States Supreme Court has said that the purpose of the Wagner Act was:

"To compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made.

"I quote from President Truman's address to the Management-Labor Conference in November 1945:

"We shall have to find methods not only of peaceful negotiation of labor contracts, but also of insuring industrial peace for the lifetime of such contracts.

"I quote still further from President Truman's address:

"Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

"A bill was introduced, as I recall, by the Senator from Virginia [Mr. BYRD] to require all labor unions to incorporate. We found that to be awkward, and we thought it unnecessary. All we provide in the amendment is that voluntary associations shall in



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effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce and therefore involves a Federal question. As a matter of fact, labor unions in theory are responsible for their contracts. At times they have been sued, including actions for tort. In the Danbury Hatters case it will be remembered a judgment was obtained, and because it was a voluntary association, the houses of all the various members were levied upon and taken in satisfaction of the judgment. We do not want to perpetuate such a condition. Therefore, we provide very simply that a labor union may be sued as if it were a corporation, and if it is sued, then the funds of the labor organization and its assets are responsible for the judgment, but the funds and the assets of the individual members are not liable on such a judgment. In other words, we think in subsection (a) and in subsection (b) we have fairly stated the proposition.

“Let me finish discussing subsection (c) first. It simply provides how labor unions may be sued, how they may be served, and provides the machinery by which the suit may be brought. The difficulty with respect to unincorporated associations is that under most State laws they are very difficult to sue. In theory, they are suable, but as a practical matter there are many States in which it is almost impossible to sue them. It is necessary to make practically every member of the labor organization a party to the suit. Various other kinds of restrictions and difficulties exist which, as a practical matter, in a large part of the United States makes it absolutely impossible to sue a labor union.” (92 Cong. Rec. 5705.)

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"What good is a collective-bargaining agreement if people are not bound by it? If there is a collective-bargaining agreement and the men are bound by it, they ought to carry it out. If the union wants to carry it out, and some of the men say, 'We will not do it,' they ought to be liable. This provision applies only if the action of the individual is a violation of the collective-bargaining agreement." (*Id.*, at 5706.)

b. Senator Ball:

"The pending amendment very simply seeks to establish for unions the same responsibility for carrying out their contracts that now apply to employers. . . .

. . . . .  
"Mr. President, it is the contention of some of the opponents of this amendment that unions are now suable in State courts. A lawyer on my staff looked up a number of recent decisions. Several of them show that in Kentucky, West Virginia, in Massachusetts, and in Illinois, all of which are important industrial States, unions cannot be sued as legal entities. . . .

. . . . .  
"Mr. President, it seems to me that equal responsibility by both parties to a contract is a principle which the Senate should apply in the field of labor relations. I hope the amendment will be adopted." (*Id.*, at 5722.)

c. Senator Murray, opposing the measure, argued, among other things, that labor unions are peculiar in that they are unincorporated associations, that state rules regarding them are the same for all

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unincorporated associations, and that it would be unjust to subject the union to different rules in the federal courts. The following quotations, relied upon by those seeking to find federal substantive law in Section 301, must be viewed in the context of this procedural discussion:

"By their proposal, the minority members of the committee proposing this amendment would create a completely new Federal right in the United States courts. It would not create this new right as against all unincorporated associations, but it would set up a new and special court right against unions.

"To realize the full implication of this matter, it should be remembered that the courts of the United States, as distinguished from the courts of each of the several States, operate under a very long-standing set of laws defining their jurisdiction. It is not possible to bring each and any case into the United States courts. . . . The Federal courts were created solely for the purpose of handling special matters which are appropriately in the jurisdiction of a Federal agency. Thus, suits involving rights of a citizen under Federal statute may go to a Federal court. Suits involving citizens of more than one State may go to a Federal court under appropriate circumstances.

"What is the state of the law today with respect to the right to bring a suit in a Federal court for violation of a collective-bargaining agreement? The law in such a situation is identical with that affecting all individuals, corporations, or associations. Where there is diversity of citizenship—plaintiffs and defendants from different States—action may be brought in the Federal courts. Where rights under a Federal statute are involved,



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the matter may be brought to a Federal court. In short, where, under general law a matter appropriate for Federal jurisdiction is involved, suits under labor contracts, as under any other type of contract, may be brought in the Federal courts.

"The Senators making the present proposal are not satisfied with this, however. Their proposal would take labor agreements out of the category of normal State court operations, and would make them at all times and under all circumstances a matter for the Federal courts. The proposal would create a new and special Federal right to enforce in the Federal courts the terms in a labor agreement." (*Id.*, at 5708.)

"Continuing my discussion of the amendment, I wish to say that the first issue is not whether a collective-bargaining agreement may be enforced in court. Collective-bargaining agreements are as enforceable in the courts as any other kind of agreement under the law today. The first question is whether collective-bargaining agreements, unlike any other agreements, are to be thrown into the Federal courts and made the subject of Federal court jurisdiction." (*Id.*, at 5720.)

- d. Senator Magnuson, opposing the amendment before it was actually introduced, went into detailed consideration of the amendment, which he described as one to "create a right of action, under Federal statute, for breach of a collective-bargaining agreement." He asserted that such agreements were already fully binding legally on both parties, and that the difficulty was in the union's status as an unincorporated association. He defended the necessity for the restrictive rules regarding suits against such associations, and emphasized the modification of

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the rule in many states designed to facilitate suits against unions. Then:

"The minority views of the Senate Labor Committee in urging the adoption of the amendment, correctly assert that the Federal courts must follow the laws of the States in suits on collective-bargaining agreements when a Federal statute is not involved. The minority views however, give an incorrect picture of the laws of the various States on the question. At the present time, fully three-fourths of the States permit suits to be brought against unincorporated associations in their own names. In other words, at least three-fourths of the States allow a suit to be brought against any employee or any group of employees for the violation of a collective-bargaining agreement.

. . . . .

"The comparative freedom of courts of equity also make [*sic*] it possible for them to limit recoveries to funds or property belonging to the associations as a condition for permitting this type of suit. Senators, in view of this progress made by the States, I see no reason why it is necessary for the Federal Government to invade the realm of the States to such an extent as to furnish them laws governing suits for breaches of purely private contracts. The law governing private contracts has traditionally been a matter for State control, and we should not lightly violate this separation of functions under the guise of controlling interstate commerce.

. . . . .

"Mr. President, the minority views picture a dark future for a party who wishes to enforce an agreement with a labor union. Actually the picture given is quite misleading. For instance, it says that

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an employer or even the Government has no Federal right of action to enforce a collective bargaining agreement.

"Of course, the amendment of the Senator from Minnesota would allow a Federal right of action to enforce a collective-bargaining agreement. All of us who are lawyers know that a party who enters into an ordinary private contract has practically no Federal right of action to have the contract enforced.

" . . . Under the amendment of the Senator from Minnesota a contract would be enforceable only in Federal courts, and would, therefore, violate a long-time cardinal principle of law, namely, that all contracts are enforceable, if at all, in State courts.

"Mr. President, there is another point regarding the pending amendment which I should like to mention. The amendment under discussion is designed to make it easier for employers to bring suit against labor unions. Do the Members of the Senate realize that it is almost impossible for a labor union to sue an employer for breach of contract? Collective-bargaining agreements are generally construed either as contracts between the employer and the employees or contracts for the benefit of the employees. In either case injured employees must usually sue for themselves. A union may not bring suit because it has no interest in the matter. Furthermore, even though its disability to sue as an unincorporated association has now largely been removed, it still has the same difficulties bringing suit as an employer does in bringing it into court as a defendant. If the Senate is going to confer special



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privileges on one side, it probably should also adopt an amendment which would confer the same privileges on the other side.

"Mr. BALL. . . . The Senator is complaining that unions have difficulty in suing employers for violations of contract. This amendment would cure that situation.

"Mr. MAGNUSON. I do not so understand it. Perhaps I have not read the amendment too carefully, or perhaps the language has been changed.

"Mr. BALL. The language of the amendment is 'may sue or be sued.' " (*Id.*, at 5412-5415.)

- e. Senator Magnuson's belief that the section was intended to exclude State court jurisdiction was disposed of later by Senator Ferguson, answering Senator Murray's similar assumption. (*Id.*, at 5708.) These incorrect assumptions by Senator Magnuson do much to explain his belief that a federal "right of action" was granted by § 10. Moreover, his discourse occurred prior to Senator Taft's explanation of the purpose of the amendment.

5. Senator Taft's amendment was incorporated in the bill by the Senate without substantial alteration. 92 Cong. Rec. 5723. See I., D., *infra*, p. 511.

### C. House debates:

1. The House accepted the Senate version of § 10 without requesting a conference.
2. Representative Case:

"All this section on suability does is to carry out the same purpose we had in the House bill, when we provided for making contracts actually binding

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upon both parties to it. It has been found that while a few States permit suing on a labor contract, many States do not. Unless you have some such provision as this in Federal law, collective-bargaining contracts will not be good, in the words of the President, 'for the lifetime of such contracts.'

"So the Senate very carefully and properly drafted this provision in the way they did, to insure that 'contracts,' again in the words of President Truman, 'once made must be lived up to' and 'changed only in the manner agreed upon by the parties.'

"Individual members of a union are not made liable for any money judgment, I might point out, but only the union as an entity. . . ." (92 Cong. Rec. 5930-5931.)

3. Representative Slaughter:

"The second point in the bill provides for mutuality of contracts. Who is there in this body or in any labor union or among any group of right-minded men and women who would say that both parties to a contract are not mutually liable. . . .

"An employer is liable for his contracts and should be, and, by the same token, so should the employee." (*Id.*, at 5942.)

4. Representative Springer:

". . . It does, however, contain the provision that after collective bargaining and the meeting of the minds upon a contract, agreeable to both parties, that for the duration of that contract, so agreed upon, both parties are bound by the terms and provisions of that contract.

"Of course, that is merely the law under which every American is guided. The sanctity of contracts must remain inviolate, and all parties to a

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contract fully agreed upon, . . . must be bound by the terms and provisions contained therein. . . . it would be an assurance that labor would carry out its contractual obligations under the provisions of the contracts made and entered into. . . ." (*Id.*, at 5944.)

5. Representative Robsion:

" . . . It also provides for suits by labor organizations for damages done to them by management for violation of contract and the right of action is given to the employer against the labor union for damages sustained by the breach of a contract between the employer and the union. . . . When a contract is once entered into the aggrieved party should have the right of action against the party at fault. . . ." (*Id.*, at 5939.)

D. *The bill, as passed by both Houses:*

"SEC. 10. (a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.



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“(c) For the purposes of this section district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of summons, subpoena, or other legal process upon such officer or agent shall constitute service upon the labor organization.

“(d) Any employee who participates in a strike or other interference with the performance of an existing collective bargaining agreement, in violation of such agreement, if such strike or interference is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights for such employee, shall lose his status as an employee of the employer party to such agreement for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: *Provided*, That such loss of status for such employee shall cease if and when he is reemployed by such employer.”

E. *Veto Message* (H. R. Doc. No. 651, 79th Cong., 2d Sess.):

“Section 10:

“I am in accord with the principle that it is fair and right to hold a labor union responsible for a violation of its contract. However, this legislation goes much further than that. This section, taken in conjunction with the next section, largely repeals the Norris-LaGuardia Act and changes a long-established congressional policy.

“I am sure that, without repealing the Norris-LaGuardia Act, . . . a sound and effective means of enforcing labor's responsibility can be found.”

## II. THE TAFT-HARTLEY ACT.

### A. *Legislative history in the House:*

1. Hearings before Committee on Education and Labor on H. R. 8, 725, 880, 1095, and 1096, 80th Cong., 1st Sess.:

  - a. Among the bills under consideration, only H. R. 725 contained a section concerning federal jurisdiction touching breach of contract. It provided:

#### "EQUAL RESPONSIBILITY AND LIABILITY

"SEC. 305. (a) Suits for violations of contracts between an employer and a labor organization if such contracts affect commerce as defined in this Act may be brought by either party in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization, and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of this section, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers

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or agents are engaged in promoting or protecting the interests of employee members. The service of summons, subpoena, or other legal process upon such officer or agent shall constitute service upon the labor organization."

- b. Discussion of the problem of contract responsibility was frequent, but almost exclusively in general terms of the existence of a problem and the desirability of having collective agreements enforceable against the union as well as the employer. See pp. 4, 34-36, 90-91, 125, 135, 227, 229, 406, 533, 547, 558-559, 569-570, 582, 590-591, 593, 673, 1007-1008, 1074, 1088, 1218, 1804, 1891, 2292, 2345, 2368, 2530, 2532, 2631, 2695.
- c. The only considered analysis of the problem, and the remedy proposed, occurred in the testimony of Secretary of Labor Schwollenbach:

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"H. R. 267, section 305 of H. R. 725, section 4 of H. R. 1430, and section 2 of H. J. Res. 43, refer to suits by and against labor organizations.

"Few subjects are so widely discussed and so little understood as this one. I agree that labor unions should be subject to suit. The general idea seems to be that labor unions are not subject to suit because they are labor unions. Such a concept has no basis in law.

"In some States labor unions are not suable in their common names because they are unincorporated associations.

"As a matter of fact, there are only 13 States where unincorporated associations cannot be sued in their common name in an action at law for breach of contract or tortious conduct. . . .



"Since the adoption of the Federal Rules of Civil Procedure, there are 35 States where they can sue or be sued in the Federal courts. Rule 17 (b) of those rules provides in part [reading]:

"... capacity to sue or be sued shall be determined by the law of the State in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such State, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

"Since the field of necessary legislative action is so narrow, I see no reason why the gates of the Federal courts should be opened so wide as to invite litigation, as would be done by the bills listed above.

"I have three suggestions to make concerning these bills.

"Second, I do not see why it is necessary in this field to abandon the diversity of citizenship requirement. In fact, I doubt that it can be abandoned constitutionally. The Constitution, as you know, limits suits in the Federal courts to cases arising under the Constitution and the laws of the United States or involving diversity of citizenship.

"I grappled with the question of what the meaning of 'arising under the laws of the United States' was a good many times and I make no categorical statement as to whether or not under this proposed legislation the courts would hold that suits so started would arise under the laws of the United States.

"However, the general concept always has been in private litigation that a necessary prerequisite to Federal jurisdiction is diversity of citizenship." (Pp. 3016-3017.)

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2. The bill, as reported from committee (H. R. 3020):

"EQUAL RESPONSIBILITY AND LIABILITY

"SEC. 302. (a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.

"(b) Any labor organization whose activities affect commerce shall be bound by the acts of its agents, and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

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"(e) In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes,' shall not have any application in respect of either party."

3. House Report (No. 245, 80th Cong., 1st Sess.):

a. Majority:

"It makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts." (P. 6.)

"*Section 302* deals in improved form with another subject which was included in last year's Case bill. It provides that actions and proceedings involving violations of contracts between employers and labor organizations may be brought by either party in any district court of the United States . . . .

"When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. Labor organizations cannot justifiably ask to be treated as responsible contracting parties unless they are willing to assume the responsibility of such contracts to the same extent as the other party must assume his. Public opinion polls in evidence before the committee show that nearly 75 percent of the union members themselves concur in this view. For this reason, not only does the section, as heretofore



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pointed out, make the labor organization equally suable, but it also makes the Norris-LaGuardia Act inapplicable . . . . Among other things, this change makes applicable in such cases as these the rules of evidence that apply in suits involving all other citizens." (Pp. 45-46.)

b. Minority:

"Section 302 of title III has the dual purpose first of giving the Federal courts jurisdiction, without regard to the amount in controversy, to entertain actions involving violations of collective bargaining agreements affecting commerce or where the court otherwise has jurisdiction of the cause; and, second, of providing for suit against labor organizations whose activities affect commerce, with judgment enforceable only against the union assets. In any such suits the union would be bound by the acts of its agents and the courts would have the power to grant injunctive relief regardless of the provisions of the Norris-LaGuardia Act.

"The question of amenability of unions to suit has been the subject of much misunderstanding. Unions have never been exempt from suit because they are labor unions. It has only been difficult to reach union assets because unions are unincorporated associations. And even here, these difficulties have been removed in the great majority of States. Actually, there are only 13 States where union funds cannot be easily reached under laws in effect permitting satisfaction of judgments from the central funds of the union. . . . Of the remaining 35 States, there are 10 which by statute permit the union assets to be reached by representative suits in any type of action and there are 25 which permit suits against unions in the common name of the

union, in some cases with liability attaching not only to the union funds, but also to the assets of every individual member of the union.

"This bill would seek to open the Federal courts generally to suits by and against labor organizations. Since the adoption of the Federal Rules of Civil Procedure, however, the Federal courts have already been authorized to entertain suits by and against labor organizations in the 35 States which already permit effective recovery against union funds. Rule 17 (b) of those rules provides in part as follows:

" . . . The capacity of an individual, other than one acting in a representative [*sic*], to sue or be sued shall be determined by the law of his domicile. . . . In all other cases capacity to sue or be sued shall be determined by the law of the State in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such State, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

"It is concluded, therefore, that there now exists only a very narrow field for necessary Federal legislative action. There is perceived very little reason why the Federal courts should now be opened to so wide a degree, inviting litigation, when rules presently in existence effectively permit suit and may, in the sound discretion of the United States Supreme Court, be broadened even further to permit suit regardless of State procedural laws and without the necessity of further legislation.

"The question of conferring upon Federal courts broad power to entertain suits for violation of union agreements regardless of the amount involved and apparently in complete disregard of the constitutional requirement of diversity of citizenship is

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fraught with grave issues of policy and legality. It would appear particularly unwise to abandon in this field the present requirement of the \$3,000 amount in controversy as a prerequisite to Federal jurisdiction. It is feared that the result would be to involve the Federal courts, already overburdened, with a great mass of petty litigation over amounts less than \$3,000, easily capable of being adjudicated effectively by the more numerous State courts. This type of action would undoubtedly invite the return of conditions in the Federal Courts during prohibition days, when they bogged down in litigation ordinarily handled by the average police court.

"As to legality, the bill would apparently give the Federal courts jurisdiction of disputes over union agreements affecting commerce regardless of diversity of citizenship of the parties. The Constitution limits suits in the Federal courts to cases arising under the Constitution and laws of the United States or involving diversity of citizenship (Constitution, art. 3, sec. 2). The bill apparently attempts to found jurisdiction upon the Constitution and laws of the United States by the use of the words 'if such agreement affects commerce.' There would be involved here, however, no substantive right under the laws of the United States or under the Constitution. Actually substantive legal questions as to a contract dispute would be decided in accordance with applicable State law. The United States Supreme Court has held that the fact that the circumstances involve engaging in interstate commerce will not permit the Federal courts to assume jurisdiction where there is no diversity of citizenship (*In Re Metropolitan Railway Receivership*, 208 U. S. 90, 28 S. Ct. 219, 52 L. Ed. 403).



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It is therefore concluded that this aspect of the bill constitutes an approach which is of doubtful legality and certainly is both hasty and unwise.

"It is noted that the bill makes an effort to secure union responsibility for the acts of its agents. Very general language is used. It is submitted, however, that, instead, care should be used in determining what are acts of duly authorized agents acting within the scope of their authority. . . ." (Pp. 108-110.)

4. House debates:

a. Representative Hartley:

"It makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts." (93 Cong. Rec. 3424.)

b. Both Mr. Hartley and Mr. Case agreed to the following statement by Representative Barden:

"It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract." (*Id.*, at 3656.)

c. No other member of the committee made a statement with regard to the section. Nor did any other

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member cast any light upon the section. Only casual references to it appear. (Pp. 3529, 3531, 3666.)

5. The bill passed the House in the same form as introduced.

*B. Legislative history in the Senate:*

1. Hearings before Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess.:
  - a. S. 55, under consideration, was introduced by Senators Ball, Taft and Smith, and contained as Section 203:

“SUITS BY AND AGAINST LABOR ORGANIZATIONS

“SEC. 203. (a) Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties.

“(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued in its common name in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not

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be enforceable against any individual member or his assets.

“(c) For the purposes of this section district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of summons, subpoena, or other legal process upon such officer or agent shall constitute service upon the labor organization.

“(d) Any employee who participates in a strike or other interference with the performance of an existing collective-bargaining agreement, in violation of such agreement, if such strike or interference is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights for such employee, shall lose his status as an employee of the employer party to such agreement for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: *Provided*, That such loss of status for such employee shall cease if and when he is reemployed by such employer.”

- b. Again, there was considerable general discussion regarding the necessity for making unions responsible for their agreements. (Pp. 389, 635, 780, 965, 1227, 1321, 1422, 1493, 1617, 1656, 1817, 2019, 2349, 2371.)
- c. The unions, in testimony and filed statements, unanimously opposed the section. One of the points constantly made was that the belief that state law did not regard them as responsible on their contracts was erroneous. (Pp. 1042, 1154, 1391, 1534,



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1547, 2295.) The procedural nature of the problem was, however, seldom made explicit. (Pp. 689, 1798, 2011.)

- d. Again the most significant testimony occurred when Secretary of Labor Schwollenbach appeared as a witness:

"Secretary SCHWELLENBACH. . . . Suits by and against labor organizations: This is a subject upon which there is much discussion and about which there is very little widespread information. The general concept is that labor unions are exempt from suits because they are labor unions. There is no legal basis for this conclusion. They are exempt from suits because they are unincorporated associations. Actually there are only 13 States in the Union where unincorporated associations are not subject to suits . . . .

"Since the adoption of the Federal Rules of Civil Procedure, there are 35 States where they can sue or be sued, in the Federal courts.

. . . . .

"Since the field of necessary legislative action is so narrow, I see no reason why the gates of the Federal courts should be opened so wide as to invite litigation, as is done by this proposed section. Speaking as a lawyer and former member of the Federal judiciary, I have an objection to the abandonment in this field of the requirement of the \$3,000 amount in controversy as a prerequisite to Federal jurisdiction. This is a right which has been jealously guarded by the Congress and by the Federal courts. To have them cluttered up with a great mass of petty litigation involving amounts less than \$3,000 would bring them back to the position which

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they occupied during prohibition days when they became just a little bit above the level of the average police court insofar as criminal work was concerned.

"I do not see why it is necessary in this field to abandon the diversity of citizenship requirement. In fact I doubt that it can be abandoned constitutionally. The Constitution, as you know, limits suits in the Federal courts to cases arising under the Constitution and the laws of the United States or involving diversity of citizenship.

"I grappled with the question of what the meaning of 'arising under the laws of the United States' was a good many times and I make no categorical statement as to whether or not under this proposal [*sic*] legislation the courts would hold that suits so started would arise under the laws of the United States. However, the general concept always has been in private litigation that a necessary prerequisite to Federal jurisdiction is diversity of citizenship. In addition to that, care should be used in determining what are acts of duly authorized agents operating within the scope of their authority. To that extent a distinction must be made between labor unions and other organizations. The question was fully discussed, studied, and argued by the Congress at the time of the passage of the Norris-LaGuardia Act and the language there used limited the liability of the organization to those 'unlawful acts of individual officers, members or agents,' where there is 'clear proof of actual participation in or actual authorization of such acts or of ratification of such acts after actual knowledge thereof.' With few exceptions I have found that the officers of international unions were just as anxious to pre-

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vent the breaking of contracts as were the employers. I found that the officers of local unions by and large were much more anxious to prevent breaking of contracts than some small groups within the union. I respectfully suggest that the language of the Norris-LaGuardia Act should be inserted in the provision of this section.

"The CHAIRMAN [Senator Taft]. Mr. Secretary, of course, the basis for the jurisdiction is the Federal law—in other words, we are saying that all matters of collective-bargaining contracts shall be made in certain ways; that both parties shall be compelled to negotiate them, and they furnish the solution for the difficulty, which is an interstate commerce difficulty. I don't quite see why suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law arising under the laws of the United States, therefore subject properly to the jurisdiction of the Federal courts. I don't understand how we can cover the whole subject, as we do, in Federal laws, and then say, when you come down to suing about it, that the Federal court has no jurisdiction. I don't understand that.

"Secretary SCHWELLENBACH. I am not contending that the Federal court should not have jurisdiction. My two objections are that you should not clutter up the Federal courts with small suits, and—

"The CHAIRMAN. I should not think there would be many suits against unions for violating collective-bargaining contracts. I think that would be only a club in a closet. It would be an awkward suit. Many unions would not have any funds to collect, and I should think that any suit brought



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would certainly involve more than \$3,000. It doesn't seem to me that this would bring any great deluge of litigation upon the Federal courts.

"Secretary SCHWELLENBACH. I am testifying as a former Federal judge with a desire to protect the courts from a large volume of small matters.

"Senator ELLENDER. What limitation would you make?

"Secretary SCHWELLENBACH. You should have the same requirements for jurisdiction in reference to these suits, \$3,000 the amount in controversy, and diversity of citizenship. They have got the right to go into the State courts, you know, in 35 of the 48 States.

"Senator BALL. Aren't there some pretty important industrial States among those 13, though, where they cannot go into the State courts, such as Massachusetts and Virginia, Rhode Island?

"Senator DONNELL. Don't leave out Illinois and Missouri. [Laughter.]

"Secretary SCHWELLENBACH. I am not going to get into that one.

"Senator PEPPER. Mr. Secretary, in any of these 13 States that you have mentioned, where an unincorporated association is not suable, if those States were to provide that they are suable, under the Federal rules they would be suable in the Federal courts. So in those cases the matter would be up to the State to determine whether the Federal courts should have jurisdiction or not, and whether they would be suable in the State courts or not.

"Secretary SCHWELLENBACH. I am not objecting to the provision, except I don't like the idea.

"Senator PEPPER. That is the fact, isn't it?

"Secretary SCHWELLENBACH. Yes.

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"Senator PEPPER. Now, in the second place I get the intimation from your statement that you made the decision [*sic*], which I was not quite sure the chairman recognized or agreed to, namely, that there was a difference between intrusting a right that exists under the Federal law or Federal Constitution, for which there could be redress in the Federal court, and the attempt of Congress merely to provide a Federal forum, Federal procedure, for the determination of the substantive rights which might be enforced by State law? Isn't that a distinction that you meant to suggest?

"Secretary SCHWELLENBACH. When I was on the bench I suppose I tried half a dozen or 10 cases involving the question of whether or not there was jurisdiction, because they arose under the Federal statute, and they are tough, very tough, very hard to distinguish. And I am not making any categorical statement.

"Senator PEPPER. I mean to suggest this distinction: If Congress should provide a forum—

"Secretary SCHWELLENBACH. That is what this proposes to do; provide a Federal forum for suits against labor.

"Senator PEPPER. For violation of substantive rights. If Congress were to lay down rules of damages in cases within congressional jurisdiction—that is, involving interstate commerce—if Congress were to lay down the obligations of the parties and prescribe the rules and measure of damages, and so forth, for the violation of those obligations, then a suit for the enforcement of the penalty provided, or for the redress allowed, might properly be brought in the Federal courts, but what seems to be the intention here is to transfer to the Federal courts

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suits for breach of contract, the contracts being entered into under local law, and redress in all but 13 States being available now under local law." (Pp. 56-58.)

2. The bill as reported:

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"SEC. 301. (a) Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act may sue or be sued in its common name in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of this section district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization, and make such organization a party to the suit."



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3. Senate Report (No. 105, 80th Cong., 1st Sess.):

a. Majority:

"ENFORCEMENT OF CONTRACT RESPONSIBILITIES

"The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made' (*H. J. Heinz & Co.*, 311 U.S. 514).

"The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process. Despite these practical difficulties in the collection of a judgment against a union, the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective agreement.

"President Truman, in opening the management-labor conference in November 1945, took cognizance

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of this condition. He said very plainly that collective agreements should be mutually binding on both parties to the contract:

"We shall have to find methods not only of peaceful negotiations of labor contracts, but also of insuring industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

"If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

"Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.

"The amendment specifically provides that only the assets of the union can be attached to satisfy a money judgment against it; the property of the individual members of the organization would not be subject to any liability under such a judgment. Thus the members of the union would secure all

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the advantages of limited liability without incorporation of the union.

"The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations. At common law voluntary associations are not suable as such (*Wilson v. Airline Coal Company*, 215 Iowa 855; *Iron Molders' Union v. Allis-Chalmers Company*, C. C. A. 7, 166 F. 45). As a consequence the rule in most jurisdictions, in the absence of statute, is that unincorporated labor unions cannot be sued in their common name (*Grant v. Carpenters' District Council*, 322 Pa. St. 62). Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law against a union arises from the fact that each individual member of the union must be named and made a party to the suit.

"Some States have enacted statutes which subject unincorporated associations to the jurisdiction of law courts. These statutes are by no means uniform; some pertain to fraternal societies, welfare organizations, associations doing business, etc., and in some States the courts have excluded labor unions from their application.

"On the other hand, some States, including California and Montana, have construed statutes permitting common name suits against associations doing business to apply to labor unions (*Armstrong v. Superior Court*, 173 Calif. 341; *Vance v. McGinley*, 39 Mont. 46). Similarly, but more restrictive, in a considerable number of States the action is permitted against the union or representatives [*sic*] in proceedings in which the plaintiff could have



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maintained such an action against all the associates. . . .

"In at least one jurisdiction, the District of Columbia, the liberal view is held that unincorporated labor unions may be sued as legal entities, even in the absence of statute (*Busby v. Elec. Util. Emp. Union*, U. S. Court of Appeals for the District of Columbia, No. 8548, Jan. 22, 1945).

"In the Federal courts, whether an unincorporated union can be sued depends upon the procedural rules of the State in which the action is brought (*Busby v. Elec. Util. Empl. Union* [323 U. S. 72], U. S. Supreme Court, 89 Law. Adv. Op. 108, Dec. 4, 1944).

"The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing, or boycotting, when carried on in breach of a collective agreement, involve a 'labor dispute' under the act so as to make the activity not enjoyable [*sic*] without a showing of the requirements which condition the issuance of an injunction under the act (*Wilson & Co. v. [Birl,]* 105 F. (2d) 948, C. C. A. 3).

"A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act, and the courts of many of these jurisdictions have held that a strike in violation of a collective agreement is a 'labor dispute' and cannot be enjoined (*Nevins v. Kasmach*, 279 N. Y. 323; *Bulkin v. Sacks*, 31 Pa., D and C 501).

"There are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no 'substantive right' to enforce, in order to make the union suable as such in Federal courts.

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"Even where unions are suable, the union funds may not be reached for payment of damages and any judgments or decrees rendered against the association as an entity may be unenforceable. (See *Aalco Laundry Co. v. Laundry Linen Union*, 115 S. W. 2d 89 Mo. App.) However, only where statutes provide for recognition of the legal status of associations do association funds become subject to judgments (*Deeney v. Hotel & Apt. Clerks' Union*, 134 P. 2d 328 (1943), California).

"Financial statutory liability of associations is provided for by some States, among which are Alabama, California, Colorado, Connecticut, Delaware, New Jersey, North Dakota, and South Carolina. Even in these States, however, whether labor unions are included within the definition of 'association' is a matter of local judicial interpretation.

"It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements. The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.

"Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.

"It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.

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"This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.

"In any event, it is certainly a point to be bargained over and any union with the status of 'representative' under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." (Pp. 15-18.)

"Section 301 is the only section contained in [Title III]. It relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of section 8 of title I also dealing with breach of contracts. The legal effect of this section has been described at some length in the main body of the report, *supra*." (P. 30.)

b. Minority:

"Finally, sections 8 (a) (6) and 8 (b) (5) together with section 301 would give rise to a conflict of jurisdiction between the National Labor Relations Board and the United States district courts. This latter section permits suits in the United States district courts for violations of collective-bargaining agreements. Parties to such agreements thus have the choice of bringing their action before the Board or the United States district courts. Obviously,



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the necessity for uniform decisions in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable.

“(1) *Suits for violation of collective-bargaining agreements*

“The Federal courts have always had jurisdiction to entertain suits for breach of collective-bargaining contracts and have awarded money damages where the amount in controversy fulfills the present \$3,000 requirement and diversity of citizenship exists. *Nederlandsche Amerikaanische Stoomvaart Maatschappij v. Stevedores and Longshoremen's Benevolent Society* ((1920), 265 Fed. 397). It is apparent from the language of section 301 that no change is made in the application of State law for this purpose. The section states that—

“suits for violation of contracts concluded . . . in an industry affecting commerce . . . may be brought in any district court of the United States . . . .

“Every district court would still be required to look to State substantive law to determine the question of violation. This section does not, therefore, create a new cause of action but merely makes the existing remedy available to more persons by removing the requirements of amount in controversy and of diversity of citizenship where interstate commerce is affected.

“. . . the Federal courts would be made an available tribunal for every petty cause of action between citizens of the same State, and, undoubtedly in many instances, residents of the same community,

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with application by the Federal judge of exactly the same principles of law which would govern the controversy if it were brought before a State judge in the more numerous State courts.

"Added to these practical objections, are serious questions concerning the legality of abandoning the diversity-of-citizenship requirement. The Constitution limits suits in the Federal courts, *inter alia*, to cases arising under the Constitution and laws of the United States or involving diversity of citizenship (Constitution, art. III, sec. 2).

"Reflection upon these practical and legal objections to this phase of the bill lead to the conclusion that very little useful purpose would be served by making Federal courts more broadly available for the adjudication of disputes under collective-bargaining agreements. The only advantage, if indeed it may be called an advantage, is to give many disputing parties an otherwise unavailable opportunity to choose a Federal forum rather than a State forum. The substantive law governing the settlement of the dispute would not be changed in the least no matter which forum were chosen. It is our conviction that the added burdens upon the Federal courts and the doubtful legality of this measure constitute an extravagant price to pay for a needless indulgence benefiting litigants whose remedies are now as adequate in the State courts as they would be in the Federal courts." (Pp. 13-14.)

4. Senate debates:

a. Senator Taft:

"Mr. President, title III of the bill, on page 53, makes unions suable in the Federal courts for viola-

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tion of contract. As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served. But the pending bill provides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of labor unions." (93 Cong. Rec. 3839.)

"What is the purpose of title III? The purpose of title III is to give the employer and the employee the right to go to the Federal courts to bring a suit to enforce the terms of a collective-bargaining agreement—exactly the same subject matter which is contained in titles I and II. It is impossible to separate them." (*Id.*, at 4141.)

"Finally, we have a provision in title III for bringing a lawsuit for breach of contract. Breach of what kind of contract? Breach of contract for collective bargaining." (*Id.*, at 4262.)

"The Senator from Oregon, when speaking about paragraph (5) [§ 8 (b)(5)] on page 16, stated clearly that for the purpose of enforcing the collective-bargaining agreement we were duplicating the two remedies, one by lawsuits in court for violation of an agreement and the other by making the violation of the agreement an unfair labor practice. I do not think that is a legitimate objection to such an amendment." (*Id.*, at 4437.)



## b. Senator Ball:

"Fourth, we give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. It does not go beyond that. As a matter of law, I think they have that right, now, but because unions are voluntary associations, the common law in a great many States requires service on every member of the union, which is very difficult; and, if a judgment is rendered, it holds every member liable for the judgment.

"The pending measure, by providing that the union may sue and be sued as a legal entity, for a violation of contract, and that liability for damages will lie against union assets only, will prevent a repetition of the Danbury Hatters case, in which many members lost their homes because of a judgment rendered against the union which also ran against individual members of the union." (*Id.*, at 5014.)

## c. Senator Smith:

"I now come to title III, which is very brief, and merely provides for suits by and against labor organizations, and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as the result of collective bargaining. That is all title III does. I cannot conceive of any sound reason why a party to a contract should not be responsible for the fulfillment of the contract; it is outside my comprehension how anyone can take such a position.

"I have heard it argued that it is a terrible thing to make labor unions responsible for carrying out their contracts, but I have a quotation here, if I can find it, from Mr. Justice Brandeis, who was the greatest friend of labor in the Federal judicial field.

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He said the greatest thing labor could do would be to recognize its responsibility. This is a quotation from an address delivered by him before the Economic Club of Boston on December 4, 1902:

"The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress, and thus show that they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men.

"I cannot see how anyone can take issue with so clear-cut a statement as that, or can take issue with the provisions of title III, which simply carry out the idea, by providing that whichever side is guilty of violating a contract solemnly entered into shall be responsible for damages resulting from such violation.

"All that has been done in title III of the pending bill is to state, in terms, the very principle that Mr. Brandeis lays down as a precept to be followed by unions who desire to be respected in the community." (*Id.*, at 4281-4282.)

d. Senator O'Daniel:

"I believe that labor unions should be made responsible under the laws with which other citizens must comply. I do not think anyone is justified in giving labor unions legal immunity when they practice coercion, or when they seek to exercise the secondary boycott, or when they engage in violence, or when they seek to evade their responsibility for damages with which they may rightly be charged. There is no reason on earth why we should allow labor unions special exemption from laws with which all other citizens must comply." (*Id.*, at 4758.)

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- e. Senator Murray read, word for word with minor exceptions, the material contained in the Senate minority report, quoted above (II. B. 3. b.), which stressed the fact that Federal courts would be required to look to state law, and that a serious constitutional problem would be involved. (*Id.*, at 4033.) At a later point, in connection with a substitute bill proposed by the minority, he said:

"We of the minority do not see the wisdom of permitting suits in the Federal courts concerning the violation of collective-bargaining agreements regardless of the amount involved or of the constitutional requirement of diversity of citizenship. It is clear that the Federal courts are already open to these suits where the present Federal requirements are met, and we object to burdening them with a host of petty litigation not heretofore countenanced in any way. The State courts are adequate for the purposes of these petty suits. We have nonetheless found that there is a present inability of Federal courts to permit union assets to be reached easily in the few States where the application of State procedural laws prevent suits against unincorporated associations. For this reason section 601 would grant jurisdiction in otherwise justiciable contract actions where suit is brought by or against a union in its common name." (*Id.*, at 4906.)

- f. Senator Thomas:

"Or consider the provisions which open the Federal courts to damage suits for breach of collective bargaining agreements. Not content with the unfair labor practice provisions relative to breaches of collective-bargaining agreements, the authors of S. 1126 now propose to give the Government two bites at the cherry. It must be remembered that



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these provisions do not, in fact, give a remedy where none previously existed, although some care has been taken to create the impression that they do. What these provisions really do is to invite the Federal district courts to police the parties in their adherence to their collective-bargaining agreements by dispensing with the sensible statutory requirement of a jurisdictional amount of \$3,000 and the constitutional requirement of diversity of citizenship. I am firmly convinced that this is a vain effort, because I am sure that the suits contemplated by these provisions will not be regarded by the courts as presenting any Federal question. . . ." (*Id.*, at 4768.)

g. Senator Morse:

"One procedure is found in the title which permits, of course, suits by employers against unions for breach of contract. That is subject to a great deal of criticism on the part of unions. I do not think the criticism is well founded, because in my opinion, when union officials sign a labor contract, their signature ought to be given the same sanctity and the same effect as the signature of an employer. So I am going along with the proposal for legislation which permits suits for breach of contract against unions. I think a careful reading by labor leaders of the particular proposal contained in the bill will dispel their minds of many of the exaggerated fears they seem to entertain. But, be that as it may, I think it is only fair and proper that when unions damage the property rights of employers or third parties as the result of breaches of contract, they should be held responsible for the obligation they took unto themselves when they signed the contract." (*Id.*, at 4207.)

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- h. Other references to the section are of little importance here. (*Id.*, at 3838, 4030, 4148, 4209, 4358, 4986, 5007, and 6454.)
  5. Section 301 remained unchanged in the bill as it passed the Senate.
- C. *Conference Report* (H. R. Rep. No. 510, 80th Cong., 1st Sess.):
1. The Conference's revised Section 301 was that presently in force.
  2. The Report stated:

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"Section 302 of the House bill and section 301 of the Senate amendment contained provisions relating to suits by and against labor organizations in the courts of the United States. The conference agreement follows in general the provisions of the House bill with changes therein hereafter noted.

"Section 302 (a) of the House bill provided that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction. Under the Senate amendment the jurisdictional test was whether the employer was in an industry affecting commerce or whether the labor organization represented employees in such an industry. This test contained in the Senate amendment is also contained in the conference agreement, rather than the

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test in the House bill which required that the 'contract affect commerce.'

"Section 302 (b) of the House bill provided that any labor organization whose activities affected commerce should be bound by the acts of its agents and might sue or be sued as an entity in the courts of the United States. Any money judgment in such a suit was to be enforceable only against the organization as an entity and against its assets and not against any individual member or his assets. The conference agreement follows these provisions of the House bill except that this subsection is made applicable to labor organizations which represent employees in an industry affecting commerce and to employers whose activities affect commerce, as later defined. It is further provided that both the employer and the labor organization are to be bound by the acts of their agents. This subsection and the succeeding subsections of section 301 of the conference agreement (as was the case in the House bill and also in the Senate amendment) are general in their application, as distinguished from subsection (a)." (Pp. 65-66.)

*D. Debate on the Conference Report:*

1. House:

a. Representative Case:

"The Taft-Hartley bill incorporates some other provisions which were in the Case bill of last year and which are pretty much accepted as proper subjects of legislation.

"For instance, the bill establishes suability for and by labor organizations as entities. The bill last year did that. The objection to suits against labor



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organizations has stemmed from a proper resentment against the travesty that took place in the old Danbury Hatters case where individual members of a union were harried and their property attached to satisfy a judgment for action taken by officers whom they did not control. It was as bad as such action would be against minority and individual stockholders of a corporation for acts they could not control. Both in the bill last year, and in this Taft-Hartley bill, the language while making labor organizations responsible under their contracts and for the acts of their agents, limits judgments to the assets of the organization itself." (93 Cong. Rec. 6283.)

2. Senate: None.

E. *Veto Message* (H. R. Doc. No. 334, 80th Cong., 1st Sess.):

"It would discourage the growing willingness of unions to include 'no strike' provisions in bargaining agreements, since any labor organization signing such an agreement would expose itself to suit for contract violation if any of its members engaged in an unauthorized 'wildcat' strike." (P. 3.)

"The bill would invite unions to sue employers in the courts regarding the thousands of minor grievances which arise every day over the interpretation of bargaining agreements. . . ." (P. 4.)

"At the same time it would expose unions to suits for acts of violence, wildcat strikes and other actions, none of which were authorized or ratified by them. . . ." (P. 5.)

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F. *Subsequent debate:*

1. House:

a. Representative Robsion:

"For a number of years high, responsible labor leaders have stated over and over that they believe in the observance of contracts by both parties. One of the purposes of organizing and collective bargaining is to make a contract by management and the workers. This bill provides that management and labor each shall fairly and honestly live up to the terms of their contract and if either party breaks the contract and the other suffers loss or damage thereby, the party who is at fault must respond in fair and just damages. If the parties do not intend to live up to their contract, why should they take the time, trouble, and incur expense of making a contract? . . ." (93 Cong. Rec. 7491.)

2. Senate:

a. Senator Taft:

"This is a perfectly reasonable bill in every respect. If we are to have free collective bargaining it must be between two responsible parties. Some of the provisions of this bill deal with the question of making the unions responsible. There is no reason in the world why a union should not have the same responsibility that a corporation has which is engaged in business. So we have provided that a union may be sued as if it were a corporation. . . ." (*Id.*, at 7537.)

Opinion of the Court.

GENERAL ELECTRIC CO. v. LOCAL 205, UNITED  
ELECTRICAL, RADIO AND MACHINE  
WORKERS OF AMERICA (U. E.).

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

No. 276. Argued March 26, 1957.—Decided June 3, 1957.

In a suit by a union under § 301 (a) of the Labor Management Relations Act of 1947, a Federal District Court has authority to compel compliance by an employer with an agreement to arbitrate disputes arising under a collective bargaining agreement with the union. *Textile Workers v. Lincoln Mills*, ante, p. 448. Pp. 547-548. 233 F. 2d 85, affirmed.

*Warren F. Farr* argued the cause for petitioner. With him on the brief were *Lane McGovern* and *James Vorenberg*.

*Allan R. Rosenberg* argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama*, ante, p. 448. Respondent-union and petitioner-employer entered into a collective bargaining agreement governing the hours of work, rates of pay, and working conditions in a Massachusetts plant owned by petitioner. The agreement provided a procedure for the settlement of employee grievances, a procedure having four steps. It also provided that, when the four steps had been exhausted, either party could, with exceptions not material here, submit the grievance to arbitration.



The respondent filed written grievances, one asking higher pay for an employee and another complaining that an employee had been wrongfully discharged. Both complaints were carried through the four steps. The union, being dissatisfied, asked for arbitration. The employer refused. The union brought suit in the District Court to compel arbitration of the grievance disputes. The District Court dismissed the bill, being of the view that the relief sought was barred by the Norris-LaGuardia Act. 129 F. Supp. 665. The Court of Appeals reversed, 233 F. 2d 85. It first held that the Norris-LaGuardia Act did not bar enforcement of the arbitration agreement. It then held that while § 301 (a) of the Labor Management Relations Act of 1947 gave the District Court jurisdiction of the cause, it supplied no body of substantive law to enforce an arbitration agreement governing grievances. But it found such a basis in the United States Arbitration Act, which it held applicable to these collective bargaining agreements. It accordingly reversed the District Court judgment and remanded the cause to that court for further proceedings.

We affirm that judgment and remand the cause to the District Court. We follow in part a different path than the Court of Appeals, though we reach the same result. As indicated in our opinion in No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama*, *supra*, we think that § 301 (a) furnishes a body of federal substantive law for the enforcement of collective bargaining agreements in industries in commerce or affecting commerce and that the Norris-LaGuardia Act does not bar the issuance of an injunction to enforce the obligation to arbitrate grievance disputes.

*Affirmed.*

MR. JUSTICE BURTON, whom MR. JUSTICE HARLAN joins, concurs in the result in this case for the reasons set forth in his concurrence in No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama*, ante, p. 459.

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

[For dissenting opinion of MR. JUSTICE FRANKFURTER, see ante, p. 460.]

GOODALL-SANFORD, INC., v. UNITED TEXTILE  
WORKERS OF AMERICA, A. F. L.  
LOCAL 1802, ET AL.

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

No. 262. Argued March 25-26, 1957.—

Decided June 3, 1957.

1. In a suit by a union under § 301 (a) of the Labor Management Relations Act of 1947, a Federal District Court has authority to compel compliance by an employer with an agreement to arbitrate disputes arising under a collective bargaining agreement with the union. *Textile Workers v. Lincoln Mills*, ante, p. 448. Pp. 550-552.
2. A decree under § 301 (a) ordering enforcement of an arbitration provision in a collective bargaining agreement is a "final decision" within the meaning of 28 U. S. C. § 1291 and is appealable. Pp. 551-552.

233 F. 2d 104, affirmed.

*Douglas M. Orr* argued the cause for petitioner. With him on the brief were *William B. Mahoney* and *Daniel T. Drummond, Jr.*

*David E. Feller* argued the cause for respondents. With him on the brief were *Sidney W. Wernick* and *Arthur J. Goldberg*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, a companion case to No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama*, ante, p. 448, was brought by respondent-union in the District Court to compel specific performance



of a grievance arbitration provision of a collective bargaining agreement between it and petitioner. The controversy arose over the layoff of employees incident to a curtailment of production and a liquidation of the plants in question. Petitioner terminated the employment of the men who were laid off. The respondent protested the termination of employment, claiming that the men should not have been discharged, thus preserving certain accrued rights to fringe benefits (such as insurance, pensions, and vacations) payable to laid-off employees.

The District Court granted specific performance. 131 F. Supp. 767. The Court of Appeals affirmed, 233 F. 2d 104, relying on its prior decision in *General Electric Co. v. United Electrical Workers*, ante, p. 547. For the reasons given in No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama*, ante, p. 448, we think the Court of Appeals was correct in affirming the District Court's judgment ordering enforcement of the agreement to arbitrate.

There remains the question whether an order directing arbitration is appealable. This case is not comparable to *Baltimore Contractors v. Bodinger*, 348 U. S. 176, which held that a stay pending arbitration was not a "final decision" within the meaning of 28 U. S. C. § 1291. Nor need we consider cases like *In re Pahlberg*, 131 F. 2d 968, and *Schoenamsgruber v. Hamburg Line*, 294 U. S. 454, holding that an order directing arbitration under the United States Arbitration Act is not appealable. The right enforced here is one arising under § 301 (a) of the Labor Management Relations Act of 1947. Arbitration is not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought. A decree under § 301 (a) ordering enforcement of an

BURTON, J., concurring in result.

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arbitration provision in a collective bargaining agreement is, therefore, a "final decision" within the meaning of 28 U. S. C. § 1291.

*Affirmed.*

MR. JUSTICE BURTON, whom MR. JUSTICE HARLAN joins, concurs in the result in this case for the reasons set forth in his concurrence in No. 211, *Textile Workers Union of America v. Lincoln Mills of Alabama*, ante, p. 459.

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

[For dissenting opinion of MR. JUSTICE FRANKFURTER, see ante, p. 460.]

## Syllabus.

CALIFORNIA *v.* TAYLOR ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT.

No. 385. Argued April 2, 1957.—Decided June 3, 1957.

The Railway Labor Act applies to the State Belt Railroad, a common carrier owned and operated by the State of California and engaged in interstate commerce; and, notwithstanding the fact that the Railroad's employees are state employees appointed under the state civil service laws, the National Railroad Adjustment Board has jurisdiction over claims based on a collective-bargaining agreement between the Railroad and its employees which conflicts with the state civil service laws, as does the Railway Labor Act itself. Pp. 554-568.

(a) Federal statutes regulating interstate railroads, or their employees, have consistently been held applicable to publicly owned or operated railroads, though they do not refer specifically to public railroads as being within their coverage. Pp. 561-563.

(b) Nothing in the legislative history of the Act indicates that it should be treated differently from such other federal railway statutes, insofar as its applicability to a state-owned railroad is concerned. Pp. 563-564.

(c) A different result is not required by the fact that, in certain other federal statutes governing employer-employee relationships, Congress has expressly exempted employees of the United States or a State. Pp. 564-566.

(d) The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclusion that Congress intended it to apply to any common carrier by railroad engaged in interstate commerce, whether or not owned or operated by a State. Pp. 566-567.

(e) By engaging in interstate commerce by rail, California has subjected itself to the commerce power of Congress, and Congress can regulate its relationships with the employees of its interstate railroad. P. 568.

233 F. 2d 251, affirmed.



*Herbert E. Wenig*, Assistant Attorney General of California, argued the cause for petitioner. With him on the brief were *Edmund G. Brown*, Attorney General, *Richard S. L. Roddis*, Deputy Attorney General, and *Edward M. White*.

*Burke Williamson* argued the cause for respondents. With him on a brief was *Jack A. Williamson* for Taylor et al., respondents.

*Philip C. Wilkins* filed a brief for the California State Employees' Association, as *amicus curiae*, in support of petitioner.

*Solicitor General Rankin*, *Assistant Attorney General Hansen* and *Charles H. Weston* filed a brief for the United States, as *amicus curiae*, urging affirmance.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question presented here is whether the Railway Labor Act of May 20, 1926, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, applies to the State Belt Railroad, a common carrier owned and operated by the State of California and engaged in interstate commerce. For the reasons hereafter stated, we hold that it does.

The operations of the State Belt Railroad have been described by this Court in *Sherman v. United States*, 282 U. S. 25; *United States v. California*, 297 U. S. 175; and *California v. Latimer*, 305 U. S. 255. It parallels the San Francisco waterfront, serves wharves and industrial plants, and connects with car ferries, steamship docks and three interstate railroads. It is a common carrier engaged in interstate commerce and files tariffs with the Interstate Commerce Commission.

For over 65 years, the Belt Railroad has been owned by the State of California. It is operated by the Board of State Harbor Commissioners for San Francisco Harbor, composed of three Commissioners appointed by the Gover-

nor. Its employees number from 125 to 255 and are appointed in accordance with the civil service laws of the State. These laws prescribe procedures for hirings, promotions, layoffs and dismissals, and authorize the State Personnel Board to fix rates of pay and overtime.<sup>1</sup>

On September 1, 1942, the Board of State Harbor Commissioners entered into a collective-bargaining agreement with the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen as the representatives of the Belt Railroad's operating employees. This agreement established procedures for promotions, layoffs and dismissals. It also fixed rates of pay and overtime. Those procedures and rates differed from their counterparts under the state civil service laws.

The collective-bargaining agreement conformed to the Railway Labor Act and was observed by the parties at least until January 1948. At that time, a successor Harbor Board instituted litigation in the state courts of California in which it contended that the Railway Labor Act had no application to the Belt Railroad, and that the wages and working conditions of the Railroad's employees were governed by the State's civil service laws rather than by the agreement. This contention was rejected by a local trial court and by the California District Court of Appeal. *State v. Brotherhood of Railroad Trainmen*, 222 P. 2d 27. It was, however, accepted by the Supreme Court of California, with one justice dissenting, 37 Cal. 2d 412, 422, 232 P. 2d 857, 864, certiorari denied, 342 U. S. 876.

Shortly thereafter, five employees of the Belt Railroad instituted the present action in the United States District Court for the Northern District of Illinois against

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<sup>1</sup> See West's Cal. Ann. Codes, Constitution, Art. XXIV; West's Cal. Ann. Codes, Government, § 18000 *et seq.*

the ten members of the National Railroad Adjustment Board, First Division, and its executive secretary. The employees alleged that they had filed with the First Division, pursuant to § 3, First (i), of the Railway Labor Act, claims relating to their classifications, extra pay and seniority rights under the agreement. They charged that the five carrier members of the Division had refused to consider these claims on the ground that the Board was without jurisdiction, because, under the above decision of the Supreme Court of California, the Belt Railroad was not subject to the Railway Labor Act. The employees alleged that this refusal created an impasse in the ten-member Division and they sought a court order requiring action on their claims. The United States, answering on behalf of the First Division and its executive secretary, supported the complaint and prayer for relief. The carrier members, answering through their own attorneys, opposed the complaint, as did the present petitioner, the State of California, which intervened as a party defendant.

The District Court granted California's motion for summary judgment and dismissed the complaint. 132 F. Supp. 356. The Court of Appeals reversed. 233 F. 2d 251. It held that the Railway Labor Act applied to the Belt Railroad, and remanded the cause to the District Court with directions to enter a decree granting the relief sought. We granted certiorari to resolve the conflict between the United States Court of Appeals and the California Supreme Court as to the applicability of the Railway Labor Act to a railroad owned and operated by a State. 352 U. S. 940.<sup>2</sup> We invited the Solicitor

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<sup>2</sup> Petitioner expressly excluded from the questions presented by its petition for certiorari the following issues involved in the decision of the Court of Appeals: whether the adjudication in the state courts was *res judicata* in the federal courts, whether the collective-bargaining agreement had been approved by the Department of



General to file a brief as *amicus curiae* and, in doing so, he urged that the Railway Labor Act was applicable to the State Belt Railroad.

The Railway Labor Act of 1926, 44 Stat. 577, evolved from legislative experimentation beginning in 1888.<sup>3</sup> The evolution of this railroad labor code was marked by a continuing attempt to bring about self-adjustment of disputes between rail carriers and their employees. To this end, specialized machinery of mediation and arbitration was established. The 1926 Act—unique in that it had been agreed upon by the majority of the railroads and

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Finance of the State and, therefore, met the requirements of California law in that respect, and whether the California Personnel Board, rather than the National Railroad Adjustment Board, had jurisdiction over respondents' claims.

In its briefs before this Court, California suggests that the collective-bargaining agreement is invalid because the Board of State Harbor Commissioners lacked authority to negotiate the contract, some of the terms of which are in conflict with the state civil service laws. The Court of Appeals, however, held that this contention had been waived because it was not briefed there by the State and not mentioned in the State's oral argument. We, accordingly, do not recognize this contention here. The same argument was rejected by the California District Court of Appeal in the earlier state court litigation, *State v. Brotherhood of Railroad Trainmen*, 222 P. 2d 27, 31-33, and the Supreme Court of California apparently did not reject that position of the appellate court, 37 Cal. 2d 412, 421-422, 232 P. 2d 857, 863-864. Thus, even if the State's present suggestion were before us, we would feel constrained to accept the ruling of the District Court of Appeal.

<sup>3</sup> Act of 1888, 25 Stat. 501; Erdman Act of 1898, 30 Stat. 424; Newlands Act of 1913, 38 Stat. 103; Adamson Act of 1916, 39 Stat. 721, see *Wilson v. New*, 243 U. S. 332; General Order No. 8, February 21, 1918, signed by W. G. McAdoo, Director General of Railroads (formulating the Federal Government's labor policy after it took over the railroads in December 1917), Hines, *War History of American Railroads* (1928), 304-305, see also, p. 155 *et seq.*; Title III of the Transportation Act of 1920, 41 Stat. 469.

their employees <sup>4</sup>—incorporated practically every device previously used in settling disputes between carriers and their employees. These included (1) conferences between the parties; (2) appeal to a Board of Adjustment; (3) recourse to the permanent Board of Mediation; (4) submission of the controversy to a temporary Board of Arbitration; and (5) the establishment of an Emergency Board of Investigation appointed by the President.

Dissatisfaction with the operation of this legislation led to its 1934 amendments. 48 Stat. 1185.<sup>5</sup> One of the most significant changes was the creation of the National Railroad Adjustment Board composed of equal numbers of carrier representatives and representatives of unions national in scope. The Board was divided into four divisions, each with jurisdiction over particular crafts or classes and their disputes. § 3. This arrangement made available a National Board to settle disputes in case the carrier and its employees could not agree upon a system, group or regional board. The National Board was given jurisdiction over “minor disputes,” meaning those involving the interpretation of collective-bargaining agreements in a particular set of facts. Either party to such a dispute could bring the other before the Board in what

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<sup>4</sup> See S. Rep. No. 606, 69th Cong., 1st Sess. 2; 67 Cong. Rec. 463.

<sup>5</sup> The purposes of the Act were stated as follows:

“SEC. 2. . . . (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.” 48 Stat. 1186–1187.

was, in fact, compulsory arbitration. *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30. Provisions were made for the enforcement of a Board order against a carrier in a United States District Court. § 3, First (p).

Section 2, Fourth, of the 1934 amendments insured to railroad employees the right to organize their own unions and the right of a majority of any craft or class of employees to select the representative of that craft or class. Section 2, Ninth, authorized the newly created National Mediation Board to hold representation elections and to certify the representative with which the carrier must deal. Section 2, Fourth, provided that the employees shall have the right to bargain collectively through representatives of their own choosing. On numerous occasions, this Court has recognized that the Railway Labor Act protects and promotes collective bargaining. *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515, 548-549, 553; *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 300, 302; *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, 346-347; *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 202; *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, 233, 235.<sup>6</sup>

If the Railway Labor Act applies to the Belt Railroad, then the carrier's employees can invoke its machinery established for adjustment of labor controversies, and the National Railway Adjustment Board has jurisdiction over respondents' claims. Moreover, the Act's policy of protecting collective bargaining comes into conflict with the rule of California law that state employees have no right to bargain collectively with the State concerning

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<sup>6</sup> Another significant amendment to the Railway Labor Act came in 1951 when Congress authorized union-shop agreements, notwithstanding any state law. § 2, Eleventh, 64 Stat. 1238. See *Railway Employees' Dept. v. Hanson*, 351 U. S. 225.



terms and conditions of employment which are fixed by the State's civil service laws.<sup>7</sup> This state civil service relationship is the antithesis of that established by collectively bargained contracts throughout the railroad industry. "[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, *supra*, at 347. If the Federal Act applies to the Belt Railroad, then the policy of the State must give way.<sup>8</sup>

"... a State may not prohibit the exercise of rights which the federal Acts protect. Thus, in *Hill v. Florida*, 325 U. S. 538, the State enjoined a labor union from functioning until it had complied with certain statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a 'federally established right to collective bargaining' with which the injunction conflicted." *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 474.

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<sup>7</sup> *Nutter v. Santa Monica*, 74 Cal. App. 2d 292, 168 P. 2d 741; *Los Angeles v. Los Angeles Building Council*, 94 Cal. App. 2d 36, 210 P. 2d 305; *State v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 417-418, 232 P. 2d 857, 861.

<sup>8</sup> For cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, see *Napier v. Atlantic C. L. R. Co.*, 272 U. S. 605 (Boiler Inspection Act); *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439 (Safety Appliance Act); *Erie R. Co. v. New York*, 233 U. S. 671 (Hours of Service Act); *Second Employers' Liability Cases*, 223 U. S. 1 (Employers' Liability Act). Cf. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, to the effect that the Railway Labor Act did not preclude a State from establishing minimum health and safety regulations in the interests of railway employees. That case did not concern a conflict between federally protected collective bargaining and inconsistent state laws.

Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws.<sup>9</sup> In *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 232, involving § 2, Eleventh, of the Railway Labor Act, which permits the negotiation of union-shop agreements notwithstanding any law of any State, we stated that "A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State."

We turn now to the applicability of the Railway Labor Act to the Belt Railroad. Section 1, First, of that Act defines generally the carriers to which it applies as "*any* carrier by railroad, subject to the Interstate Commerce Act . . . ." (Emphasis supplied.) The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 1 (1), applies to all common carriers by railroad engaged in interstate transportation. The Belt Railroad concededly is a common carrier engaged in interstate transportation. It files its tariffs with the Interstate Commerce Commission, and the Commission has treated it and other state-owned interstate rail carriers as

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<sup>9</sup> On October 30, 1944, the Attorney General of California rendered an opinion in which he concluded that the State Belt Railroad was subject to the Railway Labor Act, that the Board of Harbor Commissioners must bargain collectively with the Railroad's employees, and that the terms of the existing collective-bargaining agreement supersede conflicting provisions of the state civil service laws. 4 Op. Atty. Gen. Cal. (1944) 300-306; Rhyne, *Labor Unions and Municipal Employee Law* (1946), 247-251. See also, *Long Island R. Co. v. Department of Labor*, 256 N. Y. 498, 515-517, 177 N. E. 17, 23-24.

subject to its jurisdiction. See *California Canneries Co. v. Southern Pacific Co.*, 51 I. C. C. 500, 502-503; *United States v. Belt Line R. Co.*, 56 I. C. C. 121; *Texas State Railroad*, 34 I. C. C. Val. R. 276. Finally, this Court has recognized that practice. *United States v. California*, 297 U. S. 175, 186. See also, *New Orleans v. Texas & P. R. Co.*, 195 F. 2d 887, 889.

With the exception of the Supreme Court of California's holding in *State v. Brotherhood of Railroad Trainmen*, 37 Cal. 2d 412, 232 P. 2d 857, federal statutes regulating interstate railroads, or their employees, have consistently been held to apply to publicly owned or operated railroads. Yet none of these statutes referred specifically to public railroads as being within their coverage. In *United States v. California*, *supra*, the United States sought to recover a statutory penalty for the State's operation of this Belt Railroad in violation of the Safety Appliance Act, 27 Stat. 531-532, as amended, 45 U. S. C. §§ 2, 6. That Act applied to "any common carrier engaged in interstate commerce by railroad . . . ." (Emphasis supplied.) The State contended there, as it does here, that the Act was inapplicable to the Belt Railroad because a federal statute is presumed not to restrict a constituent sovereign State unless it expressly so provides. This Court said that this presumption "is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." 297 U. S., at 186. See also, *California v. United States*, 320 U. S. 577, 585-586; *Case v. Bowles*, 327 U. S. 92, 98-100. The Court then held unequivocally that the Safety Appliance Act was applicable to the Belt Railroad. "We can perceive no reason for extending it [the presumption] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-



embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." 297 U. S., at 186.

Likewise, three courts have ruled that the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51, the coverage of which corresponded to that of the Safety Appliance Act, was applicable to public railroads. *Mathewes v. Port Utilities Commission*, 32 F. 2d 913 (D. C. E. D. S. C.); *Higginbotham v. Public Belt Railroad Commission*, 192 La. 525, 188 So. 395 (Sup. Ct. La.); *Maurice v. State*, 43 Cal. App. 2d 270, 110 P. 2d 706 (Cal. Dist. Ct. of App.) (involving the Belt Railroad now before us). Similarly, a Federal Court of Appeals has held that the Carriers Taxing Act of 1937, 50 Stat. 435, as amended, 45 U. S. C. (1946 ed.) § 261 (a companion measure of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. § 228a), the coverage of which was identical with that of the Railway Labor Act, was applicable to this Belt Railroad. *California v. Anglim*, 129 F. 2d 455. At least two federal courts have taken the position that the Railway Labor Act is applicable to railroads owned or operated by the public. *National Council v. Sealy*, 56 F. Supp. 720, 722-723, aff'd, 152 F. 2d 500, 502; *New Orleans Public Belt R. Commission v. Ward*, 195 F. 2d 829; and see the opinion of the Attorney General of California, n. 9, *supra*.

Nothing in the legislative history of the Railway Labor Act indicates that it should be treated differently from the above-mentioned railway statutes, insofar as its applicability to a state-owned railroad is concerned. Congress apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad. This omission is readily explainable in view of the limited operations of publicly owned railroads. We are told by the parties that there are today 30 publicly owned railroads, all of which are switching or terminal roads, and

only 11 of which are operated directly by the public. The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included.<sup>10</sup>

The State contends that doubts are created about congressional intent to make the Railway Labor Act applicable to state-owned railroads by the fact that in certain other federal statutes governing employer-employee relationships, Congress has expressly exempted employees of the United States or of a State.<sup>11</sup> We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so pro-

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<sup>10</sup> Although the coverage of the Act of 1888, 25 Stat. 501, the Erdman Act of 1898, 30 Stat. 424, and the Newlands Act of 1913, 38 Stat. 103, was not related to the Interstate Commerce Act, those Acts by their terms applied to any carriers by railroad engaged in interstate transportation. The cross-reference to the Interstate Commerce Act, found in the Railway Labor Act, came with the Adamson Act of 1916, 39 Stat. 721, and was carried forward to Title III of the Transportation Act of 1920, 41 Stat. 469. A House Committee reporting on the bill which was to become Title III of the Transportation Act stated that "Section 300 defines the term 'carrier' so that disputes of the railroads and express and sleeping-car companies, engaged in interstate commerce, are subject to the provisions of the title." (Emphasis supplied.) H. R. Rep. No. 456, 66th Cong., 1st Sess. 24.

<sup>11</sup> The statutes cited are the National Labor Relations Act of 1935, 49 Stat. 449, as amended by the Labor Management Relations Act of 1947, 61 Stat. 137, 29 U. S. C. § 152 (2); the War Labor Disputes Act of 1943, 57 Stat. 164, 50 U. S. C. App. (1946 ed.) § 1502 (d); the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 203 (d), and the re-employment provisions of the Universal Military Training and Service Act, 62 Stat. 614-615, 50 U. S. C. App. § 459 (b).

vided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees.<sup>12</sup>

The Railway Labor Act is essentially an instrument of industry-wide government. See *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 749, 751 (dissenting opinion). The railroad world for which the Act was designed has been described as "a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This

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<sup>12</sup> When Congress desired to make exceptions to the broad coverage of the Railway Labor Act, it expressly stated that intent in a proviso to the Act's definition of the term "carrier":

"SECTION 1. . . .

"First. . . . *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities." 48 Stat. 1185-1186, 54 Stat. 785-786, 45 U. S. C. § 151, First.

In *United States v. United Mine Workers*, 330 U. S. 258, this Court ruled that the general term "employer," as used in the restrictive provisions of the Norris-LaGuardia Act, 47 Stat. 70, and § 20 of the Clayton Act, 38 Stat. 738, did not include the Federal Government, and that an injunction could issue in a federal court to prevent a union and its officers from precipitating a strike in the bituminous coal mines which, at the time, were being operated by the Government. That case is not a guide here since the statutes there involved differ widely in history and purpose from the Railway Labor Act. See *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30, 39-42.



state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, *The National Railroad Adjustment Board; A Unique Administrative Agency*, 46 Yale L. J. 567, 568-569 (1937). Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes. A primary purpose of this machinery of railway government is "To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." 48 Stat. 1186 (§ 2), 45 U. S. C. § 151a. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 242. Like the Safety Appliance Act, the Railway Labor Act is "all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186. The fact that, under state law, the employees of the Belt Railroad may have no legal right to strike<sup>13</sup> reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the Act's "reign of law" was established. A terminal railroad facility like the Belt Railroad is a vital link in the national transportation system. Its continuous operation is important to the national flow of commerce.

The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclu-

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<sup>13</sup> See the *Los Angeles Building Council* case, n. 7, *supra*.

sion that Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State. The principal unions in the railroad industry are national in scope, and their officials are intimately acquainted with the problems, traditions and conditions of the railroad industry. Bargaining collectively with these officials has often taken on a national flavor,<sup>14</sup> and agreements are uniformly negotiated for an entire railroad system. "[B]reakdowns in collective bargaining will typically affect a region or the entire nation." Lecht, *Experience under Railway Labor Legislation* (1955), 4. It is by no means unreasonable to assume that Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force.<sup>15</sup>

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<sup>14</sup> Lecht, *Experience under Railway Labor Legislation* (1955), 4, 70-71, 158, 161, 167-168, 177, 192, 209, 225, 233.

<sup>15</sup> Congress clearly had considerations such as these in mind in 1951 when it authorized union-shop agreements, notwithstanding any state law. See n. 6, *supra*. The House Committee on Interstate and Foreign Commerce stated that—

"It will be noted that the proposed paragraph eleventh would authorize agreements notwithstanding the laws of any State. For the following reasons, among others, it is the view of the committee that if, as a matter of national policy, such agreements are to be permitted in the railroad and airline industries it would be wholly impracticable and unworkable for the various States to regulate such agreements. Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay,

Finally, the State suggests that Congress has no constitutional power to interfere with the "sovereign right" of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In *United States v. California*, *supra*, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297 U. S., at 184. "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers . . . ." *Id.*, at 185. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships. See also, *California v. United States*, 320 U. S. 577, 586; cf. *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, 233-238.<sup>16</sup>

The judgment of the Court of Appeals accordingly is

*Affirmed.*

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

rules of working conditions of employees in many States; the duties of many employees require the constant crossing of State lines; many seniority districts under labor agreements, extend across State lines, and in the exercise of their seniority rights employees are frequently required to move from one State to another." H. R. Rep. No. 2811, 81st Cong., 2d Sess. 5.

<sup>16</sup> The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Railroad Adjustment Board in a suit against the State in a United States District Court under § 3, First (p), of the Act is not before us under the facts of this case.



## Syllabus.

## JACKSON v. TAYLOR, ACTING WARDEN.

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

No. 619. Argued April 30, 1957.—Decided June 3, 1957.

A general court-martial found a soldier guilty of the separate offenses of premeditated murder and attempted rape and, in accordance with the usual practice, gave him an aggregate sentence of life imprisonment for both offenses. The Army Board of Review set aside the conviction on the murder charge; but it sustained the conviction for attempted rape and reduced the sentence to 20 years' imprisonment, which is the maximum sentence for attempted rape. In a habeas corpus proceeding, the soldier challenged the validity of the reduced sentence. *Held*: The action of the Board of Review in modifying the sentence to 20 years' imprisonment was authorized by Article 66 (c) of the Uniform Code of Military Justice, and it is sustained. Pp. 570–580.

(a) A different result is not required by the facts that the law officer of the court-martial advised the court-martial that, in view of the finding on the murder charge, it had only two alternatives, a death sentence or life imprisonment, and that he made no reference to punishment for attempted rape, the maximum for which is 20 years. Pp. 573–574.

(b) The Board of Review had authority under Article 66 (c) of the Uniform Code of Military Justice to modify the life sentence to 20 years after the murder conviction was set aside. Pp. 574–577.

(c) In view of the gross-sentence practice required in court-martial proceedings and the power vested by law in the Board of Review to correct such a sentence, the Board's action cannot be set aside on the conjecture that the court-martial might have imposed less than the maximum sentence for attempted rape had it considered that offense separately. Pp. 577–579.

(d) The case should not be remanded for a rehearing before the court-martial on the question of sentence, since there is no specific authority for doing so under the Uniform Code of Military Justice, and Congress intended that the Board of Review should exercise this power. P. 579.

(e) Nor should the case be remanded for rehearing before a new court-martial, since the function of reviewing such sentences is vested by law in the Board of Review. Pp. 579–580.

(f) Since the sentence here involved was legally imposed by military authorities, its severity is not reviewable on habeas corpus in the civil courts. P. 578, note 10.  
234 F. 2d 611, affirmed.

*Urban P. Van Susteren* argued the cause and filed a brief for petitioner.

*Ralph S. Spritzer* argued the cause for respondent. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *James W. Booth*.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus proceeding in which petitioner, a soldier, attacks the validity of a sentence of 20 years he is now serving as the result of his conviction by an Army court-martial of the offense of attempted rape. While serving in the United States Army in Korea, he was found guilty by a general court-martial of the separate offenses of premeditated murder and attempted rape of a Korean woman. He was given an aggregate sentence<sup>1</sup> of life imprisonment for both offenses. The Army board of review found "incorrect in law and fact" the court-martial finding of guilty on the murder charge, but it approved the guilty finding for attempted rape. As to the sentence, the board found "that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact." As so modified,

<sup>1</sup> The Manual for Courts-Martial, United States (1951), App. 8, at 521, specifically provides, *inter alia*: "The court will adjudge a single sentence for all the offenses of which the accused was found guilty." This sentence is known as an "aggregate" or "gross" sentence. A court-martial may not impose separate sentences for each finding of guilt, but may impose only a single, unitary sentence covering all of the guilty findings in their entirety, no matter how many such findings there may be.

it approved the sentence. *United States v. Fowler*, 2 C. M. R. 336. The petitioner makes no attack on his original conviction on the attempted rape charge and its affirmance by the board. But he attacks the sentence of the board alleging that "the action of the Review Board in reserving twenty (20) years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reserved and set aside the conviction, was null and void." The District Court denied the writ and discharged the rule to show cause, *Jackson v. Humphrey*, 135 F. Supp. 776, holding that the board of review on reversing the murder conviction, properly modified the sentence and was not required to order a new trial or to remand the case for resentencing by the general court-martial. The Court of Appeals, in a unanimous opinion, affirmed. *Jackson v. Taylor*, 234 F. 2d 611. It held that the board of review upon affirming the attempted rape conviction was authorized to "affirm . . . such part or amount of the sentence, as it finds correct," citing Article 66 (c) of the Uniform Code of Military Justice, 64 Stat. 128, 50 U. S. C. § 653 (c). We believe the sentence must stand.

Petitioner was tried with two other soldiers and each was convicted of the same offenses, premeditated murder and attempted rape. Each was also sentenced to life imprisonment. The record of the trial was then forwarded to the convening authority where the convictions and sentences were approved. In accordance with military procedure, the record was then forwarded with the convening authority's approval to a board of review in the office of the Judge Advocate General of the Army. That board, as already stated, found the murder convictions unsupported by the record and set them aside, but sustained the convictions for attempted rape and modified the sentences. The soldiers then sought further review by petition before the United States Court of Military



Appeals. No question regarding the authority of the review board to modify the sentences was raised and the petition was denied without opinion. *United States v. Fowler*, 1 U. S. C. M. A. 713. The soldiers, having started to serve their sentences, were held in different prisons. Each filed a writ of habeas corpus in the district in which he was imprisoned and each raised the same issue of the authority of the board of review to sentence in the manner described. A conflict between the Circuits has resulted<sup>2</sup> and we granted certiorari, limited to the gross sentence question, not only to resolve this conflict but to settle an important question in the administration of the Uniform Code. 352 U. S. 940.

Petitioner claims no deprivation of constitutional rights. He argues only that under military law the board of review should have ordered either a rehearing or that he be released because it was without authority to impose the 20-year sentence.

The review board derives its power from Article 66 of the Uniform Code of Military Justice, 64 Stat. 128, 50 U. S. C. § 653.<sup>3</sup> We are concerned more particularly with subsection (c) of that section. It provides:

“(c) In a case referred to it, the board of review shall act only with respect to the findings and sen-

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<sup>2</sup> Carl De Coster, one of the codefendants with petitioner, was released on an order of the Court of Appeals for the Seventh Circuit. See *De Coster v. Madigan*, 223 F. 2d 906 (1955). The other codefendant, Harriel Fowler, was denied release by the Court of Appeals for the Fifth Circuit. See *Wilkinson v. Fowler*, 234 F. 2d 615 (1956). While no petition was filed in the *De Coster* case, we granted certiorari in both the petitioner's and Fowler's cases.

<sup>3</sup> Since this action was filed this section has been revised and recodified as 70A Stat. 59, 10 U. S. C. (Supp. IV) § 866. The changes in language are not pertinent to this case. Other sections of the Uniform Code are cited in the form and source in which they appeared during the course of this litigation. The Uniform Code now appears in 70A Stat. 36-78, 10 U. S. C. (Supp. IV) §§ 801-934.

tence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

Here the board relied on its power to "affirm . . . such part or amount of the sentence, as it finds correct . . . ." Petitioner argues, however, that the 20-year sentence was not a "part or amount" of the sentence imposed by the court-martial. He supports this by reference to the action of the law officer of the court-martial who, after the findings of guilt were returned, advised its members in open court of the punishment it might impose. In view of the finding on the murder charge, he told the court-martial it had only two alternatives, a death sentence or life imprisonment. Art. of War 92, 62 Stat. 640. He made no reference to the punishment for attempted rape, the maximum for which is 20 years. Since the court-martial was required to impose a single sentence covering both of the guilty findings,<sup>4</sup> it entered a life sentence. Petitioner claims there was no sentence on the attempted rape conviction and, therefore, the entry of a 20-year sentence thereon by the board was an entirely new and independent imposition which was beyond its power. He bases this conclusion wholly on deduction. He contends that since the law officer advised the court-martial only as to the punishment for murder it follows that it did not sentence him on the attempted rape charge. But why should the officer go through the useless motion

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<sup>4</sup> See note 1, *supra*.

of instructing on the attempted rape when the court-martial by law was required to impose a sentence of death or life imprisonment? The sentence could have been no heavier unless it were death. What possible good would it have done for the court-martial, if it had been authorized, to add 20 or any other number of years onto a life sentence? In addition to the fact that the Uniform Code authorizes no such sentence we should not construe the Act of Congress to require the doing of a useless act.

But, the petitioner says, simple arithmetic shows that no sentence was imposed on the attempted rape finding. He reasons that the offense of premeditated murder carries a minimum punishment of life imprisonment, the exact sentence he received. The sentence therefore included no punishment covering the attempted rape finding he claims. It is true that the sentence was not broken down as to offenses. That is not permitted. However, the petitioner in his analysis overlooks entirely the requirement of military law that only the entry of a single gross sentence for both of the offenses is permitted. This Court has approved this practice. *Carter v. McClaghry*, 183 U. S. 365, 393 (1902). See also *McDonald v. Lee*, 217 F. 2d 619, 622 (1954); Winthrop, *Military Law and Precedents* (2d ed. 1920), 404. The sentence here was a gross sentence. It covered both the convictions. What the petitioner would have us do is to strike down this long practice, not only approved over the years by the Congress but by our cases. This we cannot do.

The question remains whether the board had the authority to modify the life sentence to 20 years after the murder conviction was set aside. Reviewing authorities have broad powers under military law.<sup>5</sup> Unlike a

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<sup>5</sup>For a detailed analysis and history of review powers under military law see Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15 (1949).



civilian trial in most jurisdictions, the initial sentence under military law is imposed by the members of the court-martial. Otherwise the court-martial performs functions more like those of a jury than a court. It is composed of laymen. See Art. 25 of the Uniform Code, 64 Stat. 116, 50 U. S. C. § 589. The powers of review, modification, and sentence-adjustment under the Uniform Code rest elsewhere than on this body of laymen.

Review of a court-martial conviction is first provided by the convening authority—the commanding officer who directed that the case be tried before a court-martial. He is empowered to reduce a sentence though he cannot increase it. He can weigh facts, determine credibility of witnesses, disapprove findings of guilt which he believes erroneous in law or fact, and determine sentence appropriateness without regard to what the court-martial might have done had it considered only the approved findings. Art. 64 of the Uniform Code, 64 Stat. 128, 50 U. S. C. § 651. He has other broad powers. See Manual for Courts-Martial, United States (1951), c. 17. Here the convening authority approved the action of the court-martial.

The next stage of review is that with which we are particularly concerned. It is conducted by the board of review composed of legally-trained officers.<sup>6</sup> Such boards first received statutory recognition in 1920. Art. of War 50½, 41 Stat. 797-799. At that time Congress gave them power to review, with the Judge Advocate General, records for legal sufficiency. By 1949 this power

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<sup>6</sup> Art. 66 (a) of the Uniform Code, 64 Stat. 128, 50 U. S. C. § 653 (a) provides:

“(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.”

was increased to weigh facts, though, as petitioner argues, these boards still did not have power to determine sentence appropriateness. Art. of War 50 (g), 62 Stat. 637. Such power was, however, given to the Judge Advocate General and a Judicial Council.<sup>7</sup>

Against this background of broad powers of review under military law, Congress began the drafting of the new Uniform Code of Military Justice. Their work culminated, so far as we are here concerned, with Article 66 (c), *supra*. Petitioner finds the language of this section ambiguous and argues that any ambiguity must be resolved in favor of the accused. That would be true if there were ambiguity in the section. But the words are clear. The board may "affirm . . . such part or amount of the sentence, as it finds correct . . . ." That is precisely what the review board did here. It affirmed such part, 20 years, of the sentence, life imprisonment, as it found correct in fact and law for the offense of attempted rape. Were the words themselves unclear, the teachings from the legislative history of the section would compel the same result.

The Uniform Code was drafted by a committee chaired by Professor Edmund M. Morgan, Jr. In testifying before the Senate Subcommittee which considered the bill, Professor Morgan stated with reference to the review board that it now

"has very extensive powers. It may review law, facts, and practically, sentences; because the provisions stipulate that the board of review shall affirm only so much of the sentence as it finds to be justified by the whole record. It gives the board of review . . . the power to review facts, law and sen-

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<sup>7</sup> See Art. of War 51 (a), 62 Stat. 638, and Art. of War 49, 62 Stat. 635.

tence . . . ." Hearings before a Subcommittee of the Senate Committee on Armed Services on S. 857 and H. R. 4080, 81st Cong., 1st Sess. 42.

Military officials opposed giving the review boards power to alter sentences. *Id.*, at 262, 285. The Subcommittee nevertheless decided the boards should have that power. *Id.*, at 311. The Committee Report to the Senate augments the conclusion that the boards of review were to have the power to alter sentences.<sup>8</sup> A study of the legislative history of the Code in the House of Representatives leads to the same conclusion. See H. R. Rep. No. 491, 81st Cong., 1st Sess. 31; 95 Cong. Rec. 5729. Article 66 was enacted in the language approved by the committees. It is manifest then that it was the intent of Congress that a board of review should exercise just such authority as was exercised here.<sup>9</sup>

Boards of review have been altering sentences from the inception of the Code provision. These alterations have been attacked but have found approval in the courts as

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<sup>8</sup> "The Board of Review shall affirm a finding of guilty of an offense or a lesser included offense . . . if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. . . . The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces." S. Rep. No. 486, 81st Cong., 1st Sess. 28.

<sup>9</sup> Commentators have recognized this power of sentence review since the enactment of the Code. See, *e. g.*, Currier and Kent, *The Boards of Review of the Armed Services*, 6 Vand. L. Rev. 241 (1953). "The greatest single change brought about in the powers and duties of the boards of review by the Uniform Code of Military Justice is the power of the board to affirm only so much of the sentence in a given case as it finds appropriate." *Id.*, at 242. See also 65 Yale L. J. 413.



is shown by the list of cases collected in the opinion of Judge Hastie in the Court of Appeals. 234 F. 2d, at 614, n. 3. Petitioner objects, however, that the board of review should not have imposed the maximum sentence for attempted rape because the court-martial might have imposed a lesser sentence had it considered the matter initially. But this is an objection that might properly be addressed to Congress. It has laid down the military law and it can take it away or restrict it. The Congress could have required a court-martial to enter a sentence on each separate offense just as is done in the civilian courts. The board of review would then know the attitude of the court-martial as to punishment on each of its findings of guilt. But this the Congress did not do. The argument, therefore, falls since it is based on pure conjecture. No one could say what sentence the court-martial would have imposed if it had found petitioner guilty only of attempted rape. But Congress avoided the necessity for conjecture and speculation by placing authority in the board of review to correct not only the findings as to guilt but the sentence as well. Likewise the apportionment of the sentence that the court-martial intended as between the offenses would be pure speculation.<sup>10</sup> But because of the gross sentence procedure in military law we need not concern ourselves with these problems. Military law

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<sup>10</sup> Petitioner complains that the 20-year sentence for attempted rape was excessive. He argues that because the court-martial gave him the minimum sentence for premeditated murder, it would not have given the maximum sentence for attempted rape. We need not speculate on what the court-martial would have done, nor will we interfere with the discretion exercised by the board of review. It held that in the "vicious circumstances of this case," 20 years was an appropriate sentence. Furthermore, since the sentence was legally imposed, its severity is not reviewable on habeas corpus in the civil courts. *Carter v. McClaughry*, 183 U. S. 365, 401 (1902).

provides that one aggregate sentence must be imposed and the board of review may modify that sentence in the manner it finds appropriate. To say in this case that a gross sentence was not imposed is to shut one's eyes to the realities of military law and custom.

Finally the petitioner suggests that the case should be remanded for a rehearing before the court-martial on the question of the sentence. We find no authority in the Uniform Code for such a procedure and the petitioner points to none.<sup>11</sup> The reason is, of course, that the Congress intended that the board of review should exercise this power. This is true because the nature of a court-martial proceeding makes it impractical and unfeasible to remand for the purpose of sentencing alone. See *United States v. Keith*, 1 U. S. C. M. A. 442, 451, 4 C. M. R. 34, 43 (1952). Even petitioner admits that it would now, six years after the trial, be impractical to attempt to reconvene the court-martial that decided the case originally. A court-martial has neither continuity nor situs and often sits to hear only a single case. Because of the nature of military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded. Recognizing the

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<sup>11</sup> The United States Court of Military Appeals in *United States v. Field*, 5 U. S. C. M. A. 379, 18 C. M. R. 3 (1955), hesitatingly suggested in *dictum* that a convening authority might return a case to a court-martial solely for the purpose of a reassessment of sentence on the findings of guilt affirmed by him. The court indicated that such a practice would be unlikely for "obvious and compelling reasons of a practical character." *Id.*, at 385, 18 C. M. R., at 9. It explicitly refused to express an opinion concerning the desirability of the practice. There, of course, was no suggestion that the practice was mandatory for the convening authority has, just as has the board of review, the power to modify a sentence to make it appropriate. See also *United States v. Voorhees*, 4 U. S. C. M. A. 509, 543, 16 C. M. R. 83, 117 (1954).

impossibility of remand to the same court-martial, petitioner suggests as an alternative that the case should be remanded for a rehearing before a new court-martial.<sup>12</sup> He admits that it would now be impractical for such a new court-martial to hear all of the evidence, and that the court would have to make its sentence determination on the basis of what it could learn from reading the record. Such a procedure would merely substitute one group of nonparticipants in the original trial for another. Congress thought the board of review could modify sentences when appropriate more expeditiously, more intelligently, and more fairly. Acting on a national basis the board of review can correct disparities in sentences and through its legally-trained personnel determine more appropriately the proper disposition to be made of the cases. Congress must have known of the problems inherent in rehearing and review proceedings for the procedures were adopted largely from prior law. It is not for us to question the judgment of the Congress in selecting the process it chose.

*Affirmed.*

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<sup>12</sup> It is well to point out that the Uniform Code permits the convening authority under limited circumstances to return a case for "reconsideration and revision" to a court-martial composed of "only . . . the members of the court who participated in the findings and sentence." See Art. 62 of the Uniform Code, 64 Stat. 127, 50 U. S. C. § 649, and Manual for Courts-Martial, United States (1951), at 130. This would be impossible after the passage of time in nearly every case since the original court-martial could not be reassembled. On the other hand, if resentencing is a limited type of rehearing, the Uniform Code requires the rehearing to "take place before a court-martial composed of members *not* members of the court-martial which first heard the case." (Emphasis added.) Art. 63 of the Uniform Code, 64 Stat. 127, 50 U. S. C. § 650. Such a court-martial would be no more capable—if as capable—as a board of review.



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

I am unable to see how the action of the Board of Review can fairly be characterized as other than an original imposition of sentence by the Board for the offense of attempted rape. The Uniform Code of Military Justice grants no power to the Board to impose original sentences. 64 Stat. 128, 50 U. S. C. § 653. That power is reserved exclusively to the court-martial. There was, therefore, no valid gross sentence embracing attempted rape upon which the Board's power to remit an excessive portion could operate. I subscribe to what Judge Major said in the similar case of *De Coster v. Madigan*, 223 F. 2d 906, 909-910 (C. A. 7th Cir. 1955), in which De Coster was allowed habeas corpus and ordered discharged:

" . . . While the court-martial obviously had jurisdiction of plaintiff and the offenses with which he was charged, it did not fully and fairly deal with him. The Law Officer instructed the court-martial that the *minimum* sentence which could be imposed on the murder charge was life imprisonment. But the Law Officer gave no instructions as to the punishment which could be imposed on the attempted rape charge. The court-martial found plaintiff guilty of both murder and attempted rape, but its sentence was life-imprisonment, the minimum sentence for the murder charge alone. Of course, any suggestion that the court-martial should have sentenced plaintiff for a term of life plus twenty years would be ridiculous, but equally so is the assertion that the court-martial did or intended to impose any part of its sentence for attempted rape. It lacked even the

BRENNAN, J., dissenting.

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necessary instructions upon which such award of punishment would have to be based. Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here, under the statute, only the court-martial was authorized to take this step; it failed to do so."

Opinion of the Court.

FOWLER v. WILKINSON, WARDEN.

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

No. 620. Argued April 30, 1957.—Decided June 3, 1957.

1. After a general court-martial had convicted a soldier of the two separate crimes of premeditated murder and attempted rape and had imposed an aggregate sentence of life imprisonment for both offenses, an Army Board of Review, after setting aside the conviction on the murder charge, had authority under Article 66 (c) of the Uniform Code of Military Justice to reduce the sentence to the maximum sentence for attempted rape. *Jackson v. Taylor*, ante, P. 569. Pp. 583-585.
2. In a habeas corpus proceeding, a civil court may not revise a sentence imposed on a soldier by military authorities after his conviction by court-martial, on the ground that the sentence is arbitrarily severe. *Carter v. McClaughry*, 183 U. S. 365, followed. *United States v. Voorhees*, 4 U. S. C. M. A. 509, 16 C. M. R. 83, distinguished. Pp. 584-585.
3. The action of the Board of Review in adjusting the sentence does not deprive the accused of any right of appellate review. P. 585. 234 F. 2d 615, affirmed.

*Leon S. Epstein* argued the cause for petitioner. With him on the brief was *R. Monroe Schwartz*.

*Ralph S. Spritzer* argued the cause for respondent. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *James W. Booth*.

MR. JUSTICE CLARK delivered the opinion of the Court.

The factual background and the question presented in this case are the same as in *Jackson v. Taylor*, ante, p. 569, decided today. The case reaches us from the Court of Appeals for the Fifth Circuit, 234 F. 2d 615, which had reversed the District Court. We granted certiorari, 352 U. S. 940.



There are additional reasons to those in *Jackson v. Taylor* advanced for reversal in this case. Fowler contends that the 20-year sentence is arbitrarily severe, even though within the statutory maximum, citing *United States v. Voorhees*, 4 U. S. C. M. A. 509, 16 C. M. R. 83 (1954). But as we said in *Burns v. Wilson*, 346 U. S. 137 (1953), this Court exerts "no supervisory power over the courts which enforce [military law]; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Id.*, at 140. If there is injustice in the sentence imposed it is for the Executive to correct, for since the board of review has authority to act, we have no jurisdiction to interfere with the exercise of its discretion. That power is placed by the Congress in the hands of those entrusted with the administration of military justice, or if clemency is in order, the Executive. It may be that the board's judgment was harsh or that the military's highest court should have intervened as it did in the *Voorhees* case, but we have no jurisdiction in that regard. As long ago as 1902 this Court recognized that it was a "salutary rule that the sentences of courts martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed." *Carter v. McClaghry*, 183 U. S. 365, 401.

We note that petitioner's reliance on *Voorhees*' case is misplaced when he cites it as apposite to the problem here presented. While the Court of Military Appeals held there that the board should have ordered a rehearing, the rehearing was to include a reconsideration of the finding

of guilt as well as the sentence. Though, as Judge Latimer indicates in his opinion, the board of review had the power to approve the sentence, dismissal from the service, such approval was found by that court to be an abuse of the discretion placed in the board under the particular circumstances of the case. We, of course, do not sit to pass on the exercise of discretion by the military authorities. Judge Latimer further indicated the Court of Military Appeals' recognition of the power of the board of review to affirm such parts, or amount of a sentence, as it finds correct in fact and law. The case, then, instead of supporting petitioner's position, indicates authority for the power of the board to modify the sentence. See *United States v. Bigger*, 2 U. S. C. M. A. 297, 8 C. M. R. 97 (1953).

The argument that the adjustment of the sentence by the board deprives the petitioner of two appeals likewise is without merit. He contends that if the resentencing were done by a court-martial he would have a review of that resentencing by the convening authority as well as the board of review. But Congress did not intend any such result. The accused has already had his day before the court-martial and the convening authority. It is not for us to say that the procedure established by Congress is unwise. There are no constitutional questions before us. We have determined that the board of review had jurisdiction to modify the sentence. Our inquiry cannot be extended beyond that question.

For these reasons, and those stated in *Jackson v. Taylor*, *ante*, p. 569, the judgment is

*Affirmed.*

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN dissent for the reasons stated in the dissenting opinion of MR. JUSTICE BRENNAN in No. 619, *Jackson v. Taylor*, *ante*, p. 581.

UNITED STATES *v.* E. I. DU PONT DE NEMOURS  
& CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS.

No. 3. Argued November 14-15, 1956.—Decided June 3, 1957.

This is a civil action brought by the Government in 1949 under § 15 of the Clayton Act to enjoin violations of § 7 of that Act resulting from the purchase by du Pont in 1917-1919 of a 23% stock interest in General Motors. The essence of the charge was that, by means of the close relationship of the two companies, du Pont had obtained an illegal preference over competitors in the sale of automotive finishes and fabrics to General Motors, thus tending to "create a monopoly" in a "line of commerce." After trial, the District Court dismissed the complaint on the ground that the Government had failed to prove its case, and the Government appealed directly to this Court. *Held*: The Government proved a violation of § 7; the judgment is reversed and the cause is remanded to the District Court for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the stock acquisition offensive to the statute. Pp. 588-608.

(a) Any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, was within the reach of § 7 before its amendment in 1950 whenever there was reasonable likelihood that the acquisition would result in a restraint of commerce or in the creation of a monopoly of any "line of commerce"—*i. e.*, it applied to vertical as well as horizontal stock acquisitions. Pp. 590-593.

(b) Failure of the Federal Trade Commission to invoke § 7 against vertical stock acquisitions is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act. P. 590.

(c) The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. Therefore, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and



fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics. Pp. 593-595.

(d) The record shows that quantitatively and percentagewise du Pont supplies the largest part of General Motors' requirements of finishes and fabrics. Therefore, du Pont has a substantial share of the relevant market. Pp. 595-596.

(e) The test of a violation is whether, *at the time of suit*, there is a reasonable probability that the stock acquisition may lead to a restraint of commerce or tend to create a monopoly of a line of commerce. Therefore, the Government may maintain this suit, brought in 1949, based upon an acquisition of stock which occurred in 1917-1919. Pp. 596-607.

(f) Even when a purchase of stock is solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to bring about, or in attempting to bring about, a substantial lessening of competition. Pp. 597-598.

(g) On the record in this case, the background of the acquisition and the plain implications of the contemporaneous documents eliminate any basis for a conclusion that the purchase was made "solely for investment." Pp. 598-602.

(h) The bulk of du Pont's production of automotive finishes and fabrics has always supplied the largest part of the requirements of General Motors, the one customer in the automobile industry connected to du Pont by a stock interest; and there is an overwhelming inference that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit. Pp. 600-605.

(i) It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended. P. 607.

126 F. Supp. 235, reversed and remanded.

*John F. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Hansen*, *Victor H. Kramer* and *Margaret H. Brass*.

*Hugh B. Cox* argued the cause for E. I. du Pont de Nemours & Co., appellee. With him on the brief were *John Lord O'Brian*, *Charles A. Horsky* and *Daniel M. Gribbon*.

*Robert L. Stern* argued the cause for the General Motors Corporation, appellee. With him on the brief were *Miles G. Seeley*, *Henry M. Hogan*, *Robert A. Nitschke* and *William A. Grier*.

*Philip C. Scott* and *Leonard Joseph* filed a brief for the Christiana Securities Co. et al., appellees.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a direct appeal under § 2 of the Expediting Act<sup>1</sup> from a judgment of the District Court for the Northern District of Illinois,<sup>2</sup> dismissing the Government's action brought in 1949 under § 15 of the Clayton Act.<sup>3</sup> The complaint alleged a violation of § 7 of the Act<sup>4</sup> resulting from the purchase by E. I. du Pont de Nemours and Company in 1917-1919 of a 23% stock interest in General Motors Corporation. This appeal is from the dismissal of the action as to du Pont, General Motors and the corporate holders of large amounts of du Pont stock, Christiana Securities Corporation and Delaware Realty & Investment Company.<sup>5</sup>

The primary issue is whether du Pont's commanding position as General Motors' supplier of automotive

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<sup>1</sup> 32 Stat. 823, as amended, 15 U. S. C. § 29. The Court noted probable jurisdiction. 350 U. S. 815.

<sup>2</sup> 126 F. Supp. 235.

<sup>3</sup> 38 Stat. 736, 15 U. S. C. (1946 ed.) § 25.

<sup>4</sup> This action is governed by the Clayton Act as it was before the 1950 amendments, which by their terms are inapplicable to acquisitions prior to 1950. 64 Stat. 1125, 15 U. S. C. § 18.

<sup>5</sup> The amended complaint also alleged violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2. In view of our determination of the case, we are not deciding the Government's appeal from the dismissal of the action under the Sherman Act.

finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce.

The first paragraph of § 7, pertinent here, provides:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."<sup>6</sup>

Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. Acquisitions solely for investment are excepted, but only if, and so long as, the stock is not used by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.

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<sup>6</sup> 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.



We are met at the threshold with the argument that § 7, before its amendment in 1950, applied only to an acquisition of the stock of a competing corporation, and not to an acquisition by a supplier corporation of the stock of a customer corporation—in other words, that the statute applied only to horizontal and not to vertical acquisitions. This is the first case presenting the question in this Court. *International Shoe Co. v. Federal Trade Comm'n*, 280 U. S. 291, and *Thatcher Mfg. Co. v. Federal Trade Comm'n*, 272 U. S. 554, involved corporate acquisitions of stock of competitors.

During the 35 years before this action was brought, the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions. See F. T. C., Report on Corporate Mergers and Acquisitions, 168 (1955), H. R. Doc. No. 169, 84th Cong., 1st Sess. Also, the House Committee considering the 1950 revision of § 7 stated that “. . . it has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . .” H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 amendment was purposed “. . . to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . .” (Emphasis added.)

This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by Congress. Cf. *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U. S. 61, 74. The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act. Accord, *Baltimore & Ohio R. Co. v. Jackson*, 353 U. S. 325, 331.

The first paragraph of § 7, written in the disjunctive, plainly is framed to reach not only the corporate acquisi-

tion of stock of a competing corporation, where the effect may be substantially to lessen competition between them, but also the corporate acquisition of stock of any corporation, competitor or not, where the effect may be either (1) to restrain commerce in any section or community, or (2) tend to create a monopoly of any line of commerce. The amended complaint does not allege that the effect of du Pont's acquisition may be to restrain commerce in any section or community but alleges that the effect was ". . . to tend to create a monopoly in particular lines of commerce . . . ."

Section 7 contains a second paragraph dealing with a holding company's acquisition of stock in two or more corporations.<sup>7</sup> Much of the legislative history of the section deals with the alleged holding company evil.<sup>8</sup> This history does not aid in interpretation because our concern here is with the first paragraph of the section. There is, however, pertinent legislative history which does aid and support our construction.

Senator Chilton, one of the Senate managers of the bill, explained that the House conferees insisted that to prohibit just the acquisitions where the effect was "substantially" to lessen competition would not accomplish the designed aim of the statute, because "a corporation might acquire the stock of another corporation,

<sup>7</sup> This paragraph provides:

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

<sup>8</sup> See, *e. g.*, S. Rep. No. 698, 63d Cong., 2d Sess. 13; H. R. Rep. No. 627, 63d Cong., 2d Sess. 17.

and there would be no lessening of competition, but the tendency might be to create monopoly or to restrain trade or commerce." "Therefore," said Senator Chilton, "there was added . . . the following: 'Or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.' " <sup>9</sup> This construction of the section, as embracing three separate and distinct effects of a stock acquisition, has also been recognized by a number of federal courts.<sup>10</sup>

We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. Thus, although du Pont and General Motors are not competitors, a violation of the section has occurred if, as a result of the acquisition, there was at the time of suit a reasonable likelihood of a monopoly of any line of commerce. Judge Maris correctly stated in *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163, 169:

"A monopoly involves the power to . . . exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary . . . to find that . . . [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the

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<sup>9</sup> 51 Cong. Rec. 16002.

<sup>10</sup> *Aluminum Co. of America v. Federal Trade Comm'n*, 284 F. 401; *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, CCH Trade Cases ¶ 57,514 (D. C. S. D. N. Y. 1946); *United States v. New England Fish Exchange*, 258 F. 732; cf. *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163; *Sidney Morris & Co. v. National Assn. of Stationers*, 40 F. 2d 620, 625.



Clayton Act to nip monopoly in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly in order to determine the existence of a tendency to monopoly in . . . any . . . line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined. . . ."

Appellees argue that there exists no basis for a finding of a probable restraint or monopoly within the meaning of § 7 because the total General Motors market for finishes and fabrics constituted only a negligible percentage of the total market for these materials for all uses, including automotive uses. It is stated in the General Motors brief that in 1947 du Pont's finish sales to General Motors constituted 3.5% of all sales of finishes to industrial users, and that its fabrics sales to General Motors comprised 1.6% of the total market for the type of fabric used by the automobile industry.

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition."<sup>11</sup> Substantiality can be determined only in terms of the market affected. The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes

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<sup>11</sup> *Standard Oil Co. of California v. United States*, 337 U. S. 293, 299, n. 5. Section 3 of the Act, with which the Court was concerned in *Standard Oil*, makes unlawful certain agreements ". . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 14. (Emphasis added.)

and fabrics<sup>12</sup> to make them a "line of commerce" within the meaning of the Clayton Act. Cf. *Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245.<sup>13</sup> Thus, the

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<sup>12</sup> For example, the following is said as to finishes in the du Pont brief:

"The largest single finish item which du Pont sells to General Motors is a low-viscosity nitrocellulose lacquer, discovered and patented by du Pont and for which its trademark is 'Duco'. . . .

"The invention and development of 'Duco' represented a truly significant advance in the art of paint making and in the production of automobiles; without 'Duco' mass production of automobiles would not have been possible.

"By the early 1920's the need for better finishing materials for automobiles had become urgent . . . . The varnish method then used in finishing automobiles was described in detail at the trial by automobile pioneers . . . . Finishing an automobile with varnish required an intolerably long time—up to 3 or 4 weeks—to apply the numerous coats needed. When the finish was complete, its longest life expectancy was less than a year, and often it began to peel off before the car was delivered. . . ."

Du Pont's Director of Sales since 1944, Nickowitz, testified as to fabrics sold to automobile manufacturers as follows:

"Q. Now, over the years, isn't it true that speaking generally du Pont has followed the policy in selling its fabrics to the automobile field of undercutting its competitors in price? You don't try to sell it on a lower price than that quoted by any other competitor, do you?

"A. Well, we don't know. We go in and we bid based on our costs. Now, in the automotive industry, we have a different situation than you do in the furniture trade, for example, where you have an established price.

"You see, in the automobile industry, each manufacturer uses a different construction. They all have their own peculiar ideas of what they want about these fabrics. Some want dyed backs, and some want different finishes, so you don't have any standard prices in the automobile industry." (Emphasis added.)

And see extended discussions in the opinion of the trial court, as to finishes, 126 F. Supp., at 288-292, as to fabrics, *id.*, at 296-300.

<sup>13</sup> "The phrase ['in any line of commerce'] is comprehensive and means that if the forbidden effect or tendency is produced in *one*

bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.<sup>14</sup>

The market affected must be substantial. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357. Moreover, in order to establish a violation of § 7 the Government must prove a likelihood that competition may be "foreclosed in a substantial share of . . . [that market]." <sup>15</sup> Both requirements are satisfied in this case. The substantiality of a relevant market comprising the automobile industry is undisputed. The substantiality of General Motors' share of that market is fully established in the evidence.

General Motors is the colossus of the giant automobile industry. It accounts annually for upwards of two-fifths of the total sales of automotive vehicles in the Nation.<sup>16</sup>

out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied." 278 U. S., at 253.

<sup>14</sup> The General Motors brief states:

"If the market for these products were solely or mainly the General Motors Corporation, or the automobile industry as a whole, General Motors' volume and present share of the automobile industry might constitute a market large enough for the Government to rely on."

<sup>15</sup> *Standard Oil Co. of California v. United States*, 337 U. S. 293, at 314.

<sup>16</sup> Moody's Industrials lists General Motors' proportion of the industry:

	Percent		Percent
1938 .....	42+	1947 .....	38.5
1939 .....	42+	1948 .....	38.8
1940 .....	45.6	1949 .....	42.7
1941 .....	45.3	1950 .....	45.6
1942 .....	W. W. II	1951 .....	41.8
1943 .....	W. W. II	1952 .....	40.3
1944 .....	W. W. II	1953 .....	44.7
1945 .....	W. W. II	1954 .....	49.9
1946 .....	36.3	1955 .....	48.8



In 1955 General Motors ranked first in sales and second in assets among all United States industrial corporations<sup>17</sup> and became the first corporation to earn over a billion dollars in annual net income.<sup>18</sup> In 1947 General Motors' total purchases of all products from du Pont were \$26,628,274, of which \$18,938,229 (71%) represented purchases from du Pont's Finishes Division. Of the latter amount purchases of "Duco"<sup>19</sup> and the thinner used to apply "Duco" totaled \$12,224,798 (65%), and "Dulux"<sup>20</sup> purchases totaled \$3,179,225. Purchases by General Motors of du Pont fabrics in 1948 amounted to \$3,700,000, making it the largest account of du Pont's Fabrics Division. Expressed in percentages, du Pont supplied 67% of General Motors' requirements for finishes in 1946 and 68% in 1947.<sup>21</sup> In fabrics du Pont supplied 52.3% of requirements in 1946, and 38.5% in 1947.<sup>22</sup> Because General Motors accounts for almost one-half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentagewise du Pont supplies the largest part of General Motors' requirements, we must conclude that du Pont has a substantial share of the relevant market.

The appellees argue that the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding

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<sup>17</sup> Fortune Directory of the 500 Largest U. S. Industrial Corporations, July 1956, p. 2.

<sup>18</sup> N. Y. Times, Feb. 3, 1956, p. 1, col. 3.

<sup>19</sup> A finish developed specially by du Pont and General Motors for use as an automotive finish.

<sup>20</sup> A synthetic enamel developed by du Pont which is used on refrigerators, also manufactured by General Motors.

<sup>21</sup> 126 F. Supp., at 295.

<sup>22</sup> *Id.*, at 300-301.

or subsequent use of the stock. This argument misconceives the objective toward which § 7 is directed. The Clayton Act was intended to supplement the Sherman Act.<sup>23</sup> Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. The Senate declared the objective of the Clayton Act to be as follows:

“ . . . Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies *in their incipency and before consummation*. . . .”  
S. Rep. No. 698, 63d Cong., 2d Sess. 1. (Emphasis added.)

“Incipency” in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. See *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163, 166. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.<sup>24</sup> Even when the purchase is solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to

<sup>23</sup> *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346.

<sup>24</sup> Cf. *Corn Products Refining Co. v. Federal Trade Comm’n*, 324 U. S. 726, 738.

bring about, or in attempting to bring about, the substantial lessening of competition.<sup>25</sup>

Prior cases under § 7 were brought at or near the time of acquisition. See, e. g., *International Shoe Co. v. Federal Trade Comm'n*, 280 U. S. 291; *V. Vivaudou, Inc. v. Federal Trade Comm'n*, 54 F. 2d 273; *Federal Trade Comm'n v. Thatcher Mfg. Co.*, 5 F. 2d 615, rev'd in part on another ground, 272 U. S. 554; *United States v. Republic Steel Corp.*, 11 F. Supp. 117; *In re Vanadium-Alloys Steel Co.*, 18 F. T. C. 194. None of these cases holds, or even suggests, that the Government is foreclosed from bringing the action at any time when a threat of the prohibited effects is evident.

Related to this argument is the District Court's conclusion that 30 years of nonrestraint negated "any reasonable probability of such a restraint" at the time of the suit.<sup>26</sup> While it is, of course, true that proof of a mere possibility of a prohibited restraint or tendency to monopoly will not establish the statutory requirement that the effect of an acquisition "may be" such restraint or tendency,<sup>27</sup> the basic facts found by the District Court demonstrate the error of its conclusion.<sup>28</sup>

The du Pont Company's commanding position as a General Motors supplier was not achieved until shortly

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<sup>25</sup> Section 7 provides, in pertinent part:

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. . . ." 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18.

<sup>26</sup> 126 F. Supp., at 335.

<sup>27</sup> *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, at 356-357.

<sup>28</sup> There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc., 52 (a), that findings of fact shall not be set aside unless clearly erroneous.



after its purchase of a sizable block of General Motors stock in 1917.<sup>29</sup> At that time its production for the automobile industry and its sales to General Motors were relatively insignificant. General Motors then produced only about 11% of the total automobile production and its requirements, while relatively substantial, were far short of the proportions they assumed as it forged ahead to its present place in the industry.

At least 10 years before the stock acquisition, the du Pont Company, for over a century the manufacturer of military and commercial explosives, had decided to expand its business into other fields. It foresaw the loss of its market for explosives after the United States Army and Navy decided in 1908 to construct and operate their own plants. Nitrocellulose, a nitrated cotton, was the principal raw material used in du Pont's manufacture of smokeless powder. A search for outlets for this raw material uncovered requirements in the manufacture of lacquers, celluloid, artificial leather and artificial silk. The first step taken was the du Pont purchase in 1910 of the Fabrikoid Company, then the largest manufacturer of artificial leather, reconstituted as the du Pont Fabrikoid Company in 1913.

The expansion program was barely started, however, when World War I intervened. The du Pont Company suddenly found itself engulfed with orders for military explosives from foreign nations later to be allies of the United States in the war, and it had to increase its capacity and plant facilities from 700,000 to 37,000,000 pounds per month at a cost exceeding \$200,000,000. Profits accumulated and ultimately amounted to \$232,000,000. The need to find postwar uses for its expanded facilities and organization now being greater than ever,

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<sup>29</sup> Before 1917, du Pont supplied General Motors with coated fabrics. 126 F. Supp., at 297.

du Pont continued its expansion program during the war years, setting aside \$90,000,000 for the purpose. In September 1915, du Pont bought the Arlington Works, one of the Nation's two largest celluloid companies. In June 1916, the Fairfield Rubber Company, producers of rubber-coated fabrics for automobile and carriage tops, was taken over by du Pont Fabrikoid. In March 1917, purchase was made of Harrison Brothers and Company, manufacturers of paint, varnish, acids and certain inorganic chemicals used in paint manufacture. Shortly afterwards, Harrison absorbed Beckton Chemical Company, a color manufacturer, and, also in 1917, the Bridgeport Wood Finishing Company, a varnish manufacturer.

Thus, before the first block of General Motors stock was acquired, du Pont was seeking markets not only for its nitrocellulose, but also for the artificial leather, celluloid, rubber-coated goods, and paints and varnishes in demand by automobile companies. In that connection, the trial court expressly found that "... reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont," and that John J. Raskob, du Pont's treasurer and the principal promoter of the investment, "for one, thought that du Pont would ultimately get all that business . . . ." <sup>30</sup>

The Company's interest in buying into General Motors was stimulated by Raskob and Pierre S. du Pont, then du Pont's president, who acquired personal holdings of General Motors stock in 1914. General Motors was organized six years earlier by William C. Durant to acquire previously independent automobile manufacturing companies—Buick, Cadillac, Oakland and Oldsmobile. Durant later brought in Chevrolet, organized by

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<sup>30</sup> 126 F. Supp., at 243.

him when he was temporarily out of power, during 1910-1915, and a bankers' group controlled General Motors. In 1915, when Durant and the bankers deadlocked on the choice of a Board of Directors, they resolved the deadlock by an agreement under which Pierre S. du Pont was named Chairman of the General Motors Board, and Pierre S. du Pont, Raskob and two nominees of Mr. du Pont were named neutral directors. By 1916, Durant settled his differences with the bankers and resumed the presidency and his controlling position in General Motors. He prevailed upon Pierre S. du Pont and Raskob to continue their interest in General Motors' affairs, which both did as members of the Finance Committee, working closely with Durant in matters of finances and operations and plans for future expansion. Durant persistently urged both men and the "Wilmington people, as he called it,"<sup>31</sup> to buy more stock in General Motors.

Finally, Raskob broached to Pierre S. du Pont the proposal that part of the fund earmarked for du Pont expansion be used in the purchase of General Motors stock. At this time about \$50,000,000 of the \$90,000,000 fund was still in hand. Raskob foresaw the success of the automobile industry and the opportunity for great profit in a substantial purchase of General Motors stock. On December 19, 1917, Raskob submitted a Treasurer's Report to the du Pont Finance Committee recommending a purchase of General Motors stock in the amount of \$25,000,000. That report makes clear that more than just a profitable investment was contemplated. A major consideration was that an expanding General Motors would provide a substantial market needed by the burgeoning du Pont organization. Raskob's summary of reasons in support of the purchase includes this state-

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<sup>31</sup> 126 F. Supp., at 241.



ment: "Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin [celluloid], paint and varnish business of those companies, *which is a substantial factor.*" (Emphasis added.)<sup>32</sup>

This thought, that the purchase would result in du Pont's obtaining a new and substantial market, was echoed in the Company's 1917 and 1918 annual reports to stockholders. In the 1917 report appears: "Though this is a new line of activity, it is one of great promise and one that seems to be well suited to the character of our organization. *The motor companies are very large consumers of our Fabrikoid and Pyralin as well as paints and varnishes.*" (Emphasis added.) The 1918 report says: "The consumption of paints, varnishes and fabrikoid in the manufacture of automobiles gives another common interest."

This background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made "solely for investment." Moreover, immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes.

Two years were to pass before du Pont's total purchases of General Motors stock brought its percentage to 23% of the outstanding stock and its aggregate outlay to \$49,000,000. During that period, du Pont and Durant worked under an arrangement giving du Pont primary responsibility for finances and Durant the responsibility for operations. But J. A. Haskell, du Pont's former sales manager and vice-president, became the General Motors vice-president in charge of the operations committee. The trial judge said that Haskell ". . . was willing to under-

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<sup>32</sup> 126 F. Supp., at 241.

take the responsibility of keeping du Pont informed of General Motors affairs during Durant's regime . . . ."<sup>33</sup>

Haskell frankly and openly set about gaining the maximum share of the General Motors market for du Pont. In a contemporaneous 1918 document, he reveals his intention to "pave the way for perhaps a more general adoption of our material," and that he was thinking "how best to get cooperation [from the several General Motors Divisions] whereby makers of such of the low priced cars as it would seem possible and wise to get transferred will be put in the frame of mind necessary for its adoption [du Pont's artificial leather]."

Haskell set up lines of communication within General Motors to be in a position to know at all times what du Pont products and what products of du Pont competitors were being used. It is not pure imagination to suppose that such surveillance from that source made an impressive impact upon purchasing officials. It would be understandably difficult for them not to interpret it as meaning that a preference was to be given to du Pont products. Haskell also actively pushed the program to substitute Fabrikoid artificial leathers for genuine leather and sponsored use of du Pont's Pyralin sheeting through a liaison arrangement set up between himself and the du Pont sales organization.

Thus sprung from the barrier, du Pont quickly swept into a commanding lead over its competitors, who were never afterwards in serious contention. Indeed, General Motors' then principal paint supplier, Flint Varnish and Chemical Works, early in 1918 saw the handwriting on the wall. The Flint president came to Durant asking to be bought out, telling Durant, as the trial judge found, that he "knew du Pont had bought a substantial interest in General Motors and was interested in the paint industry; that . . . [he] felt he would lose a valuable

<sup>33</sup> 126 F. Supp., at 245.

customer, General Motors.”<sup>34</sup> The du Pont Company bought the Flint Works and later dissolved it.

In less than four years, by August 1921, Lammot du Pont, then a du Pont vice-president and later Chairman of the Board of General Motors, in response to a query from Pierre S. du Pont, then Chairman of the Board of both du Pont and General Motors, “whether General Motors was taking its entire requirements of du Pont products from du Pont,” was able to reply that four of General Motors’ eight operating divisions bought from du Pont their entire requirements of paints and varnishes, five their entire requirements of Fabrikoid, four their entire requirements of rubber cloth, and seven their entire requirements of Pyralin and celluloid. Lammot du Pont quoted du Pont’s sales department as feeling that “the condition is improving and that eventually satisfactory conditions will be established in every branch, but they wouldn’t mind seeing things going a little faster.” Pierre S. du Pont responded that “with the change in management at Cadillac, Oakland and Olds [Cadillac was taking very little paints and varnishes, and Oakland but 50%; Olds was taking only part of its requirements for fabrikoid], I believe that you should be able to sell substantially all of the paint, varnish and fabrikoid products needed.” He also suggested that “a drive should be made for the Fisher Body business. Is there any reason why they have not dealt with us?”

Fisher Body was stubbornly resistant to du Pont sales pressure. General Motors, in 1920, during Durant’s time, acquired 60% stock control of Fisher Body Company. However, a voting trust was established giving the Fisher brothers broad powers of management. They insisted on running their own show and for years withstood efforts of high-ranking du Pont and General Motors executives to

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<sup>34</sup> 126 F. Supp., at 267.



get them to switch to du Pont from their accustomed sources of supply. Even after General Motors obtained 100% stock control in 1926, the Fisher brothers retained sufficient power to hold out. By 1947 and 1948, however, Fisher resistance had collapsed, and the proportions of its requirements supplied by du Pont compared favorably with the purchases by other General Motors Divisions.

In 1926, the du Pont officials felt that too much General Motors business was going to its competitors. When Pierre S. du Pont and Raskob expressed surprise, Lam-mot du Pont gave them a breakdown, by dollar amounts, of the purchases made from du Pont's competitors. This breakdown showed, however, that only Fisher Body of the General Motors divisions was obtaining any substantial proportion of its requirements from du Pont's competitors.

Competitors did obtain higher percentages of the General Motors business in later years, although never high enough at any time substantially to affect the dollar amount of du Pont's sales. Indeed, it appears likely that General Motors probably turned to outside sources of supply at least in part because its requirements outstripped du Pont's production, when General Motors' proportion of total automobile sales grew greater and the company took its place as the sales leader of the automobile industry. For example, an undisputed Government exhibit shows that General Motors took 93% of du Pont's automobile Duco production in 1941 and 83% in 1947.

The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit.

We agree with the trial court that considerations of price, quality and service were not overlooked by either du Pont or General Motors. Pride in its products and its high financial stake in General Motors' success would naturally lead du Pont to try to supply the best. But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that du Pont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics.<sup>35</sup>

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<sup>35</sup> The du Pont policy is well epitomized in a 1926 letter written by a former du Pont employee, J. L. Pratt, when a General Motors vice-president and member of the Executive Committee, to the general manager of a General Motors Division:

"I am glad to know that your manufacturing, chemical and purchasing divisions feel they would be in better hands possibly by dealing with duPont than with local companies. From a business standpoint no doubt your organization would be influenced to give the business, under equal conditions, to the local concerns. However, I think when General Motors divisions recognize the sacrifice that the duPont Company made in 1920 and 1921, to keep General Motors Corporation from being put in a very bad light publicly—the duPont Company going to the extent of borrowing \$35,000,000 on its notes when the company was entirely free of debt, in order to prevent a large amount of General Motors stock being thrown on the open market—they should give weight to this which in my mind more than over-balances consideration of local conditions. In other words, I feel that where conditions are equal from the standpoint of quality, service and price, the duPont Company should have the major share of General Motors divisions' business on those items that the duPont Company can take on the basis of quality, service and price. If it is possible to use the product from more than one company I do not think it advisable to give any one company all of the business, as I think it is desirable to always keep a competitive situation, otherwise any supplier is liable to grow slack in seeing that you have the best service and price possible.

"I have expressed my own personal sentiments in this letter to you in order that you might have my point of view, but I do not wish to influence your organization in any way that would be against

Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended.

The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat, that the test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such likelihood was proved as to this acquisition. The fire that was kindled in 1917 continues to smolder. It burned briskly to forge the ties that bind the General Motors market to du Pont, and if it has quieted down, it remains hot, and, from past performance, is likely at any time to blaze and make the fusion complete.<sup>36</sup>

The judgment must therefore be reversed and the cause remanded to the District Court for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed

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your own good judgment, keeping in mind that above all the prime consideration is to do the best thing for Delco-Light Company, and that considerations in regard to the duPont Company or other concerns are secondary, and I am sure this is your feeling."

<sup>36</sup> The potency of the influence of du Pont's 23% stock interest is greater today because of the diffusion of the remaining shares which, in 1947, were held by 436,510 stockholders; 92% owned no more than 100 shares each, and 60% owned no more than 25 shares each. 126 F. Supp., at 244.



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"with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States*, 332 U. S. 392, 400-401.

The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted.

*It is so ordered.*

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

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

In June 1949, the United States brought this civil action in the United States District Court for the Northern District of Illinois under § 4 of the Sherman Act and § 15 of the Clayton Act to enjoin alleged violations of §§ 1 and 2 of the Sherman Act, and § 7 of the Clayton Act. The amended complaint, insofar as pertinent to the issues here, alleged that du Pont and General Motors have been engaged, since 1915, in a combination and conspiracy to restrain and monopolize interstate trade, and that du Pont's acquisition of General Motors' stock had the effect of restraining trade and tending to create a monopoly. In brief it was alleged that, by means of the relationship between du Pont and General Motors, du Pont intended to obtain, and did obtain, an illegal preference over its competitors in the sale to General Motors of its products, and a further illegal preference in the development of chemical discoveries made by General Motors. Appellees denied the charges.

The trial of these issues took nearly seven months. The District Court heard 52 witnesses, including most of the principal actors, and received over 2,000 exhibits. The evidence contained in the 8,283-page transcript of record covers in minute and intimate detail the facts bearing on the Government's charge that du Pont, by coercion, agreement, control or influence, had interfered unlawfully with General Motors' purchasing and manufacturing policies. On the basis of this evidence, the District Court found that the Government had failed to prove its case and, specifically, that (a) du Pont did not control General Motors, (b) there had been "no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont" or upon its "freedom . . . to deal with its chemical discoveries," and (c) after 30 years in which no such restraint had resulted, there was no "basis for a finding that there is or has been any reasonable probability of such a restraint within the meaning of the Clayton Act." 126 F. Supp. 235, 335.

The Government's basic contention in this Court is that du Pont violated §§ 1 and 2 of the Sherman Act in that, by means of its alleged control of General Motors, it obtained an unlawful preference with respect to General Motors' purchases of materials. In the closing pages of its brief, and for a few minutes in its oral argument, the Government added the assertion that du Pont had violated § 7 of the Clayton Act in that its stock interest in General Motors "has been used to channel General Motors' purchases to du Pont."

This Court, ignoring the Sherman Act issues which have been the focal point of eight years of litigation, now holds that du Pont's acquisition of a 23% stock interest in General Motors during the years 1917-1919 violates § 7 of the Clayton Act because "at the time of suit [in 1949] there [was] a reasonable probability that the acquisition [was] likely to result in the condemned

restraints." *Ante*, p. 607. In reaching this conclusion, the Court holds (1) that § 7 of the Clayton Act applies to vertical as well as horizontal stock acquisitions; (2) that in determining whether the effect of the stock acquisition is such as to constitute a restraint within § 7, the time chosen by the Government in bringing the action is controlling rather than the time of the acquisition itself; and (3) that § 7 is violated when, at the time of suit, there is a reasonable probability that the stock acquisition is likely to result in the foreclosure of competitors of the acquiring corporation from a substantial share of the relevant market.

In applying these principles to this case, the Court purports to accept the carefully documented findings of fact of the District Court. Actually, it overturns numerous well-supported findings of the District Court by now concluding that du Pont did not purchase General Motors' stock solely for investment; that du Pont's stock interest resulted in practical or working control of General Motors; that du Pont has used or might use this "control" to secure preferences in supplying General Motors with automobile finishes and fabrics; that the relevant market includes only automobile finishes and fabrics; and that there was, even at the time of suit in 1949, a reasonable probability that du Pont's competitors might be foreclosed from a substantial share of this relevant market.

The Court's decision is far reaching. Although § 7 of the Clayton Act was enacted in 1914—over 40 years ago—this is the first case in which the United States or the Federal Trade Commission has sought to apply it to a vertical integration.<sup>1</sup> Likewise, this appears to be the first case in which it ever has been argued that § 7 is applicable to a stock acquisition which took place many

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<sup>1</sup> *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, CCH Trade Cases ¶ 57,514 (D. C. S. D. N. Y. 1946), discussed *infra*, n. 10, was a private action for treble damages.



years before.<sup>2</sup> The Court, in accepting both of these contentions, disregards the language and purpose of the statute, 40 years of administrative practice, and all the precedents except one District Court decision. The sweeping character of the Court's pronouncement is further evident from the fact that to make its case the Court requires no showing of any misuse of a stock interest—either at the time of acquisition or subsequently—to gain preferential treatment from the acquired corporation. All that is required, if this case is to be our guide, is that some court in some future year be persuaded that a “reasonable probability” then exists that an advantage over competitors in a narrowly construed market may be obtained as a result of the stock interest. Thus, over 40 years after the enactment of the Clayton Act, it now becomes apparent for the first time that § 7 has been a sleeping giant all along. Every corporation which has acquired a stock interest in another corporation after the enactment of the Clayton Act in 1914, and which has had business dealings with that corporation is exposed, retroactively, to the bite of the newly discovered teeth of § 7.

For the reasons given below, I believe that the Court has erred in (1) applying § 7 to a vertical acquisition; (2) holding that the time chosen by the Government in bringing the action is controlling rather than the time of the stock acquisition itself; and (3) concluding, in disregard of the findings of fact of the trial court, that the facts of this case fall within its theory of illegality.

### I.

Section 7 of the Clayton Act, quoted in full in the Appendix, *post*, pp. 655–656, does not make unlawful all

<sup>2</sup> *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953), involved a series of stock acquisitions over many years, some of which took place at about the time of suit.

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intercorporate acquisitions and mergers.<sup>3</sup> It does not apply to acquisitions of physical assets.<sup>4</sup> It applies only to certain acquisitions of stock, and even then with important exceptions. The first paragraph of § 7, which is the statutory provision primarily involved in this case, provides—

“That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.” 38 Stat. 731–732, 15 U. S. C. (1946 ed.) § 18.

This paragraph makes unlawful only those intercorporate stock acquisitions which may result in any of three effects: (1) substantially lessen competition between the

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<sup>3</sup> Section 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18, was amended in 1950 so as to broaden its application, 64 Stat. 1125, 15 U. S. C. § 18. The amendments, by their terms, were inapplicable to acquisitions made before 1950. Thus this case is governed by the original language of § 7 and not by § 7, as amended.

<sup>4</sup> One of the earliest rulings of the Federal Trade Commission was that § 7 did not prohibit asset acquisitions. 1 F. T. C. 541–542. The primary purpose of the 1950 amendments was to bring asset acquisitions within § 7. Proponents of the 1950 amendments asserted on several occasions that the omission of asset acquisitions in the original Clayton Act had been inadvertent. See, *e. g.*, 96 Cong. Rec. 16443. However, the legislative history of the Clayton Act demonstrates that the purpose of § 7 was to prevent the formation of holding companies and certain evils peculiar to stock acquisitions, particularly the secrecy of ownership. See 51 Cong. Rec. 9073, 14254, 14316, 14420, 14456; H. R. Rep. No. 627, 63d Cong., 2d Sess. 17; S. Rep. No. 698, 63d Cong., 2d Sess. 13.

acquiring and the acquired corporations; (2) restrain commerce in any section or community; or (3) tend to create a monopoly of any line of commerce. The Government concedes that General Motors and du Pont have never been in competition with each other. Since the substantially lessen competition clause applies only to acquisitions involving competing corporations (generally referred to as horizontal acquisitions), that clause concededly is not applicable to this case. The questions before us are whether the other unlawful effects, namely, restraint of commerce in any section or community and tendency to create a monopoly of any line of commerce, are applicable to this case, and, if so, whether the 1917-1919 acquisition of General Motors' stock by du Pont resulted or may result in either of those unlawful effects.

Section 7 never has been authoritatively interpreted as prohibiting the acquisition of stock in a corporation that is not engaged in the same line of business as the acquiring corporation. Although the language of the Act is ambiguous, the relevant legislative history, administrative practice, and judicial interpretation support the conclusion that § 7 does not apply to vertical acquisitions.

The report of the House Committee on the Judiciary, presented by Representative Clayton, stated emphatically that the provisions relating to stock acquisitions by corporations, which originally appeared as § 8 of the bill, were intended to eliminate the evils of *holding companies*. H. R. Rep. No. 627, 63d Cong., 2d Sess. 17. Although a "holding company" was defined as "a company that holds the stock of another company or companies," the one "evil" referred to was that a holding company "is a means of holding under one control the *competing* companies whose stocks it has thus acquired." (Emphasis supplied.) *Ibid.* Two minority statements appended to the House Report evidence a similar understanding that the provisions of the bill were limited to *competing cor-*



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porations. *Id.*, Pt. 2, p. 6; Pt. 3, p. 8. The substance of the House Report was adopted by the Senate Committee on the Judiciary in its report on the bill. S. Rep. No. 698, 63d Cong., 2d Sess. 13, 43, 46.

The extensive debates on the bill in each House of Congress contain many detailed discussions of the provisions relating to intercorporate stock acquisitions. These discussions are devoid of any suggestion that the provisions were to apply to vertical acquisitions.<sup>5</sup> On the contrary, these provisions of the bill were repeatedly described as prohibiting the acquisition of stock of competing companies.<sup>6</sup> The one specific reference to a vertical acquisition during the entire debate on these provisions ended with a flat statement by Senator Reed to the effect that the bill as then written (containing the tendency toward monopoly clause but not the restraint of commerce clause) would *not* prevent a steel manufacturing corporation from acquiring stock in an ore producing corporation, a classic type of vertical integration.<sup>7</sup>

<sup>5</sup> The remarks of Senator Chilton relied on by the majority, *ante*, p. 591, do not indicate that he thought that § 7 was applicable to vertical acquisitions. His statements indicate merely that he thought that the restraint and monopoly clauses of § 7 were not entirely synonymous with the substantially lessen competition clause.

<sup>6</sup> See, *e. g.*, 51 Cong. Rec. 9270-9271 (Representative Carlin); *id.*, at 9554 (Representative Barkley); *id.*, at 14254-14255 (Senator Cummins); *id.*, at 14313 (Senator Reed); *id.*, at 15856-15861 (Senator Walsh); *id.*, at 15940 (Senator Nelson); *id.*, at 16001 (Senator Chilton); *id.*, at 16320 (Representative Floyd).

<sup>7</sup> 51 Cong. Rec. 14455. Senator Reed had offered an amendment to the first paragraph of § 7 which would have prevented a corporation from acquiring stock in another corporation engaged in the same line of business. This was an attempt to *stiffen* the bill in order to relieve the Government from proving that competition had been substantially lessened by the acquisition, an element of proof which he, Senator Cummins, and others thought would be quite difficult. See 51 Cong. Rec. 14254-14255, 14419-14420. Senator Chilton asked Senator Reed whether his amendment would prevent a corporation engaged in the manufacture of steel from acquiring stock in a cor-

A reading of the legislative history of the bill leaves the distinct impression that intercorporate relationships between buyers and sellers which resulted in noncompetitive preferences were intended to be dealt with exclusively by the provision forbidding interlocking directorates (§ 8 of the Clayton Act), if not covered by the specific prohibitions of certain price discriminations (§ 2), and of certain exclusive selling or leasing contracts (§ 3).<sup>8</sup>

Forty years of administrative practice provides additional support for this view. Neither the Department of Justice nor the Federal Trade Commission, the two principal enforcing agencies, has brought any action under old § 7 (other than the instant case) that has not involved a stock acquisition in allegedly competing corporations. The Federal Trade Commission repeatedly has declared its understanding that § 7, prior to its amendment in 1950, applied only to competing corporations.<sup>9</sup> In a recent report it stated without qualification:

“While the 1914 act applied solely to horizontal mergers, the 1950 act applies not only to horizontal

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poration engaged in the production of iron ore. Senator Reed replied that his amendment would *not* bar such an acquisition, *but that neither would the bill as written*:

“But I call the Senator’s attention to the fact that if the illustration he uses would not be covered by the language of my amendment it certainly would not be covered by the language I seek to amend. His argument would go as much against that, and even more than against my amendment. I do not claim that this will stop everything. I claim that it will be a long step in that direction.” *Id.*, at 14455. No one disputed Senator Reed’s interpretation of § 7.

<sup>8</sup> See, *e. g.*, the statement by Representative Carlin, one of the managers of the bill in the House, to the effect that the interlocking directorate provision contained in § 8 would prevent a director of a corporation which supplied railroads with materials from becoming a railroad director and, in effect, “buy[ing] supplies from himself.” 51 Cong. Rec. 9272.

<sup>9</sup> See, *e. g.*, F. T. C., Ann. Rep. for Fiscal Year 1929, 6–7, 60, where the Commission stated that it could take no corrective action under

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acquisitions but to vertical and conglomerate acquisitions which might substantially lessen competition or tend to create a monopoly." F. T. C., Report on Corporate Mergers and Acquisitions (May 1955), 168, H. R. Doc. No. 169, 84th Cong., 1st Sess.

Beginning in 1927, the Federal Trade Commission included in its annual recommendations to Congress a request that § 7 be amended to remedy its inadequacies. This result was achieved in 1950. 64 Stat. 1125, 15 U. S. C. § 18. As the Court recognizes in its opinion, *ante*, p. 590, one of the reasons for amending § 7 in 1950 was, in the words of the House Report on the amendments, "to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. Forty years of established administrative practice, acquiesced in and recognized by Congress, is persuasive evidence of the proper scope of § 7. *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U. S. 349, 351-352.

The cases cited by the Court, with the one exception of *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, CCH Trade Cases ¶ 57,514 (D. C. S. D. N. Y. 1946),<sup>10</sup>

the Clayton Act against large consolidations in the food industry "even though the consolidation was effected through the acquisition or exchange of capital stock," because "most of these consolidations and acquisitions were of corporations engaged in the distribution of allied but noncompetitive products." See also, F. T. C., Ann. Rep. for Fiscal Year 1927, 13-15; Statement by General Counsel Kelley in Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 2734, 81st Cong., 1st and 2d Sess. 37; Report of the Federal Trade Commission on Interlocking Directorates, H. R. Doc. No. 652, 81st Cong., 2d Sess. 1.

<sup>10</sup> In the *Ronald Fabrics* case, a rayon converter alleged that a competing corporation had restrained commerce by acquiring control of a source of supply of rayon. The District Court held that this allegation stated a cause of action under § 7 of the Clayton Act.



do not support the Court's conclusion that § 7 applies to a vertical acquisition. In *Aluminum Co. of America v. Federal Trade Commission*, 284 F. 401 (C. A. 3d Cir. 1922), the Aluminum Company, which previously had had a monopoly of all sheet aluminum produced in the United States, acquired control through an intermediary corporation of a competing sheet aluminum company established in 1916. A divestiture order of the Federal Trade Commission was upheld, the court holding that the stock acquisition substantially lessened competition and tended to create a monopoly of the sheet aluminum business. In *United States v. New England Fish Exchange*, 258 F. 732 (D. C. Mass. 1919), two holding companies which had acquired the stock of virtually all the wholesale fish dealers trading on the New England Fish Exchange, which handled about 95% of all the ground fish sold in interstate commerce in the United States, were held to have violated the provisions of § 7. Each of these cases was concerned with the acquisition of directly competing corporations—not vertical acquisitions. Statements in the opinions, not essential to the decisions, merely stand for the proposition that the restraint and monopoly clauses of § 7 are not entirely synonymous with the substantially lessen competition clause.

Assuming that the three unlawful effects mentioned in § 7 are not entirely synonymous with each other,<sup>11</sup> such an

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<sup>11</sup> A minority in the Senate, led by Senators Cummins and Walsh, sought to strike out the "tend to create a monopoly" language of § 7. 51 Cong. Rec. 14314-14316, 14319, 14459-14461. They argued that this language was superfluous because the creation of a monopoly always substantially lessened competition, and because the Sherman Act contained similar language, and that there was a danger that the language would be considered as an implied repeal of the Sherman Act. The failure of these efforts to eliminate the tendency toward monopoly clause (the restraint of commerce clause had not been added

assumption does not require the conclusion that § 7 was intended to apply to vertical acquisitions as well as to horizontal acquisitions. Corporations engaged in the same business activity in different areas do not necessarily "compete" with each other so that their combination would substantially lessen competition between them, even though their combination might result in a restraint of commerce or a tendency toward monopoly violative of § 7. Such a possibility was presented in *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953), where a banking corporation through a series of transactions acquired stock in 48 local banking corporations, most of which were located in communities in which no other bank was acquired. A divestiture order of the Board was reversed on the ground that the Board had not proved that the acquisitions of these banks in five western States either substantially lessened competition or tended to create a monopoly.

Finally, this Court has twice construed old § 7 as applying only to stock acquisitions involving competing corporations. In *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291 (1930), the Court held that the acquisition of the fifth largest shoe manufacturing company by the largest shoe manufacturer did not violate either the substantially lessen competition clause or the restraint of commerce clause of § 7 because the pre-existing competition between the two corporations was insubstantial, and because the acquired corporation was

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to § 7 at this time) indicates that the tendency toward monopoly clause was not intended to be limited to situations already encompassed by the substantially lessen competition clause. Similarly, the remarks of Senator Chilton, quoted by the Court from 51 Cong. Rec. 16002, *ante*, pp. 591-592, indicate that he thought the tendency toward monopoly and restraint of commerce clauses added something. But I find no evidence that what they did add included vertical acquisitions.

in a precarious financial condition. Substantial pre-existing competition was said to be a requisite for violation of either clause of § 7. 280 U. S., at 298, 303. An even more direct holding is found in *Thatcher Mfg. Co. v. Federal Trade Commission*, 272 U. S. 554 (1926), where this Court affirmed that portion of the lower court's decree which had allowed Thatcher, a milk bottle manufacturer, to retain the assets of Woodbury, a bottle manufacturer specializing in condiment and whiskey bottles, on the ground that the acquisition did not violate any of the three clauses of § 7 since Thatcher was not in competition with Woodbury. 272 U. S., at 560, affirming in part and reversing in part *Federal Trade Commission v. Thatcher Mfg. Co.*, 5 F. 2d 615 (C. A. 3d Cir. 1925). These holdings apparently will be overruled *sub silentio* by today's decision.

The legislative history, administrative practice, and judicial interpretation of § 7 provide the perspective in which the Government's present assertion that § 7 applies to vertical acquisitions should be viewed. Seen as a whole, they offer convincing evidence that § 7, properly construed, has reference only to horizontal acquisitions. I would so hold. However, even if the opposite view be accepted, the foregoing views of the enforcing agencies and the courts are material to a proper consideration of the other issues which must then be reached.

## II.

In this case the Government is challenging, in 1949, a stock acquisition that took place in 1917-1919. The Court, without advancing reasons to support its conclusion, holds that in determining whether the effect of the stock acquisition is such as to violate § 7, the time chosen by the Government in bringing its suit is controlling rather than the time of the acquisition of the stock. This seems to me to ignore the language and structure of § 7,



the purpose of the Clayton Act, and all existing administrative and judicial precedents.

The first paragraph of § 7 provides that "no corporation . . . shall acquire . . . the stock . . . of another corporation . . . where the effect of such acquisition may be . . . ." Yet the Court construes this provision as if it read "no corporation . . . shall acquire *or continue to hold* . . . the stock . . . of another corporation . . . *whenever it shall appear that* the effect of such acquisition *or continued holding* may be . . . ." Continued holding, to be sure, is a prerequisite to any action under § 7 because, if the stock is no longer held, the violation has been purged and there is nothing to divest.<sup>12</sup> But the fact of continued holding does not allow the Government to dispense with the necessity of proving that the stock was unlawfully acquired. The offense described by § 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete. The statutory language is unequivocal. It makes the test the probable effect of the acquisition at the time of the actual acquisition, and not at some later date to be arbitrarily chosen by the Government in bringing suit.

The distinction carefully made in the several paragraphs of § 7 between an unlawful acquisition and an unlawful use of stock reinforces this conclusion. The first paragraph of § 7, which speaks only in terms of *acquisition* of stock, is concerned solely with the purchase of stock in "another corporation." It is the only provision that is applicable in this case. The second paragraph, which expressly prohibits both *acquisition* and *use*, is concerned with stock purchases in "two or more corporations." Concededly, it is not applicable here. When Congress chose to make unlawful the use of stock

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<sup>12</sup> *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, 561.

subsequent to its acquisition, it did so in specific terms. The omission of the phrase "or the use of such stock by the voting or granting of proxies or otherwise," contained in the second paragraph of § 7, from the first paragraph of the section was not inadvertent. The phrase therefore cannot be read into the first paragraph of § 7.<sup>13</sup>

The Clayton Act was not intended to replace the Sherman Act in remedying actual restraints and monopolies. Its purpose was to supplement the Sherman Act by checking anticompetitive tendencies in their incipiency, before they reached the point at which the Sherman Act comes into play. This purpose was well stated in the Senate Report on the bill:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1.

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<sup>13</sup> It might be argued that the mention of subsequent misuse in the third paragraph of § 7, the investment proviso, enlarges the substantive content of the first paragraph of § 7. This paragraph provides that "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." But the mention of *use* in this paragraph has the effect of limiting the exception it contains, *i. e.*, the exception for stock purchased "solely for investment." This exception is lost if the stock is subsequently misused. But the exception contained in this paragraph does not come into play unless the acquisition first comes within the substantive prohibition of the first two paragraphs of § 7. This limitation on the exception cannot expand the substantive prohibition to which the exception applies.

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This purpose places emphasis on the probable anticompetitive effects of transactions or occurrences viewed as of the date of their occurrence. The determination required by the Act is one of predicting the probable outcome of a particular transaction, here an acquisition of stock in another corporation. If, at the time of the stock acquisition, a potential threat to competition is apparent, the acquisition is unlawful under § 7. If, on the other hand, a potential threat to competition is not then apparent, an antitrust violation is not involved unless subsequent use of the stock constitutes a restraint of trade prohibited by the Sherman Act.<sup>14</sup>

The Court ignores the all-important lawfulness or unlawfulness of the stock acquisition at or about the time it occurred, and limits its attention to the probable anticompetitive effects of the continued holding of the stock at the time of suit, some 30 years later. The result is to subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments. Such a view is not supported by the statutory language and violates elementary principles of fairness. Suits brought under the Clayton Act are not subject to any statute of limitations, and it is doubtful whether the doctrine of laches applies as against the Government. The result is that unexpected and unforeseeable developments occurring long after a stock acquisition can be used to challenge the legality of continued holding of the stock. In such an action, the Government need only prove that *probable* rather than *actual* anticompetitive

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<sup>14</sup> It may be that § 7 is inapplicable when the Government fails to bring suit within a reasonable period after the consummation of the stock acquisition. If so, the 30 years here involved would exceed a reasonable period of incipency. Even though § 7 of the Clayton Act, under this theory, would be inapplicable, any alleged restraint could be dealt with under the Sherman Act.



effects exist as of the time of suit. The Government may thus set aside a transaction which was entirely lawful when made, merely by showing that it would have been unlawful had it occurred at the time of suit, many years later. The growth of the acquired corporation, a fortuitous decline in the number of its competitors, or the achievement of control by an accidental diffusion of other stock may result, under this test, in rendering the originally lawful acquisition unlawful *ab initio*. Strikingly enough, all of these factors are involved in this case.<sup>15</sup>

The Court's holding is unfair to the individuals who entered into transactions on the assumption, justified by the language of § 7, that their actions would be judged by the facts available to them at the time they made their decision.

"The prohibition [of § 7] is addressed to parties who contemplate engaging in merger transactions and is meant, in the first instance, to guide them in deciding upon a course of action. The only standard they are capable of applying is one addressed to the circumstances viewed as of the date of the proposed transaction. Since this is the standard which the parties must apply in deciding whether to undertake a transaction, it seems reasonable to conclude that it is the standard which enforcement agencies should

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<sup>15</sup> The Court apparently concedes that du Pont's stock acquisition in General Motors was lawful when made because "its sales to General Motors were relatively insignificant" at that time and because "General Motors then produced only about 11% of the total automobile production . . ." *Ante*, p. 599. Throughout, the Court stresses the growth in size of General Motors. *Ante*, pp. 595-596, 599. The decline in the number of automobile manufacturers is not mentioned, but is well known. And the Court states that diffusion of General Motors' stock through the years has increased "The potency of the influence of du Pont's 23% stock interest . . ." *Ante*, p. 607, n. 36.

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apply in deciding whether the transaction violates the statute." Neal, *The Clayton Act and the Transamerica Case*, 5 *Stan. L. Rev.* 179, 220-221.

The Court cites no authority in support of its new interpretation of this 40-year-old statute. On the other hand, examination of the dozen or more cases brought under § 7 reveals that in every case the inquiry heretofore has centered on the probable anticompetitive effects of the stock acquisition at or near the time it was made.<sup>16</sup> See, e. g., *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291 (1930); *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953); *V. Vivaudou, Inc. v. Federal Trade Commission*, 54 F. 2d 273 (C. A. 2d Cir. 1931); *Federal Trade Commission v. Thatcher Mfg. Co.*, 5 F. 2d 615 (C. A. 3d Cir. 1925), rev'd in part on another ground, 272 U. S. 554; *United States v. Republic Steel Corp.*, 11 F. Supp. 117 (D. C. N. D. Ohio 1935); *In re Vanadium-Alloys Steel Co.*, 18 F. T. C. 194 (1934). The conclusion thus seems inescapable that the unlawfulness of a stock acquisition under the first paragraph of § 7 properly turns on the potential threat to competition created by the acquisition of the stock at the time of its acquisition and not by its subsequent use.

That the time of acquisition is controlling does not mean that the Government is unable to bring an action if it fails to proceed within a few years of the stock acquisition. It means only that if the Government chooses to bring its action many years later, it must prove what § 7 plainly requires—that the acquisition threatened competition when made.

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<sup>16</sup> Except in this case, the enforcing agencies appear never to have brought an action under § 7 more than four years after the date of the acquisition. Consequently, the precise problem raised here has not been directly adjudicated. Nevertheless, the cases cited in the text spell out the proof required for a violation of § 7, and thus have an important bearing on this problem.

Nor does it mean that evidence of subsequent events is necessarily irrelevant. Evidence that anticompetitive effects have occurred since the acquisition, and that these effects are traceable to the original acquisition rather than to other factors, may support an inference that such effects were "reasonably probable" at the time of acquisition. The element of causation is the necessary link with the past. However, if events subsequent to the acquisition indicate that no anticompetitive effects have occurred, that evidence may support an inference that an unlawful potential did not exist at the time of acquisition. Evidence as to what happened after the acquisition is relevant to the extent that it bears on the central question whether, at the time of the acquisition, there was a reasonable probability of a threat to competition.

I agree with the Court that § 7 does not require findings and conclusions of *actual* anticompetitive effects. Unlike the Sherman Act, § 7 merely requires proof of a reasonable *probability* of a substantial lessening of competition, restraint of commerce, or tendency toward monopoly. *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291; *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163. When a vertical acquisition is involved, its legality thus turns on whether there is a reasonable probability that it will foreclose competition from a substantial share of the market, either by significantly restricting access to needed supplies or by significantly limiting the market for any product. See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 122-127. The determination of such probable economic consequences requires study of the markets affected, of the companies involved in relation to those markets, and of the probable immediate and future effects on competition. A mere showing that a substantial dollar volume of sales is involved cannot suffice. As the Court says, "The market



affected must be substantial," *ante*, p. 595, and "Substantiality can be determined only in terms of the market affected," *ante*, p. 593. Section 7 thus requires a case-by-case analysis of the relevant economic factors.

However, when, as here, the Government brings a proceeding nearly 30 years after a stock purchase, it must prove that the acquisition was unlawful when made (*i. e.*, that there was a reasonable probability at that time that du Pont's competitors would be foreclosed from a substantial share of the relevant market), *and* also that the effect of the acquisition continued to be harmful to competition at the time suit was brought. Illegality at the time of acquisition is required by the first paragraph of § 7; continuing illegality is a prerequisite for obtaining equitable relief. See *United States v. W. T. Grant Co.*, 345 U. S. 629; *United States v. Oregon Medical Society*, 343 U. S. 326, 333; *United States v. South Buffalo R. Co.*, 333 U. S. 771, 774. This is particularly true under § 7 since it is a prophylactic measure designed to prevent stock acquisitions which probably will have a deleterious effect on competition. Proof that competition has not in fact been harmed during a long period following a stock acquisition itself indicates that a restraint in the future is unlikely. In such a case, the *actual* effect of the acquisition largely supplants the conjecture as to its *probable* effects which otherwise must be relied upon.

In this case, the District Court found that the challenged acquisition, which took place "over thirty years ago," had not resulted in any restraint of trade "In those many intervening years . . ." The District Court properly concluded that, when there had been no restraint for 30 years, "there is not . . . any basis for a finding that there is . . . any reasonable probability of such a restraint within the meaning of the Clayton Act." 126 F. Supp., at 335. If the evidence supports the District Court's conclusion that there has been no restraint for 30 years, the judgment below must be affirmed.

## III.

The remaining issues are factual: (1) whether the record establishes the existence of a reasonable probability that du Pont's competitors will be foreclosed from securing General Motors' trade, and (2) whether the record establishes that such foreclosure, if probable, involves a substantial share of the relevant market and significantly limits the competitive opportunities of others trading in that market. In discussing these factual issues, I meet the Court on its own ground, that is, I assume that the old § 7 applies to vertical acquisitions, and that the potential threat at the time of suit is controlling. Even on that basis the record does not support the Court's conclusion that § 7 was violated by this 1917-1919 stock acquisition.

## A. FORECLOSURE OF COMPETITORS.

This is not a case where a supplier corporation has merged with its customer corporation with the result that the supplier's competitors are automatically and completely foreclosed from the customer's trade.<sup>17</sup> In this case, the only connection between du Pont, the supplier, and General Motors, the customer, is du Pont's 23% stock interest in General Motors. A conclusion that such a stock interest automatically forecloses du Pont's competitors from selling to General Motors would be without justification. Whether a foreclosure has occurred in the past or is probable in the future is a question of fact turning on the evidence in the record.

The Court, at the outset of its opinion, states that the primary issue is whether du Pont's position as a substan-

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<sup>17</sup> Cf. *United States v. Columbia Steel Co.*, 334 U. S. 495, holding that even the exclusion of competition resulting from complete vertical integration does not violate the Sherman Act unless competition in a substantial portion of a market is restrained.

tial supplier to General Motors "was achieved on competitive merit alone," or resulted from du Pont's stock interest in General Motors. *Ante*, pp. 588-589. In resolving this issue, the Court states that the "basic facts" are not in dispute and hence that it is unnecessary to set aside the findings of fact of the District Court as clearly erroneous. See Fed. Rules Civ. Proc., 52 (a). The basic facts are said to be that du Pont had no standing as a General Motors' supplier before the stock purchases of 1917-1919, that it gained a "commanding position" after the stock purchases, and that certain items of evidence in this gigantic record tend to indicate that du Pont hoped to get and actually did get a preference in General Motors' trade. From these alleged facts the Court draws the conclusion that du Pont has misused its 23% stock interest in General Motors "to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics." *Ante*, p. 606. "The inference is overwhelming," the Court concludes, "that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." *Ante*, p. 605. With these words, the Court overturns the District Court's unequivocal findings to the effect that du Pont was a principal supplier to General Motors prior to the 1917-1919 stock purchases, that du Pont maintained this position in the years following the stock purchases, and that for the entire 30-year period preceding the suit, General Motors' purchases of du Pont's products were based solely on the competitive merits of those products. The evidence supporting these findings of the District Court may be summarized as follows:

Du Pont is primarily a manufacturer of chemicals and chemical products. Thousands of its products could be used by General Motors in manufacturing automobiles, appliances and machinery. Despite du Pont's sales efforts over a period of 40 years, General Motors buys



many of the commodities produced by du Pont from du Pont's competitors.<sup>18</sup> The Court, ignoring the many products which General Motors declines to buy from du Pont or which it buys only in small quantities, concentrates on the few products which du Pont has sold in large volume to General Motors for many years—paints and fabrics. Before examining the history of those large-volume purchases, it is essential to understand where and by whom purchasing decisions within General Motors have been made.

For many years, General Motors has been organized into some 30 operating divisions, each of which has final authority to make, and does make, its own purchasing decisions. This decentralized management system places full responsibility for purchasing decisions on the officers of the respective divisions. To speak of "selling to General Motors" is, therefore, misleading. A prospective supplier, instead of selling to General Motors, sells to Chevrolet, or Frigidaire, or Ternstedt, or Delco Light, as divisions. Moreover, when there are several plants within a division, each plant frequently has its own purchasing agent and presents a separate selling job.

<sup>18</sup> The following table compares General Motors' purchases, in 1947, of several products from du Pont with its purchases of the same products from competitors of du Pont.

Type of product	Purchases from du Pont	Purchases from competitors of du Pont	Total General Motors' purchases	Percent of purchases from du Pont
Finishes.....	\$18, 724, 000	\$8, 635, 000	\$27, 359, 000	68. 4
Fabrics (imitation leather and coated fabrics).....	3, 639, 000	5, 815, 000	9, 454, 000	38. 5
Adhesives.....	12, 000	3, 056, 000	3, 068, 000	. 4
Chemicals:				
Anodes.....	2, 000	1, 206, 000	1, 208, 000	. 2
Solvents.....	439, 000	3, 183, 000	3, 622, 000	12. 1
	\$22, 816, 000	\$21, 895, 000	\$44, 711, 000	51. 0

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The record discloses that each division buys independently, that the pattern of buying varies greatly from one division to another, and that within each division purchases from du Pont have fluctuated greatly in response to price, quality, service and other competitive considerations. For example, Oldsmobile is the only division which buys antifreeze from du Pont and one of the two car divisions which does not finish its cars with Duco. Buick alone buys du Pont motor enamel, and Cadillac alone uses du Pont's copper electroplating exclusively. Thus the alleged nefarious influence arising from du Pont's stock interest apparently affects the Oldsmobile antifreeze buyer, but not the Oldsmobile paint buyer; the paint buyers at Chevrolet, Buick and Pontiac, but not the antifreeze or electroplating buyers; and the electroplating buyer at Cadillac, but not the Cadillac paint buyer.

1. *Paints.*—Du Pont, for many years, has had marked success in the manufacture and sale of paints, varnishes, lacquers and related products.<sup>19</sup> In 1939, it produced 9.5% of the total dollar value of all finishes produced in

<sup>19</sup> The following table compares du Pont's total sales of industrial finishes in recent years with its sales of the same finishes to General Motors:

Year	Sales to General Motors			Total finish sales	Sales to General Motors as percent of total sales
	Duco	Other finishes	Total		
1938.....	\$4, 569, 604	\$1, 625, 625	\$6, 195, 229	\$31, 357, 134	19. 8
1939.....	6, 312, 005	2, 448, 844	8, 760, 849	38, 514, 763	22. 7
1940.....	8, 876, 970	2, 850, 091	11, 727, 061	44, 974, 778	26. 1
1941.....	9, 768, 119	3, 757, 389	13, 525, 508	61, 204, 127	22. 1
1946.....	6, 911, 596	3, 518, 256	10, 429, 852	75, 117, 079	13. 9
1947.....	12, 224, 798	6, 713, 431	18, 938, 229	105, 266, 655	18. 0

The years 1942 through 1945 are omitted from all tables because of the suspension of automobile production during the war.

the United States and, in 1947, 8.1%. In recent years, approximately three-fourths of du Pont's total sales to General Motors have consisted of industrial finishes.<sup>20</sup> Although du Pont has been General Motors' principal supplier of paint for many years, General Motors continues to buy about 30% of its paint requirements from competitors of du Pont.<sup>21</sup> Moreover, the sales of paint from du Pont to General Motors do not bulk large in the respective total sales and purchases of either company. In 1948, du Pont's finish sales to General Motors were only 3% of its total sales of all products; they were an infinitesimal percentage of General Motors' total purchases.

Two products account for a high proportion of these finish sales to General Motors: "Duco," a nitrocellulose lacquer invented and patented by du Pont, and "Dulux," a synthetic resin enamel developed by du Pont.<sup>22</sup> However, Duco and Dulux did not come into commercial use until 1924 and 1931, respectively, and du Pont's position as a

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<sup>20</sup> In 1947, a typical year, General Motors' total purchases of all products from du Pont were \$26,628,274. Of this amount, \$18,938,229, or 71% of the total, was finishes.

<sup>21</sup> In 1947, over 400 paint manufacturers other than du Pont sold finishes to General Motors. The total amount they sold was \$8,635,000, 31.6% of General Motors' requirements. Twenty-five companies, other than du Pont, each sold amounts of finishes to General Motors in excess of \$30,000 in that year; one company sold as much as \$3,205,000.

<sup>22</sup> In 1947, General Motors' purchases of industrial finishes from du Pont, by type of finish, were as follows:

Duco .....	\$12,224,798	65%
Dulux .....	3,179,225	17
All Others.....	3,534,206	18
	<hr/>	<hr/>
	\$18,938,229	100%

Thus, Duco and Dulux comprised 82% of du Pont's finish sales to General Motors in that year.



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principal manufacturer of finishes was attained much earlier.

Du Pont first assumed a leading position in the automotive finish field with its acquisition, in 1918, of a majority of the stock of the Flint Varnish & Color Works at Flint, Michigan. At that time, and for some years before, Flint supplied the finishes used on all General Motors' cars except Cadillac, and also for many other automobile companies. Du Pont's acquisition of General Motors' stock in 1917-1919 did not influence the General Motors' divisions in purchasing from Flint. In 1921, Flint lost one-half of the Oakland business and, in 1923, a substantial portion of the business at Buick, Oakland and Oldsmobile. 126 F. Supp., at 288.

The invention and development of Duco in the early 1920's represented a significant technological advance. Automobiles previously had been finished by applying numerous coats of varnish. The finishing process took from 12 to 33 days, and the storage space and working capital tied up in otherwise completed cars were immense. The life expectancy of varnish finishes was less than a year. In December 1921, General Motors created a Paint and Enamel Committee which contacted numerous paint manufacturers in an attempt to find a quicker drying and more durable finish.

Meanwhile, du Pont had been doing pioneering work in nitrocellulose lacquers. In 1920, a du Pont employee invented a quick drying and durable lacquer which contained a large amount of film-forming solids. This patented finish, named Duco, was submitted to the General Motors Paint and Enamel Committee in 1922 to be tested along with finishes of other manufacturers. After two years of testing and improvement, the Paint and Enamel Committee became satisfied that Duco was far superior

to any other product or any other method of finishing automobiles then available.

The gradual adoption of Duco by some of the General Motors' car divisions, viewed in conjunction with its proved superiority as an auto finish, illustrates the independent buying of each division and demonstrates that Duco made its way on its own merits. Oakland (now Pontiac) first adopted Duco for use on its open cars in 1924. The new finish was an immense success and was used on all Oakland cars the following year. Buick and Chevrolet adopted Duco in 1925, but Cadillac, which had offered it as an optional finish in 1925, did not abandon varnish for Duco until 1926.<sup>23</sup>

From the beginning, General Motors continued to look for competitive materials. Letters were sent to other manufacturers urging them to submit samples of their pyroxylin paint for testing. Until 1927, none of the competing lacquers was comparable in quality to Duco. But the strenuous efforts by General Motors to develop competitive sources of lacquer eventually worked a substantial change in the du Pont position. Oldsmobile and Cadillac switched to a competitor, Rinshed-Mason, in 1927, and have continued to buy almost exclusively from that company ever since. Chevrolet, Buick and Pontiac continued to buy Duco, partly because of better service from nearby du Pont plants, and partly because repeated testing failed to disclose any lacquer superior to Duco.

Finally, the success of Duco has never been confined to the General Motors' car divisions. In 1924 and 1925, nearly all car manufacturers abandoned varnish for Duco.

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<sup>23</sup> Du Pont initially sold more Duco to other auto manufacturers than it did to General Motors. In 1926, du Pont's sales of colored Duco were distributed as follows: to General Motors, 19%; to other auto manufacturers, 33%; to all others, 48%. The primary market for clear Duco has always been the furniture industry.

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By the end of 1925, all cars, except Ford and Cadillac, were using Duco. Nash, Hudson, Studebaker, Packard and Willys have bought, and still buy, Duco in substantial amounts from du Pont. Chrysler bought Duco in large volume until the early 1930's when, in pursuance of a policy to obtain suppliers to whom it would be the most important customer, it concentrated its purchases on one company, Pittsburgh Plate Glass. Ford has chosen to make a large part of its own requirements. During the 1920's, when Ford was losing its leadership in the low-priced field to Chevrolet, it continued to finish its cars in Black Japan. Mr. Ford is reported to have said, "Paint them any color, as long as they are black." Finally, in the 1930's, Ford was forced to shift to a synthetic enamel finish of its own manufacture. During this transition period, du Pont sold Ford a substantial amount of finishes. In 1935, Ford was making half and buying half from du Pont; by 1937, Ford was making three-fourths and buying one-fourth from du Pont. In 1938, Henry Ford "issued instructions that the Ford Motor Company was not to purchase any more material from the du Pont Company." From that time until Henry Ford II became active in Ford management, purchases from du Pont practically ceased. Since then, Ford has purchased finishes from du Pont in very substantial amounts.

General Motors has continued to test paints on thousands of cars annually. Du Pont has retained its position as primary lacquer supplier to several General Motors' divisions because these divisions have felt that Duco best fits their needs. Kettering, who was a leader in General Motors' research activities and who had been active in the testing and development of pyroxylin lacquers, testified that "one of the reasons" why General



Motors' cars had a higher resale value than comparable cars "in a used car lot" "is the paint."

As the District Court found, "*In view of all the evidence of record, the only reasonable conclusion is that du Pont has continued to sell Duco in substantial quantities to General Motors only because General Motors believes such purchases best fit its needs.*" (Emphasis supplied.) 126 F. Supp., at 296.

The second largest item which General Motors buys from du Pont is Dulux, a synthetic enamel finish used on refrigerators and other appliances. Prior to the development of Dulux, Duco was widely used as a finish for refrigerators. However, in 1927, Duco began to be replaced by porcelain, particularly at Frigidaire, a General Motors' appliance division. In 1930 and 1931, in collaboration with General Electric, du Pont developed Dulux, a greatly superior and cheaper product. Since its development, Dulux has been used *exclusively* by all the major manufacturers of refrigerators and other appliances—General Electric, Westinghouse, Crosley, and many others—except Frigidaire, which continues to finish part of its refrigerators with porcelain. Disinterested witnesses testified as to the superior quality and service which has led them to continue to buy Dulux.<sup>24</sup> The District Court did not err in concluding that Dulux—

"is apparently an ideal refrigerator finish and is widely used by a number of major manufacturers

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<sup>24</sup> For example, Van Derau, a Westinghouse executive, testified that his company bought its entire requirements of refrigerator finishes from du Pont because of du Pont's quality and service:

"Now, another factor—and I think I can say this without it being harmful to any other suppliers—du Pont has the finest trained technical group at their beck and call, at the beck and call of the users of the materials, of anybody in the business and we have had several times, when we have had a little problem, and I am thinking of

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other than General Motors. Several representatives of competitive refrigerator manufacturers testified that they purchased 100% of their requirements from du Pont. *There is no evidence that General Motors purchased from du Pont for any reason other than those that prompted its competitors to buy Dulux from du Pont—excellence of product, fair price and continuing quality of service.*" (Emphasis supplied.) 126 F. Supp., at 296.

The Court fails to note that du Pont's efforts to sell paints other than Duco and Dulux to General Motors have met with considerably less success. Du Pont does sell substantial amounts of automotive undercoats to Chevrolet and Buick but it has failed, despite continued sales efforts, to change the preference of Fisher Body, the largest purchaser of undercoats, for a competitor's undercoat. The successes and failures of other du Pont finish products at various General Motors' divisions emphasize the independent buying of each division and negate the notion that influence or coercion is responsible for what purchases do occur. Frigidaire uses large quantities of black finishing and machine varnish, but has not bought these products from du Pont since 1926. At A C Spark Plug Division, located in Flint, Michigan, where du Pont has a finishes plant, du Pont has been consistently successful in selling a substantial volume of the finishes used by that division. Delco-Remy Division, however,

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one in particular where we were going to find it very difficult to keep in production until the trouble would be overcome, which I called from Pittsburgh to the Chicago office, and the next morning one of the men of du Pont was on the job, and within a very few hours they had materials coming in from their Toledo plant that kept us in production.

"You cannot laugh off that kind of service. They have been simply excellent, and I don't know how you could say, any better."

purchases most of its requirements of insulating varnish from du Pont's competitors. The Electromotive Division prefers a competitive lacquer for the interior finish of its locomotives, but uses Duco on the exterior because the railroads, most of which use Duco for the exterior of the balance of the train, specify that finish. At Guide Lamp Division, du Pont developed and still supplies a finish for the inside of headlight reflectors, but a competitor developed, and has kept, that division's substantial primer business. At the Inland Division, which produces steering wheels, du Pont had some of the business at one time, but has been completely supplanted by a competitor offering better service.

The du Pont experience at the Packard Electric Division, which uses large quantities of high and low tension cable lacquer, is illustrative. Until 1932, Packard Electric was a separate company wholly unrelated to General Motors, and du Pont was a principal supplier of low tension lacquer and the sole supplier of black high tension lacquer. Now, as a division of General Motors, Packard Electric purchases its entire requirements of high tension lacquer from du Pont competitors, and produces its own low tension lacquer from film scrap bought from du Pont competitors.

The District Court did not err in concluding, on the basis of this evidence, that du Pont's success in selling General Motors a substantial portion of its paint requirements was due to the superior quality of Duco and Dulux and to du Pont's continuing research and outstanding service, and that *"du Pont's position was at all times a matter of sales effort and keeping General Motors satisfied. There is no evidence that General Motors or any Division of General Motors was ever prevented by du Pont from using a finish manufactured by one of du Pont's competitors; nor is there any evidence that*



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*General Motors has suffered competitively from its substantial use of Duco.*" (Emphasis supplied.) 126 F. Supp., at 296.

2. *Fabrics.*—The principal fabrics which du Pont has sold to General Motors are imitation leather (du Pont's "Fabrikoid" and "Fabrilita") and top material for open cars and convertibles (du Pont's "Pontop," "Everbright" and "Teal").<sup>25</sup> Its sales of these materials to General Motors in 1947 totaled \$3,369,000, or about 38.5% of General Motors' total purchases of such materials. In earlier years, before closed cars with all metal tops came to predominate, these materials constituted a larger proportion of the total fabrics used in an automobile than they do today. By 1946 they averaged, apart from the top material for convertibles, only about 1.6 yards, costing about \$2.22 per car. They are used principally for seat tops and backs, kick pads, rear shelves, etc. Du Pont does not manufacture the cotton and wool products of which most of the upholstery is composed.

Du Pont entered the manufacture of coated fabrics in 1910, when it purchased the Fabrikoid Company of Newburgh, New York. "Artificial leather," as it was then

<sup>25</sup> The following table compares du Pont's total sales of industrial fabrics, primarily imitation leather and coated fabrics, in several recent years, with the sales of those same products to General Motors:

Year	Sales to GM	Sales to others	Total sales	GM sales as percent of total sales
1938.....	\$446,357	\$6,647,112	\$7,093,469	6.6
1939.....	803,854	7,775,778	8,579,632	9.4
1940.....	1,285,280	7,780,105	9,065,385	14.2
1941.....	1,773,079	13,093,469	14,866,548	11.9
1946.....	2,083,166	14,170,639	16,253,805	12.8
1947.....	3,639,316	16,723,610	20,362,926	17.9

known, was of poor quality and had very limited areas of acceptance. As du Pont succeeded in improving both its quality and appearance, its use rapidly broadened. By mid-1913, du Pont Fabrikoid, a pyroxylin-coated fabric, had been accepted by the automobile industry for upholstery and interior trim. Three years later, in 1916, almost every automobile company was a purchaser of Fabrikoid, and a contemporary du Pont estimate in that year stated that 60% of all cars produced in the United States would be equipped with Fabrikoid. In that same year, du Pont rounded out its line of fabrics by acquiring the Fairfield Rubber Company, a manufacturer of rubber-coated fabrics. Du Pont thus had achieved, before it purchased its General Motors' stock, a leading position in the automotive fabric field. Before 1917, it was supplying substantially all of the coated fabrics requirements at Chevrolet and Oldsmobile, about half of the requirements at Buick, and about a third of the requirements at Oakland. At the Cadillac division, du Pont supplied all of the coated fabrics for interior trim but none of the top material. 126 F. Supp., at 296-297.

Although there have been variations from year to year and from one car division to another in response to competitive considerations, du Pont generally has maintained its pre-1917 position as the principal supplier of coated and combined fabrics to General Motors. In 1926, General Motors purchased about 55.5% of these fabrics from du Pont, largely because Chevrolet switched entirely to du Pont after an unfortunate experience with competitive products during the preceding year. By 1930, the proportion had declined to about 31.5%, and du Pont was selling more fabrics to Ford than to General Motors. At the time of suit, du Pont's share had increased to 38.5%, the remainder being supplied by du Pont's competitors.

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In addition to the mass of evidence supporting the District Court's finding that "*such purchases of fabrics as the General Motors divisions have made from du Pont from time to time were based upon each division's exercise of its business judgment and are not the result of du Pont domination*" (emphasis supplied), 126 F. Supp., at 301, the record clearly indicates that du Pont's fabrics can and have made their way in the automotive industry on their merits. Prior to the early 1920's, du Pont was the principal supplier of coated fabrics to all three of the then major producers—Ford, Willys-Overland and General Motors. After Ford and Willys began to produce their own coated fabrics they still turned to du Pont for much of what they could not produce. Chrysler purchased substantial amounts from du Pont until, in the early 1930's, it embarked on its policy of one principal supplier for each product and chose Textileather, a du Pont competitor. Du Pont has continued to be Ford's largest supplier for the material which it does not manufacture for itself. Du Pont likewise has supplied, over the years, a considerable part of the coated and combined fabrics of most of the smaller automobile companies.

The District Court did not err in concluding that "*Du Pont, the record shows, has maintained its position as the principal fabric supplier to General Motors through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery.*" (Emphasis supplied.) 126 F. Supp., at 301.

3. *Other Products.*—The Court concludes only that du Pont has been given an unlawful preference with respect to paints and fabrics. By limiting the issue to these products, it eliminates from deserved consideration those products which General Motors does not buy in



large quantities or proportions from du Pont.<sup>26</sup> Yet the logic of the Court's argument—that the stock relationship between du Pont and General Motors inevitably has or will result in a preference for du Pont products—requires consideration of the total commercial relations between the two companies. Du Pont "influence," if there were any, would be expected to apply to all products which du Pont makes and which General Motors buys.

However, the evidence shows that du Pont has attempted to sell to the various General Motors' divisions a wide range of products in addition to paint and fabrics, and that it has succeeded in doing so only when these divisions, exercising their own independent business judgment, have decided on the basis of quality, service and price that their economic interests would best be served by purchasing from du Pont. Six such groups of products were considered in detail by the District Court:

<sup>26</sup> The following table compares the dollar amount, in 1947, of du Pont's total sales of the products of its various departments with the amount sold by it to General Motors:

Type of product	Du Pont sales to General Motors	Total du Pont sales	Sales to General Motors, as percent of total sales
Finishes.....	\$18,938,229	\$105,266,655	18.0
Fabrics.....	3,639,316	20,362,926	17.9
Ammonia.....	1,742,416	50,320,207	3.5
Grasselli Chemicals.....	1,024,320	74,212,311	1.4
Electrochemicals.....	1,019,272	47,687,843	2.1
Plastics.....	105,422	34,823,026	0.3
Organic Chemicals.....	83,254	94,632,256	0.1
Rayon.....	45,616	250,467,514	(*)
Explosives.....	26,032	58,875,482	(*)
Pigments.....	3,530	31,496,024	(*)
Photo Products.....	867	25,699,756	(*)
	\$26,628,274	\$793,849,000	3.4

\*Less than 0.1%.

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plastics, brake fluid, casehardening materials, electroplating materials, safety glass, and synthetic rubber and rubber chemicals. 126 F. Supp., at 319-324. A few examples drawn from the findings will suffice.

Du Pont's sales to General Motors of celluloid (du Pont's "Pyralin"), used as windows in the side curtains of early automobiles, initially declined in 1918 after the stock purchase, and only revived when an improved product was adopted by all the large auto manufacturers. Instead of purchasing brake fluid and safety glass from du Pont, General Motors embarked, during the 1930's, on its own production of these substantial items. With respect to casehardening materials, General Motors has purchased less than half of its requirements from du Pont, while other auto manufacturers have purchased amounts larger in proportion and quantity. Although du Pont's new electroplating processes were widely adopted in the automobile and other industries in the 1930's only Cadillac has used du Pont's processes exclusively, Oldsmobile and Pontiac have used it occasionally, and Chevrolet and Buick never have used it except for brief periods. Neoprene, a synthetic rubber developed by du Pont, has been used to a much greater extent by Chrysler and Ford than by General Motors. Chrysler also uses, and helped develop, du Pont's synthetic rubber adhesive for brake linings, but the General Motors' divisions prefer a more expensive type of synthetic rubber.

The record supports the conclusion of the District Court:

"All of the evidence bearing upon du Pont's efforts to sell these various miscellaneous products to General Motors supports a finding that the latter bought or refused to buy solely in accordance with the dictates of its own purchasing judgment. There is no evidence that General Motors was constrained to favor, or buy, a product solely because it was offered

by du Pont. On the other hand, the record discloses numerous instances in which General Motors rejected du Pont's products in favor of those of one of its competitors. *The variety of situations and circumstances in which such rejections occurred satisfies the Court that there was no limitation whatsoever upon General Motors' freedom to buy or to refuse to buy from du Pont as it pleased.*" (Emphasis supplied.) 126 F. Supp., at 324.

*Evidence Relied on by the Court.*—The Court, disregarding the mass of evidence supporting the District Court's conclusion that General Motors purchased du Pont paint and fabrics solely because of their competitive merit, relies for its contrary conclusion on passages drawn from several documents written during the years 1918–1926, and on the logical fallacy that because du Pont over a long period supplied a substantial portion of General Motors' requirements of paint and fabrics, its position must have been obtained by misuse of its stock interest rather than competitive considerations.

The isolated instances of alleged pressure or intent to obtain noncompetitive preferences are four: (1) the Raskob report of December 1917; (2) several letters of J. A. Haskell, written during 1918–1920; (3) certain reports and letters of Pierre and Lamnot du Pont during 1921–1924; and (4) a 1926 letter of John L. Pratt. Passages drawn from these 1918–1926 documents do not justify the conclusion reached by the Court. Each of them is a matter of disputed significance which cannot be evaluated without passing on the motivation and intent of the author. Each failed to achieve its specific object. Read in the context of the situations to which they were addressed, each is entirely consistent with the finding of the District Court that, although du Pont was trying to get as much General Motors' business as it could, there was no restriction on General Motors' free-



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dom to buy as it chose, and that General Motors' buyers did not regard themselves as in any way limited.<sup>27</sup> Moreover, even if isolated paragraphs in these documents, taken from their context, are given some significance, and

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<sup>27</sup> Because the Court quotes fully from, and appears to place special weight on, the 1926 letter of J. L. Pratt, a brief discussion of it is appropriate by way of illustration. *Ante*, pp. 606-607, n. 35.

The letter only purports to be an expression of Pratt's personal views—he makes it clear in the last paragraph that he is expressing his own opinions and not General Motors' policy. It has, therefore, comparatively little bearing on du Pont's intent. Moreover, it is significant that Pratt's attitude toward du Pont was based *not* on the stock relationship, but on the fact that du Pont saved General Motors from financial disaster in 1920. His views, apparently, would have been the same whether or not du Pont owned stock in General Motors. In any event, all that Pratt says is that, in making purchases, General Motors should "always keep a competitive situation," and "the prime consideration is to do the best thing for Delco-Light Company . . . ." (Pratt was writing to the general manager of Delco, a General Motors' division.)

An examination of the circumstances in which this letter was written disposes of any notion that it expressed a policy that General Motors should prefer du Pont's products when they were equal in quality, service and price. The circumstances were these: Delco Light was buying paint from a competitor of du Pont. When the competitor failed to solve a paint problem which confronted Delco, it called on du Pont for help. However, although du Pont solved the problem and obtained one order for paint, Delco asked du Pont to withhold delivery so that the competitor could be given another opportunity to retain the business. Understandingly, Elms of the du Pont Paint Department was somewhat piqued by this, and he wrote a personal letter to his friend Pratt asking for his assistance. Pratt's letter to the general manager of Delco was the result.

Despite the fact that the du Pont product was offered at a lower price and the fact that the technical staff at Delco thought the du Pont product superior, Delco nevertheless continued to buy from the competitor. Du Pont never did receive the business to which the correspondence related. Judged by either its content or its result, the Pratt letter is a poor example of an alleged du Pont policy of "purposely employ[ing] its stock to pry open the General Motors market . . . ." *Ante*, p. 606.

the other evidence relating to the period from 1918 to 1926 is entirely ignored, *all* of the evidence after 1926 affirmatively establishes without essential contradiction that du Pont did not use its stock interest to receive any preferential treatment from General Motors.

Nor can present illegality be presumed from the bare fact that du Pont has continued to make substantial sales of several products to General Motors.<sup>28</sup> In the first place, the record affirmatively shows that the new products which du Pont has sold to General Motors since 1926 have made their way, at General Motors as elsewhere, on their merits. Sales of Duco, Dulux, Fabrilite and Teal are not attributable in any way to dealings in the earlier period. Secondly, the Court's presumption is based on the fact that du Pont does not sell to all other automobile manufacturers in the same proportion as it does to General Motors. But there is no reason why it should—the Government has not shown that sellers normally sell to all members of an industry in the same proportion. In any event, the record fully explains the disproportion. Since 1930, du Pont's sales to other members of the industry have proportionately declined, largely because Ford has chosen to make the major share of its requirements of paint and fabrics, and because Chrysler has followed the policy of selecting a single supplier to whom it can be the most important customer. The fact is that du Pont *has* continued to sell in substantial amounts to the smaller members of the automobile industry. The growth in the

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<sup>28</sup> The Court, without referring to any supporting evidence, ventures the conjecture that "General Motors probably turned to outside sources of supply at least in part because its requirements outstripped du Pont's production . . ." *Ante*, p. 605. As I read the record, du Pont was actively soliciting more business from General Motors and others throughout the period covered in this suit. I find no hint that du Pont was surfeited with business and unable to fill General Motors' orders.

dominance of General Motors, Ford and Chrysler—companies which together account for more than 85% of automobile production—when combined with the policies adopted by Ford and Chrysler, adequately explains why du Pont sells a larger proportion of paint and fabrics to General Motors than it does to the industry as a whole.

It is true that § 7 of the Clayton Act does not require proof of actual anticompetitive effects or proof of an intent to restrain trade. But these matters become crucial when the Court rests its conclusion that du Pont's stock interest violates the Act on evidence relating solely to an alleged du Pont intent to obtain a noncompetitive preference from General Motors, and on a finding that such a preference was actually secured through the unlawful use of du Pont's stock interest. Preference and intent are also relevant because the Government has brought this case 30 years after the event. If no actual restraint has occurred during this long period, the probability of a restraint in the future is indeed slight. Especially is this so when the only change in recent years has been in the direction of diminishing du Pont's participation in General Motors' affairs.

*Rule 52 (a) Governs This Case.*—The foregoing summary of the evidence relating to General Motors' purchases of paint and fabrics from du Pont, comparatively brief as it is, reveals that a multitude of factual issues underlie this case. The occurrence of events, the reasons why these events took place, and the motives of the men who participated in them are drawn in question. The issue of credibility is of great importance. The District Judge had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand. Thus, this case is a proper one for the application of the principle embodied in Rule 52 (a) of the Federal Rules of Civil Procedure, as amended, 329 U. S. 861: "Findings of fact shall not be set aside unless clearly erroneous, and



due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *United States v. Oregon Medical Society*, 343 U. S. 326, 330-332, 339; *United States v. Yellow Cab Co.*, 338 U. S. 338, 341-342.

This is not a situation in which oral testimony is contradicted by contemporaneous documents. See *United States v. United States Gypsum Co.*, 333 U. S. 364. In this case, the findings of the District Court are supported both by contemporaneous documents and by oral testimony. For example, General Motors' search for a better automotive finish, the superiority of the product developed by du Pont, and General Motors' continuous efforts to secure an equally good lacquer from other sources are all proved by letters and reports written in the early 1920's as well as by the oral testimony of many witnesses. Similarly, contemporaneous exhibits prove that General Motors purchased fabrics from du Pont because of the superiority of du Pont products, and that on other occasions it turned to competing suppliers even though du Pont's product was just as good. Appellate review of detailed findings based on substantial oral testimony and corroborative documents must be limited to setting aside those that are clearly erroneous. The careful and detailed findings of fact of the District Court in this case cannot be so labeled.<sup>29</sup>

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<sup>29</sup> The Court also overturns the District Court's express finding that du Pont purchased General Motors' stock *solely for investment*. The Court does this on the basis of an alleged du Pont purpose to secure a noncompetitive preference which the Court finds expressed in the Raskob letter and in certain statements in du Pont's 1917 and 1918 reports to its stockholders. These documents, however, are not inconsistent with the District Court's finding of an investment purpose. The District Court said:

"Raskob's report, the testimony of Pierre S. and Irene du Pont and all the circumstances leading up to du Pont's acquisition of this

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## B. RELEVANT MARKET.

Finally, even assuming the correctness of the Court's conclusion that du Pont's competitors have been or will be foreclosed from General Motors' paint and fabric trade, it is still necessary to resolve one more issue in favor of the Government in order to reverse the District Court. It is necessary to hold that the Government proved that this foreclosure involves a substantial share of the rele-

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substantial interest in General Motors, as shown by the record, establish that the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business.

"Raskob's reports and other documents written at or near the time of the investment show that du Pont's representatives were well aware that General Motors was a large consumer of products of the kind offered by du Pont. Raskob, for one, thought that du Pont would ultimately get all that business, but there is no evidence that Raskob expected to secure General Motors trade by imposing any limitation upon its freedom to buy from suppliers of its choice. Other documents also establish du Pont's continued interest in selling to General Motors—even to the extent of the latter's entire requirements—but they similarly make no suggestion that the desired result was to be achieved by limiting General Motors purchasing freedom. On the contrary, a number of them explicitly recognized that General Motors trade could only be secured on a competitive basis." 126 F. Supp., at 242, 243.

Whether any stock purchase is an investment turns largely on the intent of the purchaser. *Pennsylvania R. Co. v. Interstate Commerce Commission*, 66 F. 2d 37, aff'd by an equally divided court, 291 U. S. 651. In this case, since the District Court's finding with reference to that intent is unequivocal and not clearly erroneous, the stock acquisition falls within the proviso, stated in the third paragraph of § 7, expressly excepting acquisitions made "solely for investment."

vant market and that it significantly limits the competitive opportunities of others trading in that market.<sup>30</sup>

The relevant market is the "area of effective competition" within which the defendants operate. *Standard Oil Co. of California v. United States*, 337 U. S. 293, 299-300, n. 5. "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 303, aff'd *per curiam*, 347 U. S. 521. "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another." *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 393. This determination is primarily one of fact.

The Court holds that the relevant market in this case is the automotive market for finishes and fabrics, and not the total industrial market for these products. The Court reaches that conclusion because in its view "automotive finishes and fabrics have sufficient peculiar characteris-

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<sup>30</sup> The District Court did not reach this question since it found that there was no reasonable probability of any foreclosure of du Pont's competitors by reason of du Pont's 23% stock interest in General Motors. Consequently, there are no findings of fact dealing with the relevant market. Also, the record appears deficient on such crucial questions as the characteristics of the products, the uses to which they are put, the extent to which they are interchangeable with competitors' products, and so on. For these reasons, I believe the Court in any event should remand the case to the District Court to give the District Judge, who is more familiar with the record than we can be, an opportunity to review the record, and entertain argument with respect to the substantiality of the share of the relevant market affected by the foreclosure which the Court finds to exist. By declining to remand, the Court necessitates a scrutiny here of this huge record for a determination of an essentially factual question not passed on by the District Court, and not thoroughly briefed or argued by the parties.



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tics and uses to constitute them products sufficiently distinct from all other finishes and fabrics . . . ." *Ante*, pp. 593-594. We are not told what these "peculiar characteristics" are. Nothing is said about finishes other than that Duco represented an important contribution to the process of manufacturing automobiles. Nothing is said about fabrics other than that sales to the automobile industry are made by means of bids rather than fixed price schedules. Dulux is included in the "automobile" market even though it is used on refrigerators and other appliances, but not on automobiles. So are other finishes and fabrics used on diesel locomotives, engines, parts, appliances and other products which General Motors manufactures. Arbitrary conclusions are not an adequate substitute for analysis of the pertinent facts contained in the record.

The record does not show that the fabrics and finishes used in the manufacture of automobiles have peculiar characteristics differentiating them from the finishes and fabrics used in other industries. What evidence there is in the record affirmatively indicates the contrary. The sales of the four products principally involved in this case—Duco, Dulux, imitation leather, and coated fabrics—support this conclusion.

Duco was first marketed not to General Motors, but to the auto refinishing trade and to manufacturers of furniture, brush handles and pencils. In 1927, 44% of du Pont's sales of colored Duco, and 51.5% of its total sales, were to purchasers other than auto manufacturers. Although the record does not disclose exact figures for all years, it does show that a substantial portion of du Pont's sales of Duco have continued to be for non-automotive uses.<sup>31</sup>

<sup>31</sup> The Court states that "General Motors took 93% of du Pont's automobile Duco production in 1941 and 83% in 1947." *Ante*, p. 605. These figures are of little significance. Not only do they omit the

It is also significant that Duco was a patented product. Prior to the expiration of the patent in 1944, only five years before this suit was brought, du Pont issued over 250 licenses—to all that applied—covering its patented process. If Duco is to be treated as a separate market solely because of its initial superiority, du Pont is being penalized rather than rewarded for contributing to technological advance.

Dulux has never been used in the manufacture of automobiles. It replaced Duco and other lacquers as a finish on refrigerators, washers, dryers, and other appliances, and continues to have wide use on metallic objects requiring a durable finish. Yet the Court includes it as a finish having the unspecified but “peculiar characteristics” distinctive of “automotive finishes.” *Ante*, p. 593.

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crucial sales—those made outside the automobile industry—but they give a misleading impression with respect to du Pont's sales to the automobile industry. As previously stated, Ford chose to make its own requirements after about 1935 and Chrysler desired to concentrate its purchases on one supplier. Under these figures, after eliminating Ford and Chrysler, and deducting du Pont's sales to General Motors, du Pont must have supplied nearly half of the entire requirements of all remaining auto manufacturers in 1941 and an even larger portion in 1947.

The record does not contain complete figures on the amount of Duco sold outside the automobile industry. However, there are figures for selected years. In 1927, for example, 51.5% of all Duco sales were to other than automobile manufacturers (1,166,220 gallons, out of a total of 2,263,000 gallons). In 1948, du Pont's gross sales to purchasers other than General Motors of the same kinds of finishes bought by General Motors amounted to about \$97,000,000; its sales to General Motors in the same year were \$21,000,000, or 21.7% of the total. The record reveals that General Motors' purchases of finishes from du Pont have ranged, in recent years, from 14% to 26% of du Pont's sales of such finishes to all customers. The conclusion seems clear that du Pont's finishes have found wide acceptance in innumerable industries and that du Pont is not dependent on General Motors for a captive paint market.

In 1947, when du Pont's sales of Duco and Dulux to General Motors totaled about \$15,400,000, the total national market for paints and finishes was \$1,248,000,000, of which about \$552,000,000 was for varnishes, lacquers, enamels, japans, thinners and dopes, the kinds of finishes sold primarily to industrial users.<sup>32</sup> There is no evidence in this record establishing that these industrial finishes are not competitive with Duco and Dulux. There is considerable evidence that many of them are. It is probable that du Pont's total sales of finishes to General Motors in 1947 constituted less than 3.5% of all sales of industrial finishes.

The record also shows that the types of fabrics used for automobile trim and convertible tops—imitation leather and coated fabrics—are used in the manufacture of innumerable products, such as luggage, furniture, railroad upholstery, books, brief cases, baby carriages, hassocks, bicycle saddles, sporting goods, footwear, belts and table mats. In 1947, General Motors purchased about \$9,454,000 of imitation leather and coated fabrics. Of this amount, \$3,639,000 was purchased from du Pont (38.5%) and \$5,815,000 from over 50 du Pont competitors. Since du Pont produced about 10% of the national market for these products in 1946, 1947 and 1948, and since only 20% of its sales were to the automobile industry, the du Pont sales to the automobile industry constituted only about 2% of the total market. The Court ignores the record by treating this small fraction of the total market as a market of distinct products.

It will not do merely to stress the large size of these two corporations. The figures as to their total sales—

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<sup>32</sup> U. S. Department of Commerce, Bureau of the Census, II Census of Manufactures: 1947, Statistics by Industry, 414-415. There were 1,291 establishments manufacturing these products. Du Pont's total sales were 8.1% of the industry.



\$793,000,000 for du Pont and \$3,815,000,000 for General Motors in 1947—do not fairly reflect the volume of commerce involved in this case. The commerce involved here is about \$19,000,000 of industrial finishes and about \$3,700,000 of certain industrial fabrics—less than 3.5% of the national market for industrial finishes, and only about 1.6% of the national market for these fabrics. The Clayton Act is not violated unless the stock acquisition substantially threatens the competitive opportunities available to others. *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291; *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163; *V. Vivaudou, Inc. v. Federal Trade Commission*, 54 F. 2d 273. The effect on the market for the product, not that on the transactions of the acquired company, is controlling. *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F. 2d 534.<sup>33</sup>

The Court might be justified in holding that products sold to the automotive industry constitute the relevant

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<sup>33</sup> In the *Fargo* case, Maytag, an appliance manufacturer, acquired a 40% stock interest in, and contracted to purchase the entire output of, Globe, a gas range manufacturer. A Globe dealer, who lost his source of supply as a result of the transaction, brought a treble damage action alleging, *inter alia*, that the stock acquisition violated § 7 of the Clayton Act. The evidence showed that there were about 70 manufacturers of gas ranges, and that Globe was about eighteenth in size, selling a little less than 2% of the national market (about \$5,000,000 a year). The Court of Appeals for the Seventh Circuit held that the stock acquisition did not violate § 7 because the plaintiff had other readily available sources of supply.

The acquisition of an outlet is governed by similar principles. In either case, the question is whether competitors may be substantially limited in their competitive opportunities. Assuming that du Pont had purchased General Motors outright, and thus commanded an outlet consuming about 4% of the national market for industrial finishes and about 2% of the national market for industrial fabrics, it seems unlikely that du Pont's paint and fabric competitors would be substantially limited in selling their products, when 96% and 98%, respectively, of the national market would remain open to them.

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market in the case of products such as carburetors or tires which are sold primarily to automobile manufacturers. But the sale of Duco, Dulux, imitation leather, and coated fabrics is not so limited.

The burden was on the Government to prove that a substantial share of the relevant market would, in all probability, be affected by du Pont's 23% stock interest in General Motors. The Government proved only that du Pont's sales of finishes and fabrics to General Motors were large in volume, and that General Motors was the leading manufacturer of automobiles during the later years covered by the record. The Government did not show that the identical products were not used on a large scale for many other purposes in many other industries. Nor did the Government show that the automobile industry in general, or General Motors in particular, comprised a large or substantial share of the total market. What evidence there is in the record affirmatively indicates that the products involved do have wide use in many industries, and that an insubstantial portion of this total market would be affected even if an unlawful preference existed or were probable.

For the reasons stated, I conclude that § 7 of the Clayton Act, prior to its amendment in 1950, did not apply to vertical acquisitions; that the Government failed to prove that there was a reasonable probability at the time of the stock acquisition (1917-1919) of a restraint of commerce or a tendency toward monopoly; and that, in any event, the District Court was not clearly in error in concluding that the Government failed to prove that du Pont's competitors have been or may be foreclosed from a substantial share of the relevant market. Accordingly, I would affirm the judgment of the District Court.

## APPENDIX TO MR. JUSTICE BURTON'S DISSENT.

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches



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or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided." 38 Stat. 731-732, 15 U. S. C. (1946 ed.) § 18.

## Syllabus.

## JENCKS v. UNITED STATES.

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

No. 23. Argued October 17, 1956.—Decided June 3, 1957.

Petitioner was convicted in a Federal District Court of violating 18 U. S. C. § 1001 by filing, under § 9 (h) of the National Labor Relation Act, as president of a labor union, an affidavit stating falsely that he was not a member of the Communist Party or affiliated with such Party. Crucial testimony against him was given by two paid undercover agents for the F. B. I., who stated on cross-examination that they had made regular oral or written reports to the F. B. I. on the matters about which they had testified. Petitioner moved for the production of these reports in court for inspection by the judge with a view to their possible use by petitioner in impeaching such testimony. His motions were denied. *Held*: Denial of the motions was erroneous, and the conviction is reversed. Pp. 658-672.

(a) Petitioner was not required to lay a preliminary foundation for his motion, showing inconsistency between the contents of the reports and the testimony of the government agents, because a sufficient foundation was established by their testimony that their reports were of the events and activities related in their testimony. *Gordon v. United States*, 344 U. S. 414, distinguished. Pp. 666-668.

(b) Petitioner was entitled to an order directing the Government to produce for inspection all written reports of the F. B. I. agents in its possession, and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial. P. 668.

(c) Petitioner is entitled to inspect the reports to decide whether to use them in his defense. Pp. 668-669.

(d) The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. P. 669.

(e) Only after inspection of the reports by the accused, must the trial judge determine admissibility of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. P. 669.

(f) Criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Pp. 669-672.

(g) The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession. P. 672.

226 F. 2d 540, 553, reversed.

*John T. McTernan* argued the cause for petitioner. With him on the brief was *Nathan Witt*.

*John V. Lindsay* argued the cause for the United States. With him on the brief were *Solicitor General Rankin*, *Assistant Attorney General Tompkins*, *Clinton B. D. Brown* and *Harold D. Koffsky*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

On April 28, 1950, the petitioner, as president of Amalgamated Bayard District Union, Local 890, International Union of Mine, Mill & Smelter Workers, filed an "Affidavit of Non-Communist Union Officer" with the National Labor Relations Board, pursuant to § 9 (h) of the National Labor Relations Act.<sup>1</sup> He has been convicted under a two-count indictment charging that he

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<sup>1</sup> 61 Stat. 143, 146, as amended, 65 Stat. 602, 29 U. S. C. § 159 (h).

Section 9 (h) provides that processes of the National Labor Relations Board will be unavailable to a labor organization "... unless there is on file with the Board an affidavit executed ... by each officer of such labor organization ... 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. ..."



violated 18 U. S. C. § 1001<sup>2</sup> by falsely swearing in that affidavit that he was not on April 28, 1950, a member of the Communist Party or affiliated with such Party. The Court of Appeals for the Fifth Circuit affirmed the conviction,<sup>3</sup> and also an order of the District Court denying the petitioner's motion for a new trial.<sup>4</sup> This Court granted certiorari.<sup>5</sup>

Two alleged trial errors are presented for our review. Harvey F. Matusow and J. W. Ford, the Government's principal witnesses, were Communist Party members paid by the Federal Bureau of Investigation contemporaneously to make oral or written reports of Communist Party activities in which they participated. They made such reports to the F. B. I. of activities allegedly participated in by the petitioner, about which they testified at the trial. Error is asserted in the denial by the trial judge of the petitioner's motions to direct the Government to produce these reports for inspection and use in cross-examining Matusow and Ford. Error is also alleged in the instructions given to the jury on membership, affiliation, and the credibility of informers.<sup>6</sup>

Former Party members testified that they and the petitioner, as members of the Communist Party of New Mexico, had been expressly instructed to conceal their membership and not to carry membership cards. They also testified that the Party kept no membership records or minutes of membership meetings, and that such meetings were secretly arranged and clandestinely held. One of the witnesses said that special care was taken to conceal the Party membership of members, like the peti-

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<sup>2</sup> 62 Stat. 749.

<sup>3</sup> 226 F. 2d 540.

<sup>4</sup> 226 F. 2d 553.

<sup>5</sup> 350 U. S. 980.

<sup>6</sup> Because of our disposition of this case, it is unnecessary to consider the alleged errors in these instructions.

tioner, "occupying strategic and important positions in labor unions and other organizations where public knowledge of their membership to non-Communists would jeopardize their position in the organization." Accordingly, the Government did not attempt to prove the petitioner's alleged membership in the Communist Party on April 28, 1950, with any direct admissions by the petitioner of membership, by proof of his compliance with Party membership requirements, or that his name appeared upon a membership roster, or that he carried a membership card.

The evidence relied upon by the Government was entirely circumstantial. It consisted of testimony of conduct of the petitioner from early 1946 through October 15, 1949, and of Matusow's testimony concerning alleged conversations between him and the petitioner at a vacation ranch in July or August 1950, and concerning a lecture delivered by the petitioner at the ranch. The Government also attached probative weight to the action of the petitioner in executing and filing an Affidavit of Non-Communist Union Officer on October 15, 1949, because of the events surrounding the filing of that affidavit. The Government bridged the gap between October 15, 1949, and July or August 1950 with the testimony of Ford that, during that period, the Party took no disciplinary action against the petitioner for defection or deviation, and did not replace the petitioner in the Party office which Ford testified the petitioner held as a member of the Party State Board.

The first alleged Party activity of the petitioner preceded his union employment. A witness, who was a Party member in the spring of 1946, testified that, at that time, he and the petitioner were present at a closed Party meeting at the home of the Party chairman for Colorado, where the petitioner, a veteran of World War II, led in urging that veterans who were Party members spread out

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into several veterans' organizations and not all join the same one, the better to further Party work.

Later in 1946 the petitioner was employed by the International Union of Mine, Mill & Smelter Workers as business agent for several local unions in the Silver City-Bayard, New Mexico, area. It was testified that one of the petitioner's first acts was to meet with the International Union's then Regional Director for the Southwest, a Communist Party member, and with the Communist Party organizer for the area, to develop plans for organizing a Party group within each of those locals, which later merged to form Amalgamated Local 890 under the petitioner's presidency.

J. W. Ford was a member of the Communist Party of New Mexico from 1946 to September 1950 and, from 1948, was a member of the State Board and a Party security officer. He said that in 1948 he became a paid undercover agent for the F. B. I.<sup>7</sup> and reported regularly upon Party activities and meetings. He testified that the petitioner was also a Party and a State Board member, and he related in detail occurrences at five closed Party meetings which he said the petitioner attended.

At the first meeting, in August 1948, Ford said the Party members worked out a plan to support the petitioner's candidacy for Congress on the ticket of the Progressive Party. At the second meeting, in February 1949, Ford said that the petitioner and other Communist Party members were appointed delegates to a meeting of the Mexican-American Association in Phoenix, Arizona, to further a Party plan to infiltrate that organization and to use it for the Party's purposes. At the third meeting, in April 1949, Ford said that the Party's state organiza-

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<sup>7</sup> From 1948 through 1953, Ford was paid \$7,025 for his services. Of that sum, approximately \$3,325 covered the period to which his testimony related.



tion was completed, and the petitioner was appointed to the State Board and the Party leader in the southern half of the State. At the fourth meeting, in May 1949, Ford said that the petitioner gave a progress report upon his success in recruiting Party members among labor groups, and offered to use Local 890's newspaper, "The Union Worker," which he edited, to support issues of Party interest. At the fifth meeting, in August 1949, Ford said that preparations were made for another meeting later in that month of the Mexican-American Association in Albuquerque, and that the delegates, including the petitioner, were instructed to give vigorous support to the meeting but to take care not to make themselves conspicuous in the proceedings.

Ford's duties as a Party security officer were to keep watch on all Party members and to report "any particular defections from the Communist philosophy or any peculiar actions, statements or associations, which would endanger the security of the Communist Party of the state." If any defection reported by a security officer were considered important, the member "would be called in and would be either severely reprimanded or criticized, or disciplined. If he refused to accept such discipline he would either be suspended or expelled." Ford testified that, between August 1949 and September 1950, when Ford ceased his activities with the New Mexico Party, there was no disciplinary action taken against the petitioner and, to his knowledge, the petitioner was not replaced in his position on the State Board of the Communist Party.

The events leading up to the petitioner's execution and filing, on October 15, 1949, of an Affidavit of Non-Communist Union Officer were testified to by a former International Union representative, a Communist Party member during 1947 to 1949. He said that, about 17

months before, in May or June 1948, a meeting of Party members, holding offices in locals of the International Union of Mine, Mill & Smelter Workers, was held in Denver to formulate plans for combatting a movement, led by non-Communists, to secede from the International Union. He said that the Party members, including the petitioner, were informed of Party policy not to sign affidavits required by § 9 (h) of the then recently enacted Taft-Hartley Act. There was no testimony that that policy changed before October 15, 1949.

The affidavit was filed shortly before a C. I. O. convention was scheduled to expel the Mine-Mill International and other unions from its membership. After filing the affidavit, the petitioner and other Local 890 officers published an article in "The Union Worker" charging that the contemplated C. I. O. action was part of a program of "right-wing unions . . . gobbling up chunks of militant unions. . . . Our International Union and its officers have swallowed a lot of guff, a lot of insults. But that is not the point. . . . Now that our Union has signed the phony affidavits we can defend ourselves . . . in case of raids. We do not fear attack from that quarter any longer."

Matusow was a member of the Communist Party of New York and was a paid undercover agent for the F. B. I. before he went to New Mexico.<sup>8</sup> In July or August 1950, he spent a 10-day vacation on a ranch near Taos, New Mexico, with the petitioner and a number of other people. He testified to several conversations with the petitioner there. He said he twice told the petitioner of his desire to transfer his membership from the New York to the New Mexico Party, and that on both occa-

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<sup>8</sup> Other activities of Matusow are described in *Communist Party of the United States v. Subversive Activities Control Board*, 351 U. S. 115, and *United States v. Flynn*, 130 F. Supp. 412.

sions the petitioner applauded the idea and told him, "we can use you out here, we need more active Party members." On one of these occasions, Matusow said, the petitioner asked him for suggestions for a lecture the petitioner was preparing for delivery at the ranch, particularly as to what the New York Communists were doing about the Stockholm Peace Appeal. Matusow described to the petitioner a "do-day" program adopted in New York when the Party members were doers, not talkers, and performed some activity, such as painting signs around a baseball stadium urging support for the Peace Appeal. He testified that the petitioner showed great interest in the idea and said he might bring it back to his fellow Party members in Silver City.

Matusow testified that the petitioner delivered his planned lecture, informed his audience of the "do-day" idea, praised the Soviet Union's disarmament plan, referred to the United States as the aggressor in Korea, and urged all to read the "Daily People's World," identified by Matusow as the "West Coast Communist Party newspaper." Another witness, an expelled member of Amalgamated Local 890, testified that petitioner, during 1950, 1951 and 1952, repeatedly urged at union meetings that the union members read that paper.

Matusow also testified that, in one of their conversations, the petitioner told him of a program he was developing with leaders of the Mexican Miners Union to negotiate simultaneous expiration dates of collective bargaining agreements, to further a joint action of Mexican and American workers to cut off production to slow down the Korean War effort. Matusow also testified that when he told the petitioner that he had joined the Taos Chapter of the Mexican-American Association, the petitioner told him that this was proper Communist work because the Association was a key organization, con-



trolled by the Party, for Communist activities in New Mexico and that he, the petitioner, was active in the Association in the Silver City area.<sup>9</sup>

Ford and Matusow were subjected to vigorous cross-examination about their employment as informers for the F. B. I. Ford testified that in 1948 he went to the F. B. I. and offered his services, which were accepted. He thereafter regularly submitted reports to the F. B. I., "sometimes once a week, sometimes once a month, and at various other times; maybe three or four times a week, depending on the number of meetings . . . [he] attended and the distance between the meetings." He said that his reports were made immediately following each meeting, while the events were still fresh in his memory. He could not recall, however, which reports were oral and which in writing.

The petitioner moved "for an order directing an inspection of reports of the witness Ford to the Federal Bureau of Investigation dealing with each of the meetings which he said that he attended with the defendant Jencks in the years 1948 and 1949." The trial judge, without stating reasons, denied the motion.

Matusow, on his cross-examination, testified that he made both oral and written reports to the F. B. I. on events at the ranch, including his conversations with the petitioner. The trial judge, again without reasons, denied the motion to require "the prosecution to produce in Court the reports submitted to the F. B. I. by this witness [Matusow] concerning matters which he saw or

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<sup>9</sup> Matusow recanted as deliberately false the testimony given by him at the trial. On the basis of this recantation, the petitioner moved for a new trial, while his appeal from the conviction was pending, on grounds of newly discovered evidence. After extended hearings, the District Court denied the motion.

heard at the . . . Ranch during the period that he was a guest there . . . .”<sup>10</sup>

The Government opposed petitioner’s motions at the trial upon the sole ground that a preliminary foundation was not laid of inconsistency between the contents of the reports and the testimony of Matusow and Ford. The Court of Appeals rested the affirmance primarily upon that ground.<sup>11</sup>

Both the trial court and the Court of Appeals erred. We hold that the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony.

The reliance of the Court of Appeals upon *Gordon v. United States*, 344 U. S. 414, is misplaced. It is true that one fact mentioned in this Court’s opinion was that the witness admitted that the documents involved contradicted his testimony. However, to say that *Gordon* held a preliminary showing of inconsistency a prerequisite to an accused’s right to the production for inspection of documents in the Government’s possession, is to misinterpret the Court’s opinion. The necessary essentials of a foundation, emphasized in that opinion, and present

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<sup>10</sup> During the hearings on the motion for a new trial, the petitioner made several requests for the production of documents in the possession of the Government, relating to the testimony given. These motions were denied. Because of our disposition of this case, it is unnecessary to consider these rulings.

<sup>11</sup> In upholding the refusal to require the production of the reports, the Court of Appeals said:

“ . . . Upon a proper showing that the Government has possession of such inconsistent statements and the presence of the other requisite conditions, a person charged with crime would be permitted to examine and use them. But no such showing was made here . . . .”  
226 F. 2d, at 552.

here, are that "[t]he demand was for production of . . . *specific documents and did not propose any broad or blind fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses." (Emphasis added.) 344 U. S., at 419. We reaffirm and re-emphasize these essentials. "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule . . . ." 344 U. S., at 420.

The crucial nature of the testimony of Ford and Matu-sow to the Government's case is conspicuously apparent. The impeachment of that testimony was singularly important to the petitioner. The value of the reports for impeachment purposes was highlighted by the admissions of both witnesses that they could not remember what reports were oral and what written, and by Matu-sow's admission: "I don't recall what I put in my reports two or three years ago, written or oral, I don't know what they were."

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until



after the witness has testified, and unless he admits conflict, as in *Gordon*, the accused is helpless to know or discover conflict without inspecting the reports.<sup>12</sup> A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. For the interest of the United States in a criminal prosecution “. . . is not that it shall win a case, but that justice shall be done. . . .” *Berger v. United States*, 295 U. S. 78, 88.<sup>13</sup>

This Court held in *Goldman v. United States*, 316 U. S. 129, 132, that the trial judge had discretion to deny inspection when the witness “. . . does not use his notes or memoranda [relating to his testimony] in court . . . .” We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for

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<sup>12</sup> Cf. *United States v. Burr*, 25 Fed. Cas. 187, wherein Chief Justice Marshall, when confronted with a request for the inspection of a letter addressed to the President and in the possession of the attorney for the United States, stated:

“Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? . . .

“. . . It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld? . . .” 25 Fed. Cas., at 191.

<sup>13</sup> *United States v. Schneiderman*, 106 F. Supp. 731; *People v. Dellabonda*, 265 Mich. 486, 251 N. W. 594; see Canon 5, American Bar Association, Canons of Professional Ethics (1947).

purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.<sup>14</sup>

The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved.<sup>15</sup> Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e. g.*, evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See *Gordon v. United States*, 344 U. S., at 418.

In the courts below the Government did not assert that the reports were privileged against disclosure on grounds of national security, confidential character of the reports,

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<sup>14</sup> Chief Justice Marshall also said in *United States v. Burr*, 25 Fed. Cas. 187:

"Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge. . . ." 25 Fed. Cas., at 191.

What is true before the case is opened is equally true as the case unfolds. The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense without hearing defense argument, after inspection, as to its bearing upon the case.

<sup>15</sup> See, *e. g.*, *United States v. Grayson*, 166 F. 2d 863, 869; *United States v. Beekman*, 155 F. 2d 580, 584; *United States v. Ebeling*, 146 F. 2d 254, 256; *United States v. Cohen*, 145 F. 2d 82, 92; *United States v. Krulewitch*, 145 F. 2d 76, 78.

public interest or otherwise. In its brief in this Court, however, the Government argues that, absent a showing of contradiction, "[t]he rule urged by petitioner . . . disregards the legitimate interest that each party—including the Government—has in safeguarding the privacy of its files, particularly where the documents in question were obtained in confidence. Production of such documents, even to a court, should not be compelled in the absence of a preliminary showing by the party making the request." The petitioner's counsel, believing that Court of Appeals' decisions imposed such a qualification, restricted his motions to a request for production of the reports to the trial judge for the judge's inspection and determination whether and to what extent the reports should be made available to the petitioner.

It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. This has been recognized in decisions of this Court in civil causes where the Court has considered the statutory authority conferred upon the departments of Government to adopt regulations "not inconsistent with law, for . . . use . . . of the records, papers . . . appertaining" to his department.<sup>16</sup> The Attorney General has adopted regulations pursuant to this authority declaring all Justice Department records confidential and that no disclosure, including disclosure in response to subpoena, may be made without his permission.<sup>17</sup>

But this Court has noticed, in *United States v. Reynolds*, 345 U. S. 1, the holdings of the Court of Appeals

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<sup>16</sup> R. S. § 161, 5 U. S. C. § 22; *United States v. Reynolds*, 345 U. S. 1; cf. *Totten v. United States*, 92 U. S. 105.

<sup>17</sup> Att'y. Gen. Order No. 3229 (1939), 28 CFR, 1946 Supp., § 51.71; Att'y. Gen. Order No. 3229, Supp. 2, Pike & Fischer Admin. Law 2d, Dept. of Justice 1 (1947); Att'y. Gen. Order No. 3229, Rev., 18 Fed. Reg. 1368 (1953).



for the Second Circuit<sup>18</sup> that, in criminal causes “. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .” 345 U. S., at 12.

In *United States v. Andolschek*, 142 F. 2d 503, 506, Judge Learned Hand said:

“ . . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. . . .”

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<sup>18</sup> *United States v. Beekman*, 155 F. 2d 580; *United States v. Andolschek*, 142 F. 2d 503.

BURTON, J., concurring in result.

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We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States*, 353 U. S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

*Reversed.*

MR. JUSTICE FRANKFURTER joins the opinion of the Court, but deeming that the questions relating to the instructions to the jury should be dealt with, since a new trial has been directed, he agrees with the respects in which, and the reasons for which, MR. JUSTICE BURTON finds them erroneous.

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

MR. JUSTICE BURTON, whom MR. JUSTICE HARLAN joins, concurring in the result.

Because of the importance of this case to the administration of criminal justice in the federal courts, I believe it appropriate to set forth briefly the different route by which I reach the same result as does the Court.

Ford and Matusow, as the Court's opinion indicates, were crucial government witnesses because their testimony supplied the principal evidence relating to the period immediately surrounding the filing of petitioner's allegedly false affidavit. Cross-examination brought out

the fact that each had made oral or written reports to the Federal Bureau of Investigation relating to the respective events about which each had testified on direct examination. Having established that fact, petitioner sought an order requiring the Government to produce, for inspection by the court, the reports relating to those matters about which each witness had testified. The procedure to be followed was carefully specified: the court was to determine whether the reports had evidentiary value for impeachment of the credibility of Ford or Matusow; if the court found that they had value for that purpose, it was then to make them available to petitioner for his use in cross-examination. The Government opposed each motion on the ground that no showing of contradiction between the witness' testimony and his reports had been made as required by a controlling Fifth Circuit decision, *Shelton v. United States*, 205 F. 2d 806. Apparently on that ground, the trial court denied the motions.

Petitioner's requests were limited to a narrow category of reports dealing with specified meetings and conversations. The purpose of the requests—to impeach the credibility of crucial government witnesses—was made clear. Petitioner did not ask to inspect the documents himself; he sought access only to those portions of the reports which the trial court might determine to have evidentiary value for impeachment purposes, and to be unprivileged.<sup>1</sup>

<sup>1</sup> In his brief, petitioner states:

"Petitioner asked only that the reports be produced to the trial judge so that he could examine them and determine whether they had evidentiary value for impeachment purposes. Petitioner sought access only to those portions of the reports having this value. The motion therefore proposed no broad foray into the government's files and afforded the judge every opportunity to protect the government's legitimate privilege as to the matters not connected with this case."



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I agree that, under such circumstances, it was unnecessary for petitioner to show that Ford's and Matusow's trial testimony was contradicted in some respect by their contemporaneous reports. Although some federal courts have required a showing of contradiction,<sup>2</sup> this Court never has done so.<sup>3</sup> A rule requiring a showing of contradiction in every case would not serve the ends of justice. I concur, therefore, in that portion of the Court's opinion holding that petitioner laid a sufficient foundation for the production of the reports.

I would not, however, replace the inflexible and narrow rule adopted by the courts below with the broader, but equally rigid rule announced by the Court. In matters relating to the production of evidence or the scope of cross-examination, a "large discretion must be allowed the trial judge." *Goldman v. United States*, 316 U. S. 129, 132; *Glasser v. United States*, 315 U. S. 60, 83; *Alford v. United States*, 282 U. S. 687, 694. The appropriate determination of a motion to produce reports made in connection with the examination of a witness depends upon the significance of the facts sought to be established,

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<sup>2</sup> *Scanlon v. United States*, 223 F. 2d 382, 385-386; *Shelton v. United States*, 205 F. 2d 806, 814-815; *Christoffel v. United States*, 91 U. S. App. D. C. 241, 244-247, 200 F. 2d 734, 737-739, rev'd on other grounds, 345 U. S. 947; *D'Aquino v. United States*, 192 F. 2d 338, 375; *United States v. De Normand*, 149 F. 2d 622, 625-626; *United States v. Ebeling*, 146 F. 2d 254, 257; *Little v. United States*, 93 F. 2d 401; *Arnstein v. United States*, 54 App. D. C. 199, 203, 296 F. 946, 950.

<sup>3</sup> In *Gordon v. United States*, 344 U. S. 414, the petitioners had shown that written statements given to government agents by a key government witness contradicted the witness' trial testimony. In holding that the trial court erred in denying petitioners' motion for the production and inspection of these statements, the Court was deciding that case on its facts. I do not regard it as establishing a rule that a showing of contradiction is an essential element of the foundation precedent to production.

and upon the potential use of the requested document in proving those facts. Since that determination depends on "numerous and subtle considerations difficult to detect or appraise from a cold record . . .," the trial court's discretion should be upheld in the absence of a "clear showing of prejudicial abuse of discretion . . . ." Cf. *Michelson v. United States*, 335 U. S. 469, 480. We have so held even when the documents sought to be produced have been used at the trial for the purpose of refreshing a witness' recollection. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 232-234. When the documents have not been so used and are sought only to impeach the credibility of adverse witnesses, and not to prove the facts stated therein, the same conclusion is even more compelling.

The Court goes beyond the request of petitioner that reports be produced for examination by the trial court and, in effect, seems to hold that the Government waives any privileges it may have with respect to documents in its possession by placing the author of those documents on the witness stand in a criminal prosecution. The Government's privileges with respect to state secrets and the identity of confidential informants embody important considerations of public policy. They are peculiar privileges in that they require the withholding of evidence not only from the jury, but also from the defendant. See *Roviaro v. United States*, 353 U. S. 53 (identity of informers); *Reynolds v. United States*, 345 U. S. 1 (state secrets). Once the defendant learns the state secret or the identity of the informer, the underlying basis for the privilege disappears, and there usually remains little need to conceal the privileged evidence from the jury. Thus, when the Government is a party, the preservation of these privileges is dependent upon nondisclosure of the privileged evidence to the defendant. This makes it

necessary for the trial court, before disclosing the privileged material to the defendant, to pass on the question by examining *in camera* the portions claimed to be privileged. Cf. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221. There is nothing novel or unfair about such a procedure. According to Wigmore, it is customary.

“ . . . it is obviously not for the witness to withhold the documents upon his mere assertion that they are not relevant or that they are privileged. The question of Relevancy is never one for the witness to concern himself with; nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the Court requires; and the Court can then to its own satisfaction determine by inspection whether the documents produced are irrelevant or privileged. *This does not deprive the witness of any rights of privacy, since the Court's determination is made by its own inspection, without submitting the documents to the opponent's view . . .*” (Emphasis deleted and supplied.) VIII Wigmore, Evidence (3d ed. 1940), 117-118.

Numerous federal decisions have followed this practice with respect to the type of documents here involved—contemporaneous reports made by a government investigator or informer who later testifies at the trial.<sup>4</sup> This procedure protects the legitimate public interest in safeguarding executive files. It also respects the interests of justice by permitting an accused to receive all informa-

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<sup>4</sup> See, e. g., *United States v. Coplon*, 185 F. 2d 629, 638; *United States v. Beekman*, 155 F. 2d 580, 584; *United States v. Cohen*, 145 F. 2d 82, 92; *United States v. Krulewitch*, 145 F. 2d 76, 79; *United States v. Flynn*, 130 F. Supp. 412; *United States v. Mesarosh*, 116 F. Supp. 345, 350; *United States v. Schneiderman*, 106 F. Supp. 731, 735-738.



tion necessary to his defense. The accused is given an opportunity to argue that the privilege asserted by the Government is inapplicable and that, even if applicable, his need for the evidence, under the circumstances of the case, outweighs the Government's interest in maintaining secrecy. The problem is closely related to that involved in *Roviaro v. United States*, *supra*, dealing with the necessity of the disclosure of an informer's identity in a criminal case. There this Court said:

"[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U. S., at 62.

The trial judge exercises his discretion with knowledge of the issues involved in the case, the nature and importance of the Government's interest in maintaining secrecy, and the defendant's need for disclosure. By vesting this discretion in the trial judge, the conflicting interests are balanced, and a just decision is reached in the individual case without needless sacrifice of important public interests.<sup>5</sup>

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<sup>5</sup> Privileged material sometimes can be excised from the reports without destroying their value to the defendant. Only when deletion is impracticable is the court compelled to choose between disclosing the document as a whole and withholding it completely. Material withheld from the defendant should be sealed as part of the record so that an appellate court may review the action of the trial court and correct any abuse of discretion.

I also disagree with the Court's holding that the failure to produce the records to petitioner necessitates a new trial. Petitioner requested only that the records be produced to the trial court.<sup>6</sup> He is entitled to no more. Whether a new trial is required should depend on the contents of the requested reports. If the reports contain material that the trial court finds has evidentiary value to petitioner, a new trial should be granted in order that petitioner may use it. But if the reports do not contain contradictory or exculpatory material helpful to petitioner, no possible prejudice could have resulted from the trial court's denials of petitioner's motions.<sup>7</sup> Were it not for the fact that I believe the trial court committed reversible error in instructing the jury with respect to the meaning of membership and affiliation, I would vacate the judgment below and remand to the trial court with instructions to examine the reports and to determine, in the light of the entire record, whether the failure to produce the reports was prejudicial to petitioner.<sup>8</sup>

However, I believe the trial court failed to give the jury sufficient guidance with respect to the meaning of the phrases "member of the Communist Party," and

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<sup>6</sup> See n. 1, *supra*.

<sup>7</sup> Rule 52 (a) of the Federal Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See *Lutwak v. United States*, 344 U. S. 604, 619; *Kotteakos v. United States*, 328 U. S. 750, 756-777. There are many cases in which nonproduction of documents has been held to be harmless error. Three comparatively recent cases, dealing with reports of law-enforcement officers are *United States v. Sansone*, 231 F. 2d 887; *Montgomery v. United States*, 203 F. 2d 887, 893-894; and *Bundy v. United States*, 90 U. S. App. D. C. 12, 193 F. 2d 694.

<sup>8</sup> The trial court is the appropriate forum to consider the possible prejudicial effect of the error. See, e. g., *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115; *Remmer v. United States*, 347 U. S. 227.

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"affiliated with such party" as they are used in § 9 (h) of the Labor Management Relations Act, 61 Stat. 146, 29 U. S. C. § 159 (h). The instruction given as to membership was as follows:

"In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with membership in the Communist Party and all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member of the Communist Party on April 28, 1950."

This instruction failed to emphasize to the jury the essential element of membership in an organized group—the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member.<sup>9</sup>

The instruction on affiliation also was defective. After quoting dictionary definitions employing synonymous words, the trial court merely said: "Affiliation . . . means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both." This instruction allowed the jury to convict petitioner on the basis of acts of intermittent cooperation. It did not require a continuing course of conduct "on a fairly permanent basis" "that could not be abruptly ended without

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<sup>9</sup> *Fisher v. United States*, 231 F. 2d 99, 106–107. See also, *Ocon v. Guercio*, 237 F. 2d 177; *Baghdasarian v. United States*, 220 F. 2d 677; *Sigurdson v. Landon*, 215 F. 2d 791; *Dickhoff v. Shaughnessy*, 142 F. Supp. 535.



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giving at least reasonable cause for the charge of a breach of good faith.”<sup>10</sup>

Because of these errors in the instructions, petitioner is entitled to a new trial. Accordingly, I concur in the judgment of the Court.

MR. JUSTICE CLARK, dissenting.

The Court holds “that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused’s inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.” This fashions a new rule of evidence which is foreign to our federal jurisprudence. The rule has always been to the contrary. It seems to me that proper judicial administration would require that the Court expressly overrule *Goldman v. United States*, 316 U. S. 129, 132 (1942), which is *contra* to the rule announced today. But that is not done. That case is left on the books to haunt lawyers and trial courts in their search for the proper rule. In *Goldman* the Court was unanimous on the issue of disclosure of documents<sup>1</sup> and refused to order produced “notes and memoranda made by the [federal] agents during the investigation.” The rule announced today has no support in any of our cases.<sup>2</sup>

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<sup>10</sup> *United States ex rel. Kettunen v. Reimer*, 79 F. 2d 315, 317. See also, *Bridges v. Wixon*, 326 U. S. 135; *Fisher v. United States*, 231 F. 2d 99, 107–108.

<sup>1</sup> Though the Court was divided on an issue not here material, the two dissenting opinions expressed no disagreement whatsoever on the disclosure issue.

<sup>2</sup> The opinion cites only two of our cases for support. The quotations from *Gordon v. United States*, 344 U. S. 414 (1953), an opinion by my late Brother Jackson, a former Solicitor General and Attorney General, are lifted entirely out of context. The case holds explicitly

Every federal judge and every lawyer of federal experience knows that it is not the present rule. Even the defense attorneys did not have the temerity to ask for such a sweeping decision. They only asked that the documents be delivered to the judge for his determination of whether the defendant should be permitted to examine them. This is the procedure followed in some of our circuits. My Brother BURTON has clearly stated in his concurring opinion the manner in which this procedure works. Perhaps here with a recanting witness the trial judge should have examined the specific documents called for, as the defense requested, and if he thought justice required their delivery to the defense, order such delivery to be made. I would have no objection to this being done. But as Brother BURTON points out, this would not require a reversal but merely a vacation of the judgment and a remand to the trial court for that purpose.

Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging

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that documents must be produced only after a foundation is laid "showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried: the participation of the accused in the crime." *Id.*, at 418-419. Likewise, *United States v. Reynolds*, 345 U. S. 1 (1953), by my late Brother Chief Justice Vinson, approved the refusal of the Government to produce documents in a tort claims suit. The opinion gave no approval whatever to the conclusion announced by the majority here. I purposely omitted the reference in the opinion after the penultimate sentence, "Accord, *Roviaro v. United States*, 353 U. S. 53, 60-61." That case had to do with the disclosure of a dead informant's name and did not touch on the problem of the disclosure of government documents.

through confidential information as well as vital national secrets. This may well be a reasonable rule in state prosecutions where none of the problems of foreign relations, espionage, sabotage, subversive activities, counterfeiting, internal security, national defense, and the like exist, but any person conversant with federal government activities and problems will quickly recognize that it opens up a veritable Pandora's box of troubles. And all in the name of justice. For over eight score years now our federal judicial administration has gotten along without it and today that administration enjoys the highest rank in the world.

Director J. Edgar Hoover back in 1950 tellingly pointed this out before a Subcommittee of the Committee on Foreign Relations of the United States Senate. Among other things he said, "I have always maintained the view that if we were to fully discharge the serious responsibilities imposed upon us, the confidential character of our files must be inviolate. . . . [U]nless we drastically change or circumscribe our procedures, they should not be disclosed." In describing the files of the Bureau, he continued:

"FBI reports set forth all details secured from a witness. If those details were disclosed, they could become subject to misinterpretation, they could be quoted out of context, or they could be used to thwart truth, distort half-truths, and misrepresent facts. The raw material, the allegations, the details of associations, and compilation of information . . . are of value to an investigator in the discharge of his duty. These files were never intended to be used in any other manner and the public interest would not be served by the disclosure of their contents."

"These files contain complaints, allegations, facts, and statements of all persons interviewed. Depending upon the purpose of the investigation, par-



ticularly in security cases, they contain, not only background data on the individual but details of his private life . . . the identities of our confidential sources of information and full details of investigative techniques. In short, they consist of a running account of all that transpires.

“ . . . For want of a more apt comparison, our files can be compared to the notes of a newspaper reporter before he has culled through the printable material from the unprintable. The files do not consist of proven information alone. . . . One report may allege crimes of a most despicable type, and the truth or falsity of these charges may not emerge until several reports are studied, further investigation made, and the wheat separated from the chaff.”

“If spread upon the record, criminals, foreign agents, subversives, and others would be forewarned and would seek methods to carry out their activities by avoiding detection and thus defeat the very purposes for which the FBI was created.” Hearings before a Subcommittee of the Senate Committee on Foreign Relations on S. Res. 231, 81st Cong., 2d Sess. 327-329.

I can add nothing to this graphic expression of the necessity for the existence of the rule which, until today, kept inviolate investigative reports.

My Brother BURTON's concurrence also points up the failure of the majority to pass upon another important question involved, namely, the sufficiency of the trial judge's instructions. The impact of this failure on him and on my Brother FRANKFURTER was such that they have announced their own views though the majority never reaches the point. For myself alone, I believe that

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the instructions on the whole were sufficient. It is unfortunate that the majority does not announce its position. This is only one of some 10 Communist affidavit cases now pending in the trial and appellate courts. Unless this case goes as did Gold's,<sup>3</sup> the question of the sufficiency of instructions will come up in this as well as in each of the other cases. The Court is sorely divided on this important issue and proper judicial administration requires that charges as to what constitutes membership and affiliation in the Communist Party be announced.

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<sup>3</sup> In *Gold v. United States*, 352 U. S. 985 (1957), this Court reversed and remanded the case for a new trial because of official intrusion into the privacy of the jury. The case was dismissed on oral motion of the Government on May 9, 1957.

## Syllabus.

## LEHMANN, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, v. UNITED STATES EX REL. CARSON OR CARASANITI.

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

No. 72. Argued March 26-27, 1957.—Decided June 3, 1957.

An alien entered the United States in 1919 as a stowaway, and no action was taken to deport him "within five years after entry," as then limited by § 19 of the Immigration Act of 1917. In 1936, he was convicted in Ohio of two separate crimes of blackmail and was given two separate sentences, the second to begin at the expiration of the first. In 1945, he was granted a conditional pardon by the Governor of Ohio for the second conviction. After enactment of the Immigration and Nationality Act of 1952, he was ordered deported thereunder on two grounds: (1) as an alien who, at the time of entry, was excludable by the then existing law, and (2) as an alien who had been convicted of two crimes involving moral turpitude, for neither of which had he been granted "a full and unconditional pardon." In a habeas corpus proceeding, he challenged the validity of his deportation. *Held*: the validity of his deportation under the 1952 Act is sustained. Pp. 686-690.

(a) The saving clause in § 405 (a) of the 1952 Act is inapplicable where "otherwise specifically provided," and § 241 contains provisions which specifically provide otherwise with respect to the circumstances involved in this case. Pp. 688-690.

(b) Section 241 (a)(1) specifically provides for the deportation of an alien who "at the time of entry was . . . excludable by the laws existing at [that] time," and § 241 (a)(4) specifically provides for the deportation of an alien who "at any time after entry" has been convicted of two crimes involving moral turpitude. P. 689.

(c) Section 241 (d) makes §§ 241 (a)(1) and 241 (a)(4) applicable retroactively to cover offenses of the kinds here involved. Pp. 689-690.

228 F. 2d 142, reversed.



*Roger D. Fisher* argued the cause for petitioner. With him on a brief was *Solicitor General Rankin*. With *Mr. Rankin* on a brief were *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *J. F. Bishop*.

*David Carliner* argued the cause for respondent. With him on the brief were *Henry C. Lavine* and *Jack Wasserman*.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Respondent, a native and citizen of Italy, entered the United States in 1919 as a stowaway. No action was taken to deport him "within five years after entry" as then limited by § 19 of the Immigration Act of February 5, 1917, 39 Stat. 889.

On January 15, 1936, respondent was convicted in Ohio of the crime of blackmail, and he was sentenced to imprisonment. On April 25, 1936, he was again convicted in Ohio of another crime of blackmail and sentenced to imprisonment. The second sentence was to begin at the expiration of the first. He was released from prison on February 1, 1941. A proceeding to deport him, under the provisions of § 19 of the Act of February 5, 1917, based upon his convictions of these two independent crimes, was commenced, but before final determination of that proceeding, the Governor of Ohio, on July 30, 1945, granted petitioner a conditional pardon<sup>1</sup> for the second conviction. Because of that conditional pardon and of the provision in § 19 of the 1917 Act that "the deportation of aliens convicted of a crime involving moral turpi-

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<sup>1</sup> The pardon was "conditioned upon good behavior and conduct and provided that he demeans himself as a law abiding person and is not convicted of any other crime, otherwise this Pardon to become null and void."

tude shall not apply to one who has been pardoned," that deportation proceeding was withdrawn on October 9, 1945.

In 1952 Congress enacted the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*, by which it repealed<sup>2</sup> the Immigration Act of February 5, 1917, and, in many respects, substantially changed the law. The present proceeding was brought under the 1952 Act to deport respondent upon two grounds: first, under § 241 (a) (1), as an alien who, at the time of entry, was excludable by the law existing at the time of entry (*i. e.*, a stowaway under § 3 of the Immigration Act of February 5, 1917, 39 Stat. 875), and, second, under § 241 (a) (4), as an alien who had been convicted of two crimes involving moral turpitude for neither of which had he been granted "a full and unconditional pardon." After a hearing, respondent was ordered deported by a special inquiry officer. That order was affirmed by the Board of Immigration Appeals.

Respondent then filed a petition for a writ of habeas corpus in the District Court for the Northern District of Ohio, contending that, because of the five-year limitation contained in the former Act (§ 19 of the Immigration Act of February 5, 1917), he could not lawfully be deported as a stowaway after the lapse of five years from the date he entered this country, and that he could not lawfully be deported for having been convicted of the two crimes of blackmail, because he had been conditionally pardoned for one of them. The District Court denied the petition. The Court of Appeals reversed, 228 F. 2d 142, holding that respondent had acquired a "status of nondeportability," under the prior law, which was protected to him by the savings clause in § 405 (a) of the 1952 Act, 66 Stat. 280, 8 U. S. C. § 1101, Note, "unless otherwise

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<sup>2</sup> § 403 (a) (13), 66 Stat. 279.

specifically provided" in that Act, which it held had not been done. We granted certiorari. 352 U. S. 915.

Section 405 (a) of the 1952 Act, upon which the Court of Appeals relied, provides in pertinent part as follows:

"(a) Nothing contained in this Act, *unless otherwise specifically provided therein*, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes,<sup>3</sup> conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ." (Emphasis supplied.)

By its express terms, § 405 (a) does not apply if it is "otherwise specifically provided" in the Act. As respects the grounds of deportation involved here, we think the Act does otherwise specifically provide in § 241, 66 Stat. 204, 8 U. S. C. § 1251. That section, so far as here pertinent, provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) *at the time of entry* was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

"(4) . . . *at any time after entry* is convicted of two crimes involving moral turpitude, not arising out

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<sup>3</sup> It appears to be obvious that this was a typographical error and that the word should be read as "statutes."



of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

“(b) The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states . . . .

“(d) Except as otherwise specifically provided in this section, *the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.*” (Emphasis supplied.)

Thus, even if we assume that respondent has a “status” within the meaning of § 405 (a), that section by its own terms does not apply to situations “otherwise specifically provided” for in the Act. Section 241 (a)(1) specifically provides for the deportation of an alien who “at the time of entry was . . . excludable by the law existing at [that] time,” and § 241 (a)(4) specifically provides for the deportation of an alien who “at any time after entry” has been convicted of two crimes involving moral turpitude. And § 241 (d) makes §§ 241 (a)(1) and 241 (a)(4) applicable to all aliens covered thereby, “notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that

the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do,<sup>4</sup> to cover offenses of the kind here involved. This case is, therefore, "otherwise specifically provided" for within the meaning of § 405 (a). The Court of Appeals was in error in holding to the contrary, and its judgment is

*Reversed.*

Opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs.\*

I agree with the Court that § 241 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1251, makes aliens deportable for past offenses which when committed were not grounds for deportation. The Court goes on to hold, however, that such retrospective legislation is a valid exercise of congressional power, despite Art. I, § 9, of the Constitution providing that "No Bill of Attainder or ex post facto Law shall be passed." Past decisions cited by the Court support this holding on the premise that the ex post facto clause only forbids "penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment." *Harisiades v. Shaughnessy*, 342 U. S. 580, 594. I think this definition confines the clause too narrowly. As MR. JUSTICE DOUGLAS pointed out in his dissenting opinion in *Marcello v. Bonds*, 349

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<sup>4</sup> *Bugajewitz v. Adams*, 228 U. S. 585; *Ng Fung Ho v. White*, 259 U. S. 276; *Mahler v. Eby*, 264 U. S. 32; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U. S. 521; *Harisiades v. Shaughnessy*, 342 U. S. 580; *Galvan v. Press*, 347 U. S. 522; *Marcello v. Bonds*, 349 U. S. 302.

\*[NOTE: This opinion applies also to No. 435, *Mulcahey, District Director, Immigration and Naturalization Service, v. Catalanotte*, post, p. 692.]

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Opinion of BLACK, J.

U. S. 302, 319, another line of decisions by this Court has refused to limit the protections of the clause to criminal cases and criminal punishments as those terms were defined in earlier times. *Fletcher v. Peck*, 6 Cranch 87, 138, 139; *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333. And see *United States v. Lovett*, 328 U. S. 303, 315, 316.

What is being done to these respondents seems to me to be the precise evil the ex post facto clause was designed to prevent. Both respondents are ordered deported for offenses they committed long ago—one in 1925 and the other in 1936. Long before the 1952 Act reached back to add deportation as one of the legal consequences of their offenses both paid the price society then exacted for their misconduct. They have lived in the United States for almost 40 years. To banish them from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later. I think that this Court should reconsider the application of the ex post facto clause with a view to applying it in a way that more effectively protects individuals from new or additional burdens, penalties, or punishments retrospectively imposed by Congress.



MULCAHEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,  
v. CATALANOTTE.

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

No. 435. Argued March 27, 1957.—Decided June 3, 1957.

An alien who entered the United States in 1920 for permanent residence was convicted in 1925 of a federal offense relating to illicit traffic in narcotics. At that time, there was no statute making that offense a ground for deportation. After enactment of the Immigration and Nationality Act of 1952, he was ordered deported under §§ 241 (a) (11) and (d) thereof, which provide for the deportation of any alien who "at any time" has been convicted of violating any law relating to illicit traffic in narcotics. He challenged the validity of this order in a habeas corpus proceeding. *Held*: the order of deportation is sustained. *Lehmann v. United States ex rel. Carson*, ante, p. 685. Pp. 692-694.

236 F. 2d 955, reversed.

*Roger D. Fisher* argued the cause for petitioner. On the brief were *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *J. F. Bishop*.

*Louis M. Hopping* argued the cause and filed a brief for respondent.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

This is a companion case to *Lehmann v. United States ex rel. Carson*, ante, p. 685, and presents similar questions. Respondent, an alien who entered the United States in 1920 for permanent residence, was convicted in 1925 of a federal offense relating to illicit traffic in narcotic drugs.<sup>1</sup>

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<sup>1</sup> The sale of a quantity of cocaine hydrochloride and possession and purchase of 385 grains thereof.

At that time there was no statute making that offense a ground for deportation. He was taken into custody in May, 1953, and, after administrative proceedings, was ordered deported under § 241 (a)(11) and (d) of the Immigration and Nationality Act of 1952,<sup>2</sup> which provides, *inter alia*, for the deportation of any alien "... who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . . ." <sup>3</sup>

Respondent petitioned the District Court for the Eastern District of Michigan for a writ of habeas corpus. The District Court, after hearing, denied the petition. The Court of Appeals reversed, 236 F. 2d 955, holding—principally on the basis of its earlier decision in *United States v. Kershner*, 228 F. 2d 142, this day reversed by us, *sub nom. Lehmann v. United States ex rel. Carson*, ante, p. 685—that inasmuch as respondent's conviction in 1925 of illicit traffic in narcotic drugs was not a ground for deportation prior to the Immigration and Nationality Act of 1952, respondent had a "status" of nondeportability

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<sup>2</sup> 66 Stat. 204, 8 U. S. C. § 1251.

<sup>3</sup> Section 241 (a) (11) and (d) of the Immigration and Nationality Act of 1952 provides, in pertinent part, as follows:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . . .

"(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding . . . (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

which was preserved to him by the savings clause in § 405 (a) of that Act.<sup>4</sup> We granted certiorari, 352 U. S. 915.

As we have said in *Lehmann v. United States ex rel. Carson*, ante, p. 685, § 405 (a) by its own terms does not apply to situations "otherwise specifically provided" for in the Act. Section 241 (a)(11) and § 241 (d) specifically provide for the deportation of an alien notwithstanding that the offense for which he is being deported occurred prior to the 1952 Act. Section 241 (a)(11) makes an alien deportable if he has "at any time" been convicted of illicit traffic in narcotic drugs. And § 241 (d) makes § 241 (a)(11) applicable to all aliens covered thereby "notwithstanding . . . that the facts . . . occurred prior to the date of enactment of this Act." It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do,<sup>5</sup> to cover offenses of the kind here involved. The case is, therefore, "otherwise specifically provided" for within the meaning of § 405 (a). The Court of Appeals was in error in holding to the contrary, and its judgment is

*Reversed.*

[For dissenting opinion of MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, see ante, p. 690.]

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<sup>4</sup> 66 Stat. 280, 8 U. S. C. § 1101, Note. Section 405, so far as here material, provides "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect . . . any status . . . existing, at the time this Act shall take effect . . . ."

<sup>5</sup> *Bugajewitz v. Adams*, 228 U. S. 585; *Ng Fung Ho v. White*, 259 U. S. 276; *Mahler v. Eby*, 264 U. S. 32; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U. S. 521; *Harisiades v. Shaughnessy*, 342 U. S. 580; *Galvan v. Press*, 347 U. S. 522; *Marcello v. Bonds*, 349 U. S. 302.



DIVISIONS PER CURIAM AND ORDERS FROM  
MARCH 25 THROUGH JUNE 3, 1957.

March 25, 1957.

Decisions Per Curiam

The first 1500 pages of the United States Reports for the year 1957 are the United States Reports of Appeals for the District of Columbia Circuit, and the United States Reports of the Supreme Court of the United States.

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REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 694 and 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

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DECISIONS PER CURIAM AND ORDERS FROM  
MARCH 25 THROUGH JUNE 3, 1957.

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MARCH 25, 1957.\*

*Decisions Per Curiam.*

No. 762. WISNIEWSKI v. UNITED STATES. On certificate from the United States Court of Appeals for the Eighth Circuit.

*Per Curiam:* Defendant was convicted of violation of 26 CFR § 175.121, a Regulation promulgated by the Secretary of the Treasury under the authority of § 2871 of the Internal Revenue Code of 1939, and providing that:

“No liquor bottle shall be reused for the packaging of distilled spirits for sale, except as provided in § 175.63 [exceptions not here relevant], nor shall the original contents, or any portion of such original contents, remaining in a liquor bottle be increased by the addition of any substance.”

The Court of Appeals for the Eighth Circuit has certified to this Court the following question: “Does the phrase ‘any substance’ as employed in 26 C. F. R., Section 175.121, 1952 Cumulative Pocket Supplement, include tax paid distilled spirits?”

It appears that the question certified by the Court of Appeals was decided by another panel of that court less than a year and a half before the present certification, on reviewing the dismissal of the indictment in this very case. *United States v. Goldberg*, 225 F. 2d 180. Because of the volume of business, all but two Circuits have more than three Circuit Judges. This undoubtedly raises

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\*MR. JUSTICE WHITTAKER took no part in the consideration or decision of cases in which action was this day announced.



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problems when one panel has doubts about a previous decision by another panel of the same court. Whatever procedure a Court of Appeals follows to resolve these problems—and desirable judicial administration commends consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals—doubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties. See *In re Burwell*, 350 U. S. 521; *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U. S. 247. It is also the task of a Court of Appeals to decide all properly presented cases coming before it, except in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business.

The certificate must be dismissed.

*Theodore H. Wangensteen* for Wisniewski.

No. 548, Misc. *COLLINS 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. Reported below: 145 Cal. App. 2d 473, 302 P. 2d 603.

No. 77. *GUNACA v. NATIONAL LABOR RELATIONS BOARD EX REL. KOHLER COMPANY*. Certiorari, 351 U. S. 981, to the United States Court of Appeals for the Seventh Circuit. *Per Curiam*: Upon suggestion of mootness by all the parties, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the cause as moot. *Joseph L. Rauh, Jr., Daniel H. Pollitt, John Silard* and

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*Harold A. Cranefield* for petitioner. *Solicitor General Rankin* and *Jerome D. Fenton* for the National Labor Relations Board. *Jerome Powell* for the Kohler Company, respondent. Reported below: 230 F. 2d 542.

No. 550, Misc. *McELROY v. MARYLAND*. Appeal from the Court of Appeals of Maryland. *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. Reported below: 211 Md. 385, 127 A. 2d 380.

*Miscellaneous Orders.*

No. 11, Original. *UNITED STATES v. LOUISIANA*. The motion of the Parish of St. Bernard, Louisiana, et al. for leave to intervene is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Attorney General Brownell*, *Solicitor General Rankin*, *Oscar H. Davis*, *John F. Davis* and *George S. Swarth* for the United States, plaintiff. *L. H. Perez* for the Parishes of Plaquemines and St. Bernard, *L. O. Pecot* for the Parishes of Iberia and St. Mary, *Frank Langridge* for the Parish of Jefferson, movants, and *Frank J. Looney* of counsel.

No. 107. *KINGSLEY BOOKS, INC., ET AL. v. BROWN, CORPORATION COUNSEL*. Appeal from the Court of Appeals of New York. (Probable jurisdiction noted, 352 U. S. 962.) The motion of the Attorney General of New York for leave to appear and present oral argument, as *amicus curiae*, is denied. The Attorney General of New York is invited to file a brief, as *amicus curiae*. *Louis J. Lefkowitz*, Attorney General of New York, *James O. Moore, Jr.*, Solicitor General, and *Ruth Kessler Toch*, Assistant Attorney General, were on the motion. Reported below: 1 N. Y. 2d 177, 134 N. E. 2d 461.

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No. 422. OFFICE EMPLOYES INTERNATIONAL UNION, LOCAL No. 11, AFL-CIO, *v.* NATIONAL LABOR RELATIONS BOARD. Certiorari, 352 U. S. 906, to the United States Court of Appeals for the District of Columbia Circuit. The motion of the International Brotherhood of Teamsters et al. for leave to intervene or in the alternative to present oral argument, as *amici curiae*, is denied. The motion for leave to file reply brief of the International Brotherhood of Teamsters et al., as *amici curiae*, is granted. *Samuel B. Bassett* and *Clifford D. O'Brien* for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., movants. Reported below: 98 U. S. App. D. C. 335, 235 F. 2d 832.

No. 430. ACHILLI *v.* UNITED STATES. Certiorari, 352 U. S. 916, to the United States Court of Appeals for the Seventh Circuit. The motion of *Carl J. Batter* to withdraw appearance for petitioner is granted. Reported below: 234 F. 2d 797.

No. 752. JACOBS, DOING BUSINESS AS JACOBS INSTRUMENT Co., *v.* UNITED STATES. Motion to strike respondent's brief denied. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. Petitioner *pro se*. *Solicitor General Rankin*, *Assistant Attorney General Doub*, *Samuel D. Slade* and *Bernard Cedarbaum* for the United States. Reported below: 239 F. 2d 459.

No. 569, Misc. RENZ *v.* PINTO, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM. 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.



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No. 609, Misc. *CHAPMAN v. UNDERWOOD*, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 475, Misc. *GRAYSON v. UNITED STATES ATTORNEY GENERAL*;

No. 544, Misc. *DAVIS v. CLEMMER*, DIRECTOR, DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA;

No. 573, Misc. *FLOURNOY v. KILDAY*, SHERIFF;

No. 578, Misc. *DAVIS v. UNITED STATES*;

No. 602, Misc. *WILLIAMS v. HERITAGE*, WARDEN;

No. 604, Misc. *BROWN v. BROWNELL*, ATTORNEY GENERAL, ET AL.;

No. 607, Misc. *ROCKWELL v. NEW YORK*; and

No. 612, Misc. *CARRINGTON v. ECKLE*, SUPERINTENDENT, LONDON PRISON FARM. Motions for leave to file petitions for writs of habeas corpus denied.

No. 555, Misc. *METCALFE v. GUTKNECHT ET AL.* Motion for leave to file petition for writ of certiorari denied.

No. 778. *AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL. v. AMERICAN AIRLINES, INC., ET AL.*; and

No. 779. *INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION v. AMERICAN AIRLINES, INC., ET AL.* Motion of petitioners to defer consideration of the petitions for writs of certiorari denied. MR. JUSTICE BLACK would grant the motion. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Albert F. Beitel* and *John H. Pratt* for petitioners in No. 778. *Coates Lear* and *Theodore I. Seamon* for petitioner in No. 779. *Howard C. Westwood*, *John T. Lorch* and *Robert L. Stern* for

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respondents, and *Mr. Lorch* and *Mr. Stern* for United Air Lines, Inc., *W. Glen Harlan* for Eastern Air Lines, Inc., *Henry J. Friendly* and *Robert C. Barnard* for Pan American World Airways, Inc., *L. Welch Pogue* for Delta Air Lines, Inc., *C. Edward Leasure* for Continental Air Lines, Inc., et al., *John F. Floberg* for Allegheny Airlines, Inc., et al., *Mr. Pogue*, *D. P. Renda* and *John W. Simpson* for Western Air Lines, Inc., *Charles H. Murchison* for Capital Airlines, Inc., *Hubert A. Schneider* for Braniff Airways, Inc., *John Marshall* for Pacific Northern Airlines, Inc., *Amos M. Mathews*, *A. P. Donadio*, *Russell B. James*, *D. O. Mathews* and *Guernsey Orcutt* for Abilene & Southern Railway Co. et al., and *Richard A. Fitzgerald* for National Airlines, Inc., respondents. Reported below: 98 U. S. App. D. C. 348, 235 F. 2d 845.

*Probable Jurisdiction Noted.*

No. 647. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* DIXIE CARRIERS, INC., ET AL.;

No. 654. UNITED STATES *v.* DIXIE CARRIERS, INC., ET AL.; and

No. 655. INTERSTATE COMMERCE COMMISSION *v.* DIXIE CARRIERS, INC., ET AL. Appeals from the United States District Court for the Southern District of Texas. Probable jurisdiction noted. *Robert H. Bierma*, *Richard J. Murphy* and *Harvey Huston* for the Atchison, Topeka & Santa Fe Railway Co. et al., appellants in No. 647. *Solicitor General Rankin*, *Assistant Attorney General Hansen*, *Robert W. Ginnane* and *H. Neil Garson* for the United States and the Interstate Commerce Commission, appellants. *Donald Macleay*, *Harry C. Ames*, *Harry C. Ames, Jr.*, *Nuel D. Belnap*, *T. S. Christopher* and *John C. Ridley* for appellees. Reported below: 143 F. Supp. 844.

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*Certiorari Granted.*

No. 399. *RASMUSSEN v. BROWNELL*, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Jack Wasserman* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Isabelle R. Cappello* for respondent. Reported below: 98 U. S. App. D. C. 300, 235 F. 2d 527.

No. 761. *UNITED STATES v. F. & M. SCHAEFER BREWING Co.* C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin*, *Acting Assistant Attorney General Stull* and *Hilbert P. Zarky* for the United States. Reported below: 236 F. 2d 889.

No. 622. *NATIONAL LABOR RELATIONS BOARD v. WOOSTER DIVISION OF BORG-WARNER CORPORATION*; and

No. 758. *WOOSTER DIVISION OF BORG-WARNER CORPORATION v. NATIONAL LABOR RELATIONS BOARD*. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit in No. 622 granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit in No. 758 granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. Whether, under circumstances where an employer concededly is bargaining in good faith, in fact, and in fact fully recognizes the Union and its representative status, the employer is guilty of a refusal to bargain as a matter of law, because it sought, over Union objection, the *Union's agreement* to identify itself with a name other than that prescribed in the Board's certification."

*Solicitor General Rankin*, *Stephen Leonard*, *Dominick L. Manoli* and *Irving M. Herman* for the National Labor



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Relations Board. With them were *Theophil C. Kammholz* in No. 622 and *Jerome D. Fenton* in No. 758. *James C. Davis* for the Wooster Division of the Borg-Warner Corporation. Reported below: 236 F. 2d 898.

No. 739. FEDERAL MARITIME BOARD *v.* ISBRANDTSEN COMPANY, INC., ET AL.; and

No. 740. JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Edward D. Ransom* and *Edward Aptaker* for petitioner in No. 739. *James M. Landis*, *Seymour J. Rubin*, *Herman Goldman*, *Elkan Turk*, *Benjamin Wiener* and *Elkan Turk, Jr.* for petitioners in No. 740. *Solicitor General Rankin* for the United States and the Secretary of Agriculture, and *John J. O'Connor* and *John J. O'Connor, Jr.* for the Isbrandtsen Company, Inc., respondents. Reported below: 99 U. S. App. D. C. 312, 239 F. 2d 933.

No. 750. MOOG INDUSTRIES, INC., *v.* FEDERAL TRADE COMMISSION. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to question 4 presented by the petition for the writ which reads as follows:

"4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the

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judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner."

*Malcolm I. Frank and James W. Cassidy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner and Robert B. Dawkins* for respondent. Reported below: 238 F. 2d 43.

No. 834. *ACHILLI v. UNITED STATES*. C. A. 7th Cir. Certiorari granted. *Peter B. Atwood* for petitioner.

*Certiorari Denied.* (See also Nos. 752, 778, 779 and Misc. Nos. 550 and 555, *supra*.)

No. 735. *UNION LEADER CORP. v. McLAUGHLIN*. Supreme Court of New Hampshire. Certiorari denied. *Walter E. Barton and Robert W. Upton* for petitioner. *Stanley M. Brown* for respondent. Reported below: 99 N. H. 492, 100 N. H. 367, 116 A. 2d 489, 127 A. 2d 269.

No. 736. *CONTINENTAL BANK & TRUST Co. v. WOODALL*. C. A. 10th Cir. Certiorari denied. *Peter W. Billings and Barron K. Grier* for petitioner. *Solicitor General Rankin, John F. Davis, George B. Vest and Bolling R. Powell, Jr.* for respondent. Reported below: 239 F. 2d 707.

No. 737. *HARRY M. STEVENS, INC., v. JOHNSON, FORMER COLLECTOR OF INTERNAL REVENUE*. C. A. 2d Cir. Certiorari denied. *Joseph Walker* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice and I. Henry Kutz* for respondent. Reported below: 238 F. 2d 436.

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No. 738. *NATHAN ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* and *Daniel P. Ward* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 238 F. 2d 401.

No. 748. *CARSON ET AL. v. WARLICK*, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied. *Herman L. Taylor* and *Samuel S. Mitchell* for petitioners. *George B. Patton*, Attorney General of North Carolina, *Robert E. Giles*, Assistant Attorney General, and *William T. Joyner* for respondent. Reported below: 238 F. 2d 724.

No. 760. *INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, AFL, v. NATIONAL LABOR RELATIONS BOARD*. C. A. 9th Cir. Certiorari denied. *David Sokol* for petitioner. *Solicitor General Rankin*, *Stephen Leonard*, *Dominick L. Manoli* and *Irving M. Herman* for respondent. Reported below: 237 F. 2d 670.

No. 763. *SCHOOL BOARD OF CHARLOTTESVILLE, VIRGINIA, ET AL. v. ALLEN ET AL.* C. A. 4th Cir. Certiorari denied. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *Henry T. Wickham*, Special Assistant to the Attorney General, and *John S. Battle* for petitioners. *Oliver W. Hill*, *Robert L. Carter*, *Thurgood Marshall*, *Spottswood W. Robinson, III*, *Martin A. Martin* and *S. W. Tucker* for respondents. Reported below: 240 F. 2d 59.

No. 765. *JAMES PETROLEUM CORP. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 2d Cir. Certiorari denied. *Watson Washburn* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice*, *Hilbert P. Zarky* and *Melva M. Graney* for respondent. Reported below: 238 F. 2d 678.



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No. 764. COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL. *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, *Henry T. Wickham*, Special Assistant to the Attorney General, and *James H. Simmonds* for petitioners. *Edwin C. Brown*, *Oliver W. Hill*, *Robert L. Carter*, *Thurgood Marshall* and *Spottswood W. Robinson, III*, for respondents. Reported below: 240 F. 2d 59.

No. 768. GRAY LINE CO. *v.* GRANDQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 237 F. 2d 390.

No. 771. LONG ISLAND RAIL ROAD CO. *v.* CENTRAL ISLIP COOPERATIVE G. L. F. SERVICE, INC. C. A. 2d Cir. Certiorari denied. *Otto M. Buerger* and *William J. O'Brien* for petitioner. *Oscar A. Thompson* for respondent. Reported below: 238 F. 2d 467.

No. 774. BROADWELL ET AL. *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Robert M. Krewson* and *Charles O. Pratt* for petitioners. *Saul S. Danaceau* for respondent.

No. 788. GINSBURG *v.* BLACK ET AL. C. A. 7th Cir. Certiorari denied. *Paul Ginsburg* for petitioner. *Thomas A. Reynolds*, *pro se* and for the other respondents. Reported below: 237 F. 2d 790.

No. 802. E. L. FARMER & CO. *v.* HOOKS ET AL. C. A. 10th Cir. Certiorari denied. *Warren E. Magee* for petitioner. Reported below: 239 F. 2d 547.

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No. 776. ASSOCIATED RESOURCES CORP. ET AL. *v.* HAL-LIBURTON OIL WELL CEMENTING Co. C. A. 8th Cir. Certiorari denied. *Jack Z. Krigel* for petitioners. *Robert O. Brown, Robert E. Rice, William S. Hogsett and Hale Houts* for respondent. Reported below: 238 F. 2d 957.

No. 805. DYNER *v.* SCHWARTZ ET AL., TRUSTEES, ET AL. C. A. 7th Cir. Certiorari denied. *Joseph M. Herman* for petitioner. *Francis S. Clamitz* for Schwartz et al., and *Thomas M. Thomas* for Intelectron, Inc., respondents. Reported below: 239 F. 2d 122.

No. 551. NUNAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Richard J. Burke* and *J. Bertram Wegman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 236 F. 2d 576.

No. 268, Misc. BEARD *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se.* *William Saxbe*, Attorney General of Ohio, and *Louis H. Orkin*, Assistant Attorney General, for respondent.

No. 372, Misc. DOCKERY *v.* UNITED STATES. C. A. 4th 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 518.

No. 481, Misc. TOMPKINS *v.* MISSOURI. Circuit Court of the City of St. Louis, Missouri. Certiorari denied.

No. 485, Misc. HARRISON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

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No. 494, Misc. *GUSICK v. ARIZONA*. Supreme Court of Arizona. Certiorari denied. *Wm. Scott Stewart* for petitioner. *Robert Morrison*, Attorney General of Arizona, and *James H. Green, Jr.*, First Assistant Attorney General, for respondent. Reported below: 81 Ariz. 206, 303 P. 2d 531.

No. 496, Misc. *SAMET v. OKLAHOMA*. C. A. 10th Cir. Certiorari denied. Reported below: 237 F. 2d 336.

No. 527, Misc. *BLAKE v. NEW YORK*. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 528, Misc. *DANIELS v. NEW YORK*. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 532, Misc. *MILLER v. MARYLAND*. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 607, 125 A. 2d 668.

No. 533, Misc. *CANTER v. WARDEN, MARYLAND HOUSE OF CORRECTION*. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 643, 127 A. 2d 139.

No. 535, Misc. *BLACK v. ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL.* Court of Criminal Appeals of Texas. Certiorari denied.

No. 536, Misc. *ASH v. NASH, WARDEN*. Supreme Court of Missouri. Certiorari denied.

No. 537, Misc. *LYLE v. BANGOR & AROOSTOOK RAILROAD Co.* C. A. 1st Cir. Certiorari denied. Reported below: 237 F. 2d 683.



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No. 540, Misc. *HEFFNER v. WARDEN, MARYLAND HOUSE OF CORRECTION*. Court of Appeals of Maryland. Certiorari denied. Reported below: 211 Md. 638, 126 A. 2d 304.

No. 541, Misc. *RODRIGUEZ v. HEINZE, WARDEN*. Supreme Court of California. Certiorari denied.

No. 542, Misc. *PUCKETT v. COINER, WARDEN*. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 545, Misc. *THOMPSON v. MAYO, PRISON CUSTODIAN*. Supreme Court of Florida. Certiorari denied. Reported below: 91 So. 2d 661.

No. 547, Misc. *HERZIC v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied. Reported below: 9 Ill. 2d 572, 138 N. E. 2d 482.

No. 549, Misc. *ALLISON v. GRAY, WARDEN*. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *Jo M. Ferguson*, Attorney General of Kentucky, and *Earle V. Powell*, Assistant Attorney General, for respondent. Reported below: 296 S. W. 2d 735.

No. 553, Misc. *GOBERT v. MYERS, WARDEN*. Superior Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *James N. Lafferty* and *Victor H. Blanc* for respondent. Reported below: 182 Pa. Super. 254, 126 A. 2d 525.

No. 554, Misc. *COLWELL v. MYERS, WARDEN*. Superior Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *James N. Lafferty* and *Victor H. Blanc* for respondent. Reported below: 182 Pa. Super. 256, 126 A. 2d 513.

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No. 551, Misc. *CIONI v. RAGEN, WARDEN*. Circuit Court of Bureau County, Illinois. Certiorari denied.

No. 556, Misc. *KRULL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. *Oscar M. Smith* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney and Beatrice Rosenberg* for the United States. Reported below: 240 F. 2d 122.

No. 557, Misc. *KRULL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. *J. S. Kilpatrick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney and Beatrice Rosenberg* for the United States. Reported below: 240 F. 2d 122.

No. 560, Misc. *CORNELIOUS v. NEW YORK*. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 563, Misc. *JEROME v. NEW YORK*. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 565, Misc. *MILLER v. FLORIDA ET AL.* Supreme Court of Florida. Certiorari denied.

No. 567, Misc. *HARRE v. MISSOURI ET AL.* Supreme Court of Missouri. Certiorari denied.

No. 568, Misc. *JONES v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied. Reported below: 9 Ill. 2d 481, 138 N. E. 2d 522.

No. 570, Misc. *COHEN v. NEW JERSEY*. Supreme Court of New Jersey. Certiorari denied.

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No. 572, Misc. *MARINACCIO v. NEW YORK*. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 574, Misc. *LEWIS v. NEW YORK*. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 585, Misc. *MORGAN v. NEW YORK*. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 3 App. Div. 2d 48, 158 N. Y. S. 2d 365.

No. 534, Misc. *LEMPIA v. CALIFORNIA*. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 144 Cal. App. 2d 393, 301 P. 2d 40.

No. 720. *HULSE v. UNITED STATES*. Court of Claims. Certiorari denied. *Fred W. Shields* and *John W. Gaskins* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 133 Ct. Cl. 848, 137 F. Supp. 745.

No. 721. *CONLIN v. UNITED STATES*. Court of Claims. Certiorari denied. *Lewis Landes* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 137 Ct. Cl. 128, 146 F. Supp. 833.

No. 745. *SNIDER v. VIRGINIA*. Supreme Court of Appeals of Virginia. Certiorari denied. *O. P. Easterwood, Jr.* for petitioner. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *C. F. Hicks*, Assistant Attorney General, for respondent.



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No. 730. *DILATUSH v. WILSON, SECRETARY OF DEFENSE, ET AL.* United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Daniel L. O'Connor* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Melvin Richter* for respondents. Reported below: 99 U. S. App. D. C. 224, 239 F. 2d 44.

No. 732. *GRAHAM v. UNITED STATES.* Court of Claims. Certiorari denied. *Mathew O. Tobriner, Irving S. Rosenblatt, Jr.* and *Victor E. Cappa* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 136 Ct. Cl. 324.

No. 746. *LEVADI v. UNITED STATES.* Court of Claims. Certiorari denied. *Mayer Goldberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 137 Ct. Cl. 97, 146 F. Supp. 455.

No. 755. *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.* and *Warren W. Grimes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 99 U. S. App. D. C. 289, 239 F. 2d 452.

No. 756. *GRAUERT ET AL. v. DULLES, SECRETARY OF STATE.* United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George Eric Rosden* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 99 U. S. App. D. C. 240, 239 F. 2d 60.

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No. 810. *SANDBERRY ET AL. v. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL.* Supreme Court of Texas. Certiorari denied. *E. A. Simpson* for Sandsberry et al., *J. C. Gibson, R. S. Outlaw, C. G. Niebank, Jr., Donald R. Richberg, A. J. Folley* and *Preston Shirley* for the Gulf, Colorado & Santa Fe Railway Co. et al., petitioners. *Milton Kramer* and *Lester P. Schoene* for respondents. Reported below: 156 Tex. —, 295 S. W. 2d 412.

No. 694. *SACRAMENTO TELECASTERS, INC., v. MCCLATCHY BROADCASTING CO. ET AL.*; and

No. 733. *MCCLATCHY BROADCASTING CO. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.* United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *Dwight D. Doty* and *J. Roger Wollenberg* for Sacramento Telecasters, Inc. *Clair L. Stout, Thomas H. Wall* and *John J. Hamlyn* for the McClatchy Broadcasting Co. *Solicitor General Rankin* and *Warren E. Baker* in No. 694, and with them were *Assistant Attorney General Hansen, Daniel M. Friedman, Richard A. Solomon* and *Henry Geller* in No. 733, for the Federal Communications Commission. *Elisha Hanson* and *Arthur B. Hanson* filed a brief for the American Newspaper Publishers Association, as *amicus curiae*, in support of the petition in No. 733. Reported below: 99 U. S. App. D. C. 195, 199, 239 F. 2d 15, 19.

*Rehearing Denied.*

No. 390, Misc. *VICK v. MEMPHIS AND SHELBY COUNTY BAR ASSOCIATION, INC.*, 352 U. S. 975. Rehearing denied.

No. 439. *CLIETT ET VIR v. SCOTT ET AL.*, 352 U. S. 917. Motion for leave to file petition for rehearing granted. Petition for rehearing denied.

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No. 648. YUCHI (EUCHEE) TRIBE OF INDIANS ET AL. v. UNITED STATES ET AL., 352 U. S. 1016. Rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

MARCH 27, 1957.

*Dismissal Under Rule 60.*

No. 747. COLLINS ET AL., DOING BUSINESS AS COLLINS BROTHERS OIL Co., v. PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. Appeal from the Supreme Court of Missouri. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Jesse Jerold Middleton* for appellants, *Frank A. Thompson* for the Public Service Commission of Missouri, and *Guy A. Thompson* and *James M. Douglas* for the Laclede Gas Co., appellees, were on the stipulation. Reported below: 365 Mo. 1086, 293 S. W. 2d 345.

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*Decisions Per Curiam.*

No. 734. HITCHCOCK ET AL. v. COLLENBERG ET AL. Appeal from the United States District Court for the District of Maryland. *Per Curiam*: The motion to affirm is granted and the judgment is affirmed. *Taylor v. Oklahoma ex rel. Rutherford*, 352 U. S. 805; *Dantzler v. Callison*, 352 U. S. 939; *Dent v. West Virginia*, 129 U. S. 114.

*John J. O'Connor, Jr.* and *Charles Orlando Pratt* for appellants. *C. Ferdinand Sybert*, Attorney General of Maryland, *Stedman Prescott, Jr.*, Deputy Attorney General, and *James H. Norris, Jr.*, Special Assistant Attorney General, for appellees. Reported below: 140 F. Supp. 894.



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No. 743. *SHAW, EXECUTOR, v. ATLANTIC COAST LINE RAILROAD Co. ET AL.* On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. *Per Curiam*: The petition for writ of certiorari is granted limited to that part of the judgment in favor of *Southern Railway Company* and that part of the judgment is reversed and the cause is remanded for trial. In all other respects, the petition for writ of certiorari is denied. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500. MR. JUSTICE FRANKFURTER is of the opinion that the writ should not be granted. See his dissent in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 524. MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER dissent for the reasons given in MR. JUSTICE HARLAN's opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 559. MR. JUSTICE BURTON dissents.

*Thomas E. McCutchen, Jr.* for petitioner. *Douglas McKay* for the Atlantic Coast Line Railroad Co., and *Frank G. Tompkins, Jr.* for the Southern Railway Co., respondents. Reported below: 238 F. 2d 525.

No. 782. *FUTRELLE, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD Co.* On petition for writ of certiorari to the Supreme Court of North Carolina. *Per Curiam*: The petition for writ of certiorari is granted and the judgment is reversed and the cause is remanded for trial. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500. MR. JUSTICE FRANKFURTER is of the opinion that the writ should not be granted. See his dissent in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 524. MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER dissent for the reasons given in MR. JUSTICE HARLAN's opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 559.

*James B. Swails* for petitioner. *Louis J. Poisson, Jr.* and *M. V. Barnhill, Jr.* for respondent. Reported below: 245 N. C. 36, 94 S. E. 2d 899.

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*Miscellaneous Orders.*

No. 412. *SMITH v. UNITED STATES*, 352 U. S. 909. The motion for leave to file petition for rehearing is granted. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion.

No. 596. *UNITED STATES v. KORPAN*. Certiorari, 352 U. S. 980, to the United States Court of Appeals for the Seventh Circuit;

No. 674. *UNITED STATES v. HUNT ET AL.*; and

No. 675. *UNITED STATES v. OLLHOFF ET AL.* Appeals from the United States District Court for the District of Minnesota;

No. 723. *UNITED STATES v. MACK*;

No. 724. *UNITED STATES v. CALI*; and

No. 725. *UNITED STATES v. EDWARDS*. Appeals from the United States District Court for the District of Arizona;

No. 726. *UNITED STATES v. HATCH*. Appeal from the United States District Court for the Eastern District of Louisiana; and

No. 727. *UNITED STATES v. HARRIS ET AL.* Appeal from the United States District Court for the Western District of Arkansas. The motion to consolidate is denied. *Solicitor General Rankin* for the United States. *Robert A. Sprecher* for respondent in No. 596 and appellees in Nos. 674, 675, 723 to 727, inclusive, movants. Reported below: No. 596, 237 F. 2d 676; Nos. 674 and 675, 146 F. Supp. 143.

*Certiorari Granted.* (See also No. 312, October Term, 1955, ante, p. 98, and Nos. 743 and 782, supra.)

No. 785. *NATIONAL LABOR RELATIONS BOARD v. UNITED STEELWORKERS OF AMERICA, CIO, ET AL.* United States Court of Appeals for the District of Columbia Cir-

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cuit. Certiorari granted. *Solicitor General Rankin, Stephen Leonard* and *Dominick L. Manoli* for petitioner. *Arthur J. Goldberg* and *David E. Feller* for the United Steelworkers of America, respondent. Reported below: 100 U. S. App. D. C. —, 243 F. 2d 593.

No. 729. *NOWAK v. UNITED STATES*; and

No. 749. *MAISENBERG v. UNITED STATES*. C. A. 6th Cir. Certiorari granted. *Ernest Goodman* and *Geo. W. Crockett, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 238 F. 2d 282.

No. 383, Misc. *ESKRIDGE v. SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY*. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Washington granted. Petitioner *pro se. John J. O'Connell*, Attorney General of Washington, and *Michael R. Alfieri*, Assistant Attorney General, for respondent.

*Certiorari Denied.* (See also No. 743, *supra.*)

No. 757. *CITY OF ST. PETERSBURG ET AL. v. ALSUP ET AL.* C. A. 5th Cir. Certiorari denied. *Lewis T. Wray, Harry I. Young* and *Frank D. McDevitt* for petitioners. Reported below: 238 F. 2d 830.

No. 766. *FIELD ENTERPRISES, INC., v. PARKER ET AL.* C. A. 7th Cir. Certiorari denied. *Robert B. Johnstone* for petitioner. Reported below: 238 F. 2d 241.

No. 767. *CHICAGO CITY BANK & TRUST CO., TRUSTEE, ET AL. v. CITY OF HIGHLAND PARK*. Supreme Court of Illinois. Certiorari denied. *L. Louis Karton* for petitioners. Reported below: 9 Ill. 2d 364, 137 N. E. 2d 835.



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No. 770. ALEXANDER ET AL., COMMISSIONERS, DEPARTMENT OF BUSINESS REGULATIONS, ET AL. *v.* BENNETT ET AL. Supreme Court of Utah. Certiorari denied. *Zar E. Hayes* and *Grant Macfarlane* for petitioners. Reported below: 5 Utah 2d 163, 298 P. 2d 823.

No. 772. SIGNAL OIL & GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. *Justin R. Wolf* and *Charles A. Case, Jr.* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Doub*, *Melvin Richter*, *Willard W. Gatchell* and *Howard E. Wahrenbrock* for the Federal Power Commission, *Bradford Ross* for the Oklahoma Natural Gas Co. et al., and *Marshall Newcomb* for the Lone Star Gas Co., respondents. Reported below: 238 F. 2d 771.

No. 780. ROMANO *v.* MAGLIO ET AL. Supreme Court of New Jersey. Certiorari denied. *Robert V. Carton* for petitioner. *Harry V. Osborne, Jr.* for respondents. Reported below: 22 N. J. 574, 126 A. 2d 910.

No. 783. AUSTIN *v.* MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray*, *Milton D. Korman* and *Hubert B. Pair* for respondents. Reported below: 98 U. S. App. D. C. 339, 235 F. 2d 836.

No. 326, Misc. CLARK *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: 293 S. W. 2d 465.

No. 514, Misc. STAFFORD *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Superior Court of California, Los Angeles County. Certiorari denied.

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No. 577, Misc. SHOOK, ADMINISTRATOR, *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Leonard and Melvin Richter* for the United States. Reported below: 238 F. 2d 952.

No. 759. CASEY, ACTING JUDGE OF HARRIS COUNTY, ET AL. *v.* PLUMMER ET AL. C. A. 5th Cir. Certiorari denied. *Sam R. Merrill* for Derrington, petitioner. Reported below: 240 F. 2d 922.

No. 525, Misc. BELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 773. NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Evelyn N. Cooper* and *Lucien Hilmer* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter, Willard W. Gatchell, John C. Mason and Joseph B. Hobbs* for the Federal Power Commission, and *R. P. Parry, Clifford E. Fix and A. C. Inman* for the Idaho Power Co., respondents. Briefs of *amici curiae* in support of the petition were filed by *Robert Y. Thornton*, Attorney General, for the State of Oregon, and *John J. O'Connell*, Attorney General, and *E. P. Donnelly*, Assistant Attorney General, for the State of Washington. *Robert E. Smylie*, Governor, and *Graydon W. Smith*, Attorney General, filed a brief for the State of Idaho, as *amicus curiae*, in opposition to the petition for writ of certiorari. Reported below: 99 U. S. App. D. C. 149, 237 F. 2d 777.

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No. 538, Misc. *HAWKINS 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 *Julia P. Cooper* for the United States. Reported below: 99 U. S. App. D. C. 189, 238 F. 2d 265.

*Rehearing Granted.* (See No. 312, October Term, 1955, ante, p. 98.)

*Rehearing Denied.*

No. 614. *STANLEY ET AL. v. UNITED STATES*, 352 U. S. 1015;

No. 13, Misc. *PATTERSON v. ILLINOIS*, 352 U. S. 1005;

No. 357, Misc. *THOMAS v. UNITED STATES*, 352 U. S. 1006;

No. 452, Misc. *FRANKLIN v. INDIANA*, 352 U. S. 999; and

No. 459, Misc. *OPPENHEIMER v. GENERAL CABLE CORP. ET AL.*, 352 U. S. 1010. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

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*Decisions Per Curiam.*

No. 199. *DEEN v. GULF, COLORADO & SANTA FE RAILWAY Co.* Certiorari, 352 U. S. 820, to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. Argued April 1, 1957. Decided April 8, 1957. *Per Curiam*: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers v. Missouri*



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*Pacific R. Co.*, 352 U. S. 500; *Webb v. Illinois Central R. Co.*, 352 U. S. 512; *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521. The judgment of the Court of Civil Appeals is reversed and the case is remanded. Mr. JUSTICE FRANKFURTER would dismiss the writ as improvidently granted. See his dissent in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 524. Mr. JUSTICE HARLAN and Mr. JUSTICE WHITTAKER dissent for the reasons given in Mr. JUSTICE HARLAN's opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 559. Mr. JUSTICE BURTON dissents. *Robert Lee Guthrie* argued the cause for petitioner. With him on the brief was *David C. McCord*. *Luther Hudson* argued the cause for respondent. With him on the brief was *Preston Shirley*. Reported below: 275 S. W. 2d 529.

No. 594, Misc. *SIMPSON v. TEETS, WARDEN*. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam*: The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals for the Ninth Circuit is vacated and the cause is remanded to the District Court with directions to grant a hearing on the allegations of the petition for writ of habeas corpus unless the court finds that petitioner's state remedies have not been exhausted. *A. J. Zirpoli* for petitioner. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Arlo E. Smith*, Deputy Attorney General, for respondent. Reported below: 239 F. 2d 890.

No. 321. *THOMSON v. TEXAS & PACIFIC RAILWAY CO.* Certiorari, 352 U. S. 877, to the United States Court of Appeals for the Fifth Circuit. Argued April 2, 1957. Decided April 8, 1957. *Per Curiam*: We hold that the

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proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500; *Webb v. Illinois Central R. Co.*, 352 U. S. 512; *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521. The judgment of the Court of Appeals is reversed and the case is remanded. MR. JUSTICE FRANKFURTER would dismiss the writ as improvidently granted. See his dissent in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 524. MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER dissent for the reasons given in MR. JUSTICE HARLAN's opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 559. *Beverly Tarpley* argued the cause for petitioner. With her on the brief were *Dallas Scarborough* and *Davis Scarborough*. *J. B. Look* argued the cause for respondent. With him on the brief was *John B. Pope*. Reported below: 232 F. 2d 313.

NO. 702. *MANION ET AL. v. KANSAS CITY TERMINAL RAILWAY Co.* On petition for writ of certiorari to the Kansas City Court of Appeals of Missouri. *Per Curiam*: The petition for writ of certiorari is granted. The judgment of the Kansas City Court of Appeals of Missouri must be vacated in the light of our decision in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, because the dispute here is not pending before the National Railroad Adjustment Board. The cause is remanded for further proceedings not inconsistent with this decision and without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time. *Ralph M. Jones*, *Charles B. Blackmar*, *Russell B. Day* and *Harold C. Heiss* for petitioners. *Horace F. Blackwell, Jr.* for respondent. Reported below: 297 S. W. 2d 31.

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*Miscellaneous Orders.*

No. 11, Original. UNITED STATES *v.* LOUISIANA. The motion for reconsideration of the order denying the Parish of St. Bernard, Louisiana, et al. the right of intervention, *ante*, p. 903, is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 596. UNITED STATES *v.* KORPAN. Certiorari, 352 U. S. 980, to the United States Court of Appeals for the Seventh Circuit. The motion for leave to file brief of D. Gottlieb & Co., as *amicus curiae*, is denied. Reported below: 237 F. 2d 676.

*Certiorari Granted.* (See also No. 702 and Misc. No. 594, *supra*.)

No. 566, Misc. CHESSMAN *v.* TEETS, WARDEN. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The case is transferred to the appellate docket and set for oral argument on May 13, 1957, upon the following terms:

1. The writ of certiorari is limited to the question whether, in the circumstances of this case, the state court proceedings to settle the trial transcript, upon which petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which trial court proceedings petitioner allegedly was not represented in person or by counsel designated by the state court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. Appearances upon the writ of certiorari will be confined to counsel for the respective parties, and their argu-



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ment will be limited to the single question indicated above.

3. The brief for the petitioner will be served and filed on or before April 24, 1957. The brief for the respondent will be served and filed on or before May 10, 1957. The petitioner may file a reply brief within one week after the oral argument.

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

*George T. Davis* for petitioner. *Edmund G. Brown*, Attorney General of California, and *Clarence A. Linn*, Assistant Attorney General, for respondent. Reported below: 239 F. 2d 205.

No. 610, Misc. *PAYNE v. ARKANSAS*.

The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari to the Supreme Court of Arkansas is granted limited to questions 2 and 3 presented by the petition for the writ which read as follows:

2. Whether members of the Negro race "were systematically excluded or their number limited in the selection of the jury panel and of the Jury Commission."

3. Whether "the petitioner's alleged confession was introduced into evidence after same had been illegally and unlawfully secured from him."

*Wiley A. Branton* for petitioner. *Bruce Bennett*, Attorney General of Arkansas, and *Thorp Thomas*, Assistant Attorney General, for respondent. Reported below: 226 Ark. 910, 295 S. W. 2d 312.

*Certiorari Denied.*

No. 789. *SHROUT v. WILLIAMS*. St. Louis Court of Appeals of Missouri. *Certiorari denied.* *Frank Mashak* for petitioner. Reported below: 294 S. W. 2d 640.

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No. 787. HOLMAN ET AL. *v.* BUTLER, EXECUTRIX, ET AL. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Albert W. Dilling* and *Kirkpatrick W. Dilling* for petitioners. *Richard Z. Lambersson* for respondents. Reported below: 146 Cal. App. 2d 22, 303 P. 2d 573.

No. 659, Misc. RISER *v.* CALIFORNIA ET AL. Supreme Court of California. Application for stay of execution denied. Certiorari denied. Reported below: 47 Cal. 2d 566, 305 P. 2d 1.

No. 731. BAILEY ET UX. *v.* RUNYON, COMMONWEALTH'S ATTORNEY, ET AL. Court of Appeals of Kentucky. Certiorari denied. *L. D. May* for petitioners. *Henry D. Stratton* for respondents. Reported below: 293 S. W. 2d 631.

No. 824. DAVIS ET AL. *v.* FOREMAN ET AL. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States, respondent. Reported below: 239 F. 2d 579.

No. 798. NATIONAL WHOLESALERS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Wm. H. Neblett* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Melvin Richter* for the United States. Reported below: 236 F. 2d 944.

No. 790. LIBERTY BAKING CORP. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. *Benjamin Weintraub* and *Harris Levin* for petitioner. *Solicitor General Rankin*, *Thomas G. Meeker* and *David Ferber* for respondent. Reported below: 240 F. 2d 511.

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No. 786. *BRENNAN ET AL. v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. *Edward Bennett Williams, Elmer J. Ryan, Benedict S. Deinard and Melvin H. Siegel* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Julia P. Cooper* for the United States. Reported below: 240 F. 2d 253.

No. 804. *KANE v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 2d Cir. Certiorari denied. *Bernard Weiss* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky and Morton K. Rothschild* for respondent. Reported below: 238 F. 2d 624.

*Rehearing Denied.*

No. 37. *NILVA v. UNITED STATES*, 352 U. S. 385;

No. 62. *SENKO v. LACROSSE DREDGING CORP.*, 352 U. S. 370;

No. 94. *RADOVICH v. NATIONAL FOOTBALL LEAGUE ET AL.*, 352 U. S. 445;

No. 639. *SCHYMAN v. DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS ET AL.*, 352 U. S. 1001;

No. 651. *CLARK v. ILLINOIS*, 352 U. S. 1002;

No. 687. *FEDERIKA ET AL. v. COMMISSIONER OF INTERNAL REVENUE*, 352 U. S. 1025;

No. 698. *COOPER v. UNITED STATES*, 352 U. S. 1026;

No. 701. *POLIAFICO ET AL. v. UNITED STATES*, 352 U. S. 1025;

No. 714. *WOOLFSON v. DOYLE, TRUSTEE, ET AL.*, 352 U. S. 1031; and

No. 11, Misc. *DOPKOWSKI v. RAGEN, WARDEN*, 352 U. S. 1031. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.



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No. 11. UNITED STATES GYPSUM CO. *v.* NATIONAL GYPSUM CO. ET AL., 352 U. S. 457. The petitions for rehearing in this case are denied. MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

APRIL 22, 1957.

*Decisions Per Curiam.*

No. 534. ALLEN *v.* MERRELL, COUNTY CLERK, DUCHESNE COUNTY, UTAH. Certiorari, 352 U. S. 889, to the Supreme Court of Utah. *Per Curiam*: The motion to vacate the judgment is granted and the case is remanded to the Supreme Court of Utah for further proceedings in light of the stipulation of counsel that the cause is moot. On the stipulation were *Robert W. Barker* for petitioner and *E. R. Callister*, Attorney General of Utah, for respondent.

No. 799. UNION INSURANCE AGENCY ET AL. *v.* HOLZ, SUPERINTENDENT OF INSURANCE OF NEW YORK. Appeal from the Appellate Division of the Supreme Court of New York, First Judicial Department. *Per Curiam*: The appeal is dismissed for want of a substantial federal question. *Stanford Clinton* and *Robert A. Sprecher* for appellants. Reported below: 1 App. Div. 2d 945, 151 N. Y. S. 2d 926.

No. 803. HANDY CAFE, INC., *v.* COSTELLO DISTRIBUTING Co., INC. Appeal from the Supreme Judicial Court of Massachusetts. *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. *Angus M. MacNeil* for appellant. Reported below: 334 Mass. 707, 137 N. E. 2d 218.

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No. 775. SCHENLEY DISTILLERS, INC., ET AL. *v.* BINGLER, DISTRICT DIRECTOR OF INTERNAL REVENUE. Appeal from the United States District Court for the Western District of Pennsylvania. *Per Curiam*: The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE HARLAN took no part in the consideration or decision of this case. *Elder W. Marshall* for appellants. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky and Melva M. Graney* for appellee. Reported below: 145 F. Supp. 517.

No. 806. AMITY ESTATES, INC., ET AL. *v.* WERKING. Appeal from the Court of Appeals of New York. *Per Curiam*: 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. *Herman G. Blumenthal, Abraham H. Waisman and Francis A. Ruf* for appellants. Reported below: 2 N. Y. 2d 43, 137 N. E. 2d 321.

No. 600, Misc. REICKAUER *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Appeal from the Supreme Court of Appeals of Virginia. *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.

#### *Miscellaneous Orders.*

No. 576. ROSENBLUM *v.* UNITED STATES, 352 U. S. 969. Leave is granted to withdraw petition for rehearing pursuant to stipulation of counsel. On the stipulation were *Frederick H. Block* for petitioner and *Solicitor General Rankin* for the United States. Reported below: 236 F. 2d 502.

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No. 430. *ACHILLI v. UNITED STATES*. Certiorari, 352 U. S. 1023, to the United States Court of Appeals for the Seventh Circuit. The motion for leave to file brief of Carl J. Batter, as *amicus curiae*, is granted. The motion for leave to appear and present oral argument is denied.

No. 809. *MICHIGAN WISCONSIN PIPE LINE Co. v. CORPORATION COMMISSION OF OKLAHOMA ET AL.* Appeal from the Supreme Court of Oklahoma. The motion of the Corporation Commission of the State of Oklahoma for leave to file motion to dismiss is granted. *Ferrill H. Rogers* for movant.

No. 337, Misc. *SHAMEL v. BELINSON, SUPERINTENDENT, JACKSONVILLE, ILLINOIS, STATE HOSPITAL*. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, for respondent.

No. 624, Misc. *GIRVIN v. ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM*;

No. 625, Misc. *McCLURE v. HEINZE, WARDEN*;

No. 626, Misc. *SCOTT v. NASH, WARDEN*;

No. 629, Misc. *HUX v. ALVIS, WARDEN*;

No. 639, Misc. *HOPWOOD v. UNITED STATES BOARD OF PAROLE*;

No. 648, Misc. *McCoy v. COINER, WARDEN*; and

No. 652, Misc. *CAVINESS v. UNITED STATES*. Motions for leave to file petitions for writs of habeas corpus denied.

No. 627, Misc. *HALL v. ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL.* Motion for leave to file petition for writ of injunction denied.

No. 647, Misc. *DELANEY v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON*. Motion for leave to file petition for writ of prohibition denied.



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*Certiorari Granted.*

No. 819. *HEIKKINEN v. UNITED STATES*. C. A. 7th Cir. Certiorari granted. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 240 F. 2d 94.

No. 811. *SHERMAN v. UNITED STATES*. C. A. 2d Cir. Certiorari granted. Petitioner *pro se*. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 240 F. 2d 949.

*Certiorari Denied.* (See also Nos. 803 and 806 and Misc. No. 600, *supra*.)

No. 744. *FRIENDLY SOCIETY OF ENGRAVERS & SKETCH-MAKERS v. CALICO ENGRAVING Co.* C. A. 4th Cir. Certiorari denied. *Henry Hammer* for petitioner. *Edward W. Mullins* for respondent. Reported below: 238 F. 2d 521.

No. 751. *MUTUAL SHOE Co. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 1st Cir. Certiorari denied. *Carl J. Batter* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice*, *Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 238 F. 2d 729.

No. 754. *LIAS ET UX. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 4th Cir. Certiorari denied. *John E. Laughlin, Jr.*, *Samuel Goldstein*, *Thurman Hill* and *James M. Barnes* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Rice*, *A. F. Prescott* and *Meyer Rothwacks* for respondent. Reported below: 235 F. 2d 879.

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No. 807. *TAYLOR v. FAHS, COLLECTOR OF INTERNAL REVENUE*. C. A. 5th Cir. Certiorari denied. *Philip Elijah Paine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott and Walter Akerman, Jr.* for respondent. Reported below: 239 F. 2d 224.

No. 808. *LIEBLING v. LEVY ET AL.* C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Frank D. Mayer* and *Louis A. Kohn* for respondents. Reported below: 238 F. 2d 505.

No. 813. *MILNER ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. *Wm. Scott Stewart* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Robert G. May-sack* for the United States. Reported below: 240 F. 2d 216.

No. 815. *STEINER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. *Robert J. Downing* and *William I. Conway* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph M. Howard and Lawrence K. Bailey* for the United States. Reported below: 239 F. 2d 660.

No. 821. *CLAY ET AL. v. DOMINION OF CANADA ET AL.* C. A. 2d Cir. Certiorari denied. *John W. Guzzetta* for petitioners. *Inzer B. Wyatt* filed a brief for *Arnold D. P. Heeney*, Ambassador of Canada to the United States, as *amicus curiae*, in opposition. Reported below: 238 F. 2d 400.

No. 822. *WOLF v. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE*. C. A. 9th Cir. Certiorari denied. *John Caughlan* for petitioner. *Solici-*

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*tor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Julia P. Cooper for respondent. Reported below: 238 F. 2d 249.*

No. 826. LOCAL No. 332, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL. *v.* GRAND TRUNK WESTERN RAILROAD Co. C. A. 6th Cir. Certiorari denied. *David Previant and George S. Fitzgerald* for petitioners. *H. Victor Spike* for respondent. Reported below: 239 F. 2d 551.

No. 827. COOKE, DOING BUSINESS AS COBE OIL Co., *v.* LIBERTY MUTUAL FIRE INSURANCE Co. C. A. 8th Cir. Certiorari denied. *Ernest Hubbell* for petitioner. *Albert Leroy Plummer* for respondent. Reported below: 239 F. 2d 597.

No. 828. HOWARD *v.* FURST ET AL. C. A. 2d Cir. Certiorari denied. *Lewis M. Dabney, Jr.* for petitioner. *Mortimer Hays and Mortimer Feuer* for Furst et al., *A. Donald MacKinnon* for Everett, and *Edward W. Bourne and Eugene Z. DuBose* for the Cerro de Pasco Corporation, respondents. Reported below: 238 F. 2d 790.

No. 836. SERGEANT *v.* FUDGE, REGIONAL OPERATIONS MANAGER, POST OFFICE DEPARTMENT, ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub and Samuel D. Slade* for respondents. Reported below: 238 F. 2d 916.

No. 840. VANDERVEER *v.* ERIE MALLEABLE IRON Co. C. A. 3d Cir. Certiorari denied. *Ralph Hammar* for petitioner. *Julian Miller* for respondent. Reported below: 238 F. 2d 510.



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No. 831. *AXILROD v. MINNESOTA*. Supreme Court of Minnesota. Certiorari denied. *Max M. Kampelman* for petitioner. *Miles Lord*, Attorney General of Minnesota, *Victor J. Michaelson*, Special Assistant Attorney General, *George M. Scott*, *Bruce C. Stone* and *Per M. Larson* for respondent. Reported below: 248 Minn. 204, 79 N. W. 2d 677.

No. 850. *STEELE v. SHEERIN, ADMINISTRATRIX*. C. A. 6th Cir. Certiorari denied. *G. Cameron Buchanan* and *Richard Alan Harvey* for petitioner. *James A. Markle* for respondent. Reported below: 240 F. 2d 797.

No. 887. *OLAF PEDERSEN'S REDERI A/S v. MOTOR DISTRIBUTORS, LTD., ET AL.* C. A. 5th Cir. Certiorari denied. *Charles S. Haight* and *Richard F. Ralph* for petitioner. *William Garth Symmers* and *William Warner* for respondents. Reported below: 239 F. 2d 463.

No. 895. *WICHITA FALLS INDEPENDENT SCHOOL DISTRICT ET AL. v. AVERY ET AL.* C. A. 5th Cir. Certiorari denied. *R. Marvin Pierce* for petitioners. *Thurgood Marshall* for respondents. Reported below: 241 F. 2d 230.

No. 817. *WHITAKER CABLE CORP. v. FEDERAL TRADE COMMISSION*. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Edwin S. D. Butterfield* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Hansen*, *Daniel M. Friedman*, *Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 239 F. 2d 253.

No. 478, Misc. *TAYLOR v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 2d 409.

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No. 852. *SCOTT v. RKO RADIO PICTURES*. C. A. 9th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Robert W. Kenny* and *Charles J. Katz* for petitioner. *Irving M. Walker* for respondent. Reported below: 240 F. 2d 87.

No. 825. *FISHMAN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. *George D. Kline* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 240 F. 2d 840.

No. 440, Misc. *JAKALSKI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Isabelle Cappello* for the United States. Reported below: 237 F. 2d 503.

No. 520, Misc. *ALM v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 238 F. 2d 604.

No. 523, Misc. *HOLLOMAN v. JARNAGIN, CHAIRMAN, BOARD OF VETERAN'S APPEALS*. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondent.

No. 562, Misc. *DUNN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 238 F. 2d 908.

No. 571, Misc. *KENDALL v. ILLINOIS*. Criminal Court of Cook County, Illinois. Certiorari denied.

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No. 589, Misc. *DAVIES v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied. Reported below: 10 Ill. 2d 11, 139 N. E. 2d 216.

No. 590, Misc. *DE VONEY v. RAGEN, WARDEN*. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 593, Misc. *HARRIS v. RAGEN, WARDEN*. Circuit Court of Will County, Illinois. Certiorari denied.

No. 601, Misc. *NEALY v. GLADDEN, WARDEN*. Supreme Court of Oregon. Certiorari denied.

No. 603, Misc. *FAAS v. NEW JERSEY*. Supreme Court of New Jersey. Certiorari denied.

No. 613, Misc. *MAPLES v. MISSOURI ET AL.* Supreme Court of Missouri. Certiorari denied.

No. 615, Misc. *THOMPSON v. LAINSON, WARDEN*. Supreme Court of Iowa. Certiorari denied.

No. 634, Misc. *FREEMAN v. BIBB, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL.* Criminal Court of Cook County, Illinois. Certiorari denied.

No. 645, Misc. *LUFT v. MICHIGAN*. Supreme Court of Michigan. Certiorari denied.

No. 656, Misc. *HARRIS v. MISSOURI ET AL.* Supreme Court of Missouri and Circuit Court of Polk County, Missouri. Certiorari denied.

No. 592, Misc. *CIANCI v. NEW JERSEY*. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.



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No. 347, Misc. LEWIS *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* Will Wilson, Attorney General of Texas, and L. W. Gray, Assistant Attorney General, for respondent.

No. 477, Misc. DAVIS *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se.* John J. O'Connell, Attorney General of Washington, and Michael R. Alfieri, Assistant Attorney General, for respondent.

No. 793. TIAN *v.* BROUSSARD. Supreme Court of Texas. Certiorari denied. Charles E. Heidingsfelder, Jr. for petitioner. Reported below: 156 Tex. —, 295 S. W. 2d 405.

No. 829. NORTH AMERICAN AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Telford Taylor, George J. Solomon, Hardy K. Maclay and Walter D. Hansen for petitioners. Solicitor General Rankin, Franklin M. Stone and O. D. Ozment for respondent. Reported below: 100 U. S. App. D. C. —, 240 F. 2d 867.

No. 830. WOODS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. William B. Bryant and Henry Lincoln Johnson, Jr. for petitioners. Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Felicia Dubrovsky for the United States. Reported below: 99 U. S. App. D. C. 351, 240 F. 2d 37.

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No. 832. *GIZ v. BROWNELL, ATTORNEY GENERAL*. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 99 U. S. App. D. C. 339, 240 F. 2d 25.

No. 841. *EASTERN AIR LINES, INC., v. UNION TRUST CO. ET AL.* United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph W. Henderson*, *Richard W. Galiher* and *John M. Aherne* for petitioner. *David G. Bress*, *Sheldon E. Bernstein*, *Alvin L. Newmyer* and *Jo V. Morgan, Jr.* for respondents. Reported below: 99 U. S. App. D. C. 205, 239 F. 2d 25.

No. 522, Misc. *McGUINN v. UNITED STATES*. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 99 U. S. App. D. C. 286, 239 F. 2d 449.

No. 631, Misc. *HUMPHRIES v. MARYLAND*. Court of Appeals of Maryland. Certiorari denied. Reported below: 212 Md. 653, 139 A. 2d 87.

No. 658, Misc. *HARRISON v. MISSOURI*. Supreme Court of Missouri. Certiorari denied. Reported below: 299 S. W. 2d 479.

*Rehearing Denied.*

No. 676. *MUMMA v. UNITED STATES*, 352 U. S. 1003. Motion for leave to file petition for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion.

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No. 44. UNITED STATES *v.* INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), 352 U. S. 567;

No. 735. UNION LEADER CORP. *v.* McLAUGHLIN, *ante*, p. 909;

No. 488, Misc. ALVIN *v.* MICHIGAN, 352 U. S. 1011; and

No. 558, Misc. STONE *v.* WYOMING EX REL. GUY, ATTORNEY GENERAL, ET AL., 352 U. S. 1026. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

No. 28. ROGERS *v.* MISSOURI PACIFIC RAILROAD CO., 352 U. S. 500; and

No. 42. WEBB *v.* ILLINOIS CENTRAL RAILROAD CO., 352 U. S. 512. Motions for leave to file briefs of Association of American Railroads, as *amicus curiae*, granted. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these motions and applications.

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*Decisions Per Curiam.*

No. 801. AERO DESIGN & ENGINEERING CO. ET AL. *v.* OKLAHOMA EMPLOYMENT SECURITY COMMISSION ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam*: The judgment is affirmed. *Edward E. Soulé, Robert J. Emery* and *Edward M. Box* for appellants. *Mac Q. Williamson*, Attorney General of Oklahoma, *James C. Harkin*, Assistant Attorney General, and *Milton R. Elliott* for the Oklahoma Employment Security Commission et al., and *Harold Cranefield* for Abraham, appellees.



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No. 719. *FAVORS v. COINER, ACTING WARDEN. Certiorari*, 352 U. S. 987, to the Supreme Court of Appeals of West Virginia. *Per Curiam*: The Attorney General of West Virginia has agreed that this case should be remanded to the Supreme Court of Appeals of West Virginia for a hearing to determine the truth of the allegations made in the petition for writ of habeas corpus. If true, the allegations of that petition and the attached affidavit state a deprivation of constitutional rights under *Mooney v. Holohan*, 294 U. S. 103. Other contentions of deprivation of constitutional rights are pressed in the brief submitted to this Court on behalf of the petitioner. We express no opinion as to the validity of these contentions, but assume that they will be open to the petitioner on the hearing in the court below. The judgment of the Supreme Court of Appeals of West Virginia is vacated, and the cause is remanded for further proceedings not inconsistent with this opinion. *David Ginsburg*, acting under appointment by the Court, 352 U. S. 997, for petitioner. *W. W. Barron*, Attorney General of West Virginia, and *Fred H. Caplan*, Assistant Attorney General, for respondent.

No. 800. *VAN METER ET AL. v. ABRAHAM ET AL.* Appeal from the Supreme Court of Oklahoma. *Per Curiam*: The motion to dismiss is granted and the appeal is dismissed. *Edward E. Soulé* and *Robert J. Emery* for appellants. *Harold Cranefield* for Abraham, and *Mac Q. Williamson*, Attorney General of Oklahoma, *James C. Harkin*, Assistant Attorney General, and *Milton R. Elliott* for the Oklahoma Employment Security Commission et al., appellees. Reported below: 303 P. 2d 434.

No. 814. *SUNRAY MID-CONTINENT OIL CO. v. FEDERAL POWER COMMISSION.* On petition for writ of certiorari to the United States Court of Appeals for the Tenth

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Circuit. *Per Curiam*: The petition for writ of certiorari is granted. The power of the Court of Appeals in reviewing the order of the Federal Power Commission was exhausted when it held that the Commission had authority under § 7 (c) and (e) of the Natural Gas Act to issue certificates of public convenience and necessity of limited duration. *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80. The judgment is therefore reversed and the case is remanded to the United States Court of Appeals for the Tenth Circuit for remand to the Commission with directions to consider the applications on their merits. The Commission, now agreeing with the Court of Appeals as to its authority, agrees to this disposition of the case. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *James C. Denton, Jr., M. Darwin Kirk and Robert M. Scott* for petitioner. *Solicitor General Rankin and Willard W. Gatchell* for respondent. Reported below: 239 F. 2d 97.

#### *Miscellaneous Orders.*

No. 430. *ACHILLI v. UNITED STATES*. Certiorari, 352 U. S. 1023, to the United States Court of Appeals for the Seventh Circuit; and

No. 834. *ACHILLI v. UNITED STATES*. Certiorari, *ante*, p. 909, to the United States Court of Appeals for the Seventh Circuit. The motion for leave to file brief of L. B. Binion, as *amicus curiae*, is granted. *Jacob Kossman and Frederick Bernays Wiener* for movant. Reported below: No. 430, 234 F. 2d 797.

No. 661, Misc. *HOWELL v. MELLOTT*, U. S. DISTRICT JUDGE; and

No. 670, Misc. *TISCIO v. MARTIN, WARDEN, ET AL.* Motions for leave to file petitions for writs of mandamus denied.

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No. 635, Misc. GRAY *v.* UNITED STATES; and

No. 637, Misc. DAVIS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

*Certiorari Granted.* (See also Nos. 769, ante, p. 230, and 814, supra.)

No. 833. COLUMBIA BROADCASTING SYSTEM, INC., ET AL. *v.* LOEW'S, INC., ET AL. C. A. 9th Cir. *Certiorari* granted. *Homer I. Mitchell, W. B. Carman* and *Warren M. Christopher* for the Columbia Broadcasting System, Inc., et al., and *Loyd Wright* and *Dudley K. Wright* for Benny, petitioners. *Joseph P. Loeb* for Loew's, Inc., et al., respondents. Reported below: 239 F. 2d 532.

*Certiorari Denied.*

No. 838. GREGG COMPANY OF DELAWARE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. *Certiorari* denied. *Kenneth W. Moroney* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Meyer Rothwacks* for respondent. Reported below: 239 F. 2d 498.

No. 839. DUGAN ET AL. *v.* PENNSYLVANIA RAILROAD Co. Supreme Court of Pennsylvania, Eastern District. *Certiorari* denied. *B. Nathaniel Richter* and *Lois G. Forer* for petitioners. *Philip Price* and *Robert M. Landis* for respondent. Reported below: 387 Pa. 25, 127 A. 2d 343.

No. 857. SAPERSTEIN *v.* NEW YORK. Court of Appeals of New York. *Certiorari* denied. *Irwin N. Wilpon* and *Burton B. Turkus* for petitioner. *Frank S. Hogan* for respondent. Reported below: 2 N. Y. 2d 210, 140 N. E. 2d 252.



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No. 863. *MASSA v. JIFFY PRODUCTS Co., INC.* C. A. 9th Cir. Certiorari denied. *Jerome A. Reiner* for petitioner. *William Douglas Sellers* for respondent. Reported below: 240 F. 2d 702.

No. 870. *TREASURE COMPANY v. BULLEN ET AL.* C. A. 9th Cir. Certiorari denied. *John H. Rice* for petitioner. *Edward W. Tuttle* for respondents. Reported below: 239 F. 2d 824.

No. 254, Misc. *BOWDEN v. MICHIGAN.* Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Thomas M. Kavanagh*, Attorney General of Michigan, and *Edmund E. Shepherd*, Solicitor General, for respondent.

No. 342, Misc. *ROY v. COINER, WARDEN.* Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *W. W. Barron*, Attorney General of West Virginia, and *Fred H. Caplan*, Assistant Attorney General, for respondent.

No. 398, Misc. *TRAMAGLINO v. UNITED STATES.* C. A. 2d 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: 234 F. 2d 489.

No. 606, Misc. *FREY v. NEW YORK ET AL.* Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 660, Misc. *DEVORSE v. ILLINOIS.* Criminal Court of Cook County, Illinois. Certiorari denied.

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No. 642, Misc. IRVIN *v.* INDIANA. Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to filing for federal habeas corpus after exhausting state remedies. Petitioner *pro se*. *Edwin K. Steers*, Attorney General of Indiana, and *Owen S. Boling* and *Richard M. Givan*, Deputy Attorneys General, for respondent. Reported below: — Ind. —, 139 N. E. 2d 898.

*Rehearing Denied.*

No. 41. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL No. 427, AFL, ET AL. *v.* FAIRLAWN MEATS, INC., *ante*, p. 20. Rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 313. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* CHICAGO RIVER & INDIANA RAILROAD CO. ET AL., *ante*, p. 30. Motion for leave to file brief of Railway Labor Executives' Association, as *amicus curiae*, in support of petition for rehearing granted. Petition for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion and application.

No. 648. YUCHI (EUCHEE) TRIBE OF INDIANS ET AL. *v.* UNITED STATES ET AL., 352 U. S. 1016. Motion for leave to file a second petition for rehearing denied. MR. JUSTICE BLACK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion.

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*Certiorari Granted.*

No. 849. MCKINNEY *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. C. A. 10th Cir. Certiorari granted. *Solicitor General Rankin*, *Assistant Attorney General Doub*, *Samuel D. Slade* and *Alan S. Rosenthal* for peti-

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tioner. *M. E. Clinton* for the Missouri-Kansas-Texas Railroad Co., and *Sam Elson* for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, respondents. Reported below: 240 F. 2d 8.

*Certiorari Denied.*

No. 816. *ATWOOD v. LYDICK*. Supreme Court of Texas and/or Court of Civil Appeals of Texas, Third Judicial District. Certiorari denied. *W. C. Austin* for petitioner. Reported below: See 292 S. W. 2d 923.

No. 847. *DUDLEY v. UNITED STATES*; and

No. 851. *LONDOS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. *Stanley D. Baskin* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 240 F. 2d 1.

No. 855. *SHIRLEY-DUKE APARTMENTS, SECTION 1, INC., ET AL. v. MASON, FEDERAL HOUSING COMMISSIONER, ET AL.* C. A. 4th Cir. Certiorari denied. *Armistead L. Boothe* and *Carl Budwesky* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Melvin Richter* for respondents. Reported below: 240 F. 2d 428.

No. 856. *COLUMBIA PICTURES CORP. v. STEPHENS*. C. A. 2d Cir. Certiorari denied. *Arthur H. Schwartz* for petitioner. *David Schenker* for respondent. Reported below: 240 F. 2d 764.

No. 860. *WIESEN-HART, INC., v. ADVISERS, INCORPORATED*. C. A. 6th Cir. Certiorari denied. *J. Warren Kinney, Jr.* for petitioner. *Stanton T. Lawrence, Jr.*, for respondent. Reported below: 238 F. 2d 706.



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No. 858. *CHODORSKI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Robert G. Maysack* for the United States. Reported below: 240 F. 2d 590.

No. 869. *JULES S. BACHE TRUST ET AL. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 2d Cir. Certiorari denied. *Allan F. Ayers, Jr. and Martin D. Jacobs* for Beckman, and *Wilbur H. Friedman* for Miller, petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky and Melva M. Graney* for respondent. Reported below: 239 F. 2d 385.

No. 899. *WUNDERLICH CONTRACTING CO. ET AL. v. UNITED STATES EX REL. REISCHEL & COTTRELL ET AL.* C. A. 10th Cir. Certiorari denied. *Allan E. Mecham* for petitioners. *John S. Boyden* for respondents. Reported below: 240 F. 2d 201.

No. 859. *UNION PACIFIC RAILROAD CO. v. UNITED STATES*. Court of Claims. Certiorari denied. *Lawrence Cake and Raymond A. Negus* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter and Alan S. Rosenthal* for the United States. Reported below: 137 Ct. Cl. 267, 147 F. Supp. 483.

No. 874. *POMEROY, EXECUTOR, v. PENNSYLVANIA RAILROAD CO.* United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hyman Smollar and Eugene Gressman* for petitioner. *Hugh B. Cox and James H. McGlothlin* for respondent. Reported below: 99 U. S. App. D. C. 272, 239 F. 2d 435.

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No. 367, Misc. *TYSON v. DAY, WARDEN*. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 655, Misc. *GAWRON v. ADAMNOSKI, STATE'S ATTORNEY*. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 241, Misc. *MUHLENBROICH v. HEINZE, WARDEN*. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

*Rehearing Denied.*

No. 743. *SHAW, EXECUTOR, v. ATLANTIC COAST LINE RAILROAD Co. ET AL.*, *ante*, p. 920; and

No. 514, Misc. *STAFFORD v. SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY*, *ante*, p. 923. Petitions for rehearing denied.

No. 50. *SAN DIEGO BUILDING TRADES COUNCIL ET AL. v. GARMON ET AL.*, *ante*, p. 26;

No. 738. *NATHAN ET AL. v. UNITED STATES*, *ante*, p. 910;

No. 745. *SNIDER v. VIRGINIA*, *ante*, p. 916;

No. 788. *GINSBURG v. BLACK ET AL.*, *ante*, p. 911; and

No. 805. *DYNER v. SCHWARTZ ET AL., TRUSTEES, ET AL.*, *ante*, p. 912. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

No. 145. *JOHN DANZ CHARITABLE TRUST v. COMMISSIONER OF INTERNAL REVENUE*, 352 U. S. 828. Rehearing denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

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No. 551. *NUNAN v. UNITED STATES*, *ante*, p. 912. Rehearing denied. MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 733. *McCLATCHY BROADCASTING Co. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.*, *ante*, p. 918. Rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 752. *JACOBS, DOING BUSINESS AS JACOBS INSTRUMENT Co., v. UNITED STATES*, *ante*, p. 904. Rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

*Dismissal Under Rule 60.*

No. 872. *UNITED STATES v. OLIVER*. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Solicitor General Rankin* was on the stipulation for the United States. With him on the petition were *Assistant Attorney General Olney* and *Beatrice Rosenberg*. *Jack Z. Krigel* was on the stipulation for respondent. Reported below: 239 F. 2d 818.

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*Decisions Per Curiam.*

No. 622, Misc. *IN RE PATTERSON*. On petition for writ of certiorari to the Supreme Court of Oregon. *Per Curiam*: The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Supreme Court of Oregon is vacated and the case is remanded for reconsideration in light of *Konigsberg v. State Bar of California*, 353 U. S. 252, and



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*Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232. See also *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673.

*Charles Allan Hart, Jr.* and *R. W. Nahstoll* for petitioner. *Hugh L. Biggs* and *Cleveland C. Cory* for the Oregon State Bar and Public, respondent. Reported below: 210 Ore. 495, 302 P. 2d 227.

No. 681, Misc. *KUBALA v. ILLINOIS*. Appeal from the Supreme Court of Illinois. *Per Curiam*: The appeal is dismissed.

*Decree and Order.*

No. 3, Original, October Term, 1921. *WYOMING v. COLORADO*. Upon consideration of the joint motion of counsel for the parties in this case to vacate the former decree (259 U. S. 496; 260 U. S. 1), it is ordered that the joint motion be, and it is hereby, granted and the former decree, as amended, is vacated and a new decree is entered to read as follows:

"IT IS ORDERED, ADJUDGED AND DECREED that:

"I. The State of Colorado, or anyone recognized by her as duly entitled thereto, shall have the right to divert from the Laramie river and its tributaries, for use in the State of Colorado, 49,375 acre-feet of water in each calendar year, which diversion and use shall be subject to the limitations and restrictions hereinafter set forth. The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after such diversion and use in Colorado.

"II. The State of Colorado, its officers, attorneys, agents and employees be, and they are severally enjoined

"(a) from diverting or permitting the diversion of more than 19,875 acre-feet of water in any calendar

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year from the Laramie river and its tributaries for use in Colorado at any or all points outside of the basin of said river, which amount may be diverted by the present owners of transmountain water rights or by their successors in ownership, through any ditches, canals, tunnels or structures capable of carrying the same, as the owners of said water rights and of such structures may from time to time agree among themselves, or as may be determined by a court of competent jurisdiction;

“(b) from diverting or permitting the diversion of more than 29,500 acre-feet of water in any calendar year from the Laramie river and its tributaries for use in Colorado within the drainage basin of said river, of which amount not more than 1,800 acre-feet shall be diverted in any calendar year after July 31; provided, that if in any calendar year any part or all of said 19,875 acre-feet of water which may be diverted for use outside of the drainage basin of said river is not so diverted for use outside the drainage basin of said river, the amount not so diverted may be added to the amount which may be diverted hereunder for use in Colorado within the drainage basin of said river. Such water diverted for use in Colorado within the drainage basin of said river shall be diverted only through the headgates of ditches serving, and shall only be used to irrigate, those lands within the Laramie river basin in Colorado which are marked and designed by cross-hatching on Exhibit ‘A’ attached hereto and hereby made a part hereof, by the present owners of said lands and the water rights serving said lands or by their successors in ownership, and none of said waters shall be used for the irrigation of any lands not included within the boundaries of the lands so indicated on Exhibit ‘A’.



EXHIBIT "A"

Attached to and made a part of the  
Decree entered May 13, 1957, by  
THE SUPREME COURT OF THE UNITED STATES  
in No. 3, Original, October Term, 1921,  
WYOMING v. COLORADO.

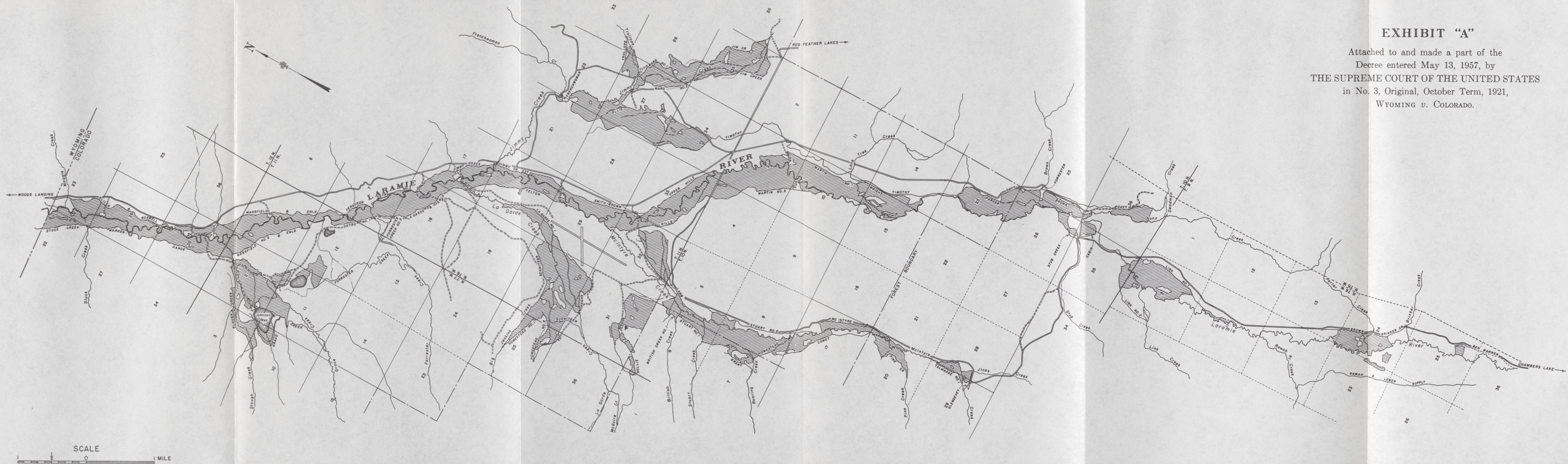




EXHIBIT "A"  
The National Forest of the United States  
Established May 13, 1907  
by Executive Order  
No. 1181  
Washington, D. C.  
Department of the Interior  
Bureau of Land Management



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"III. Except as modified or restricted hereby, the relative rights to the use of Colorado's share of the Laramie river shall continue to be governed by the rules of appropriation and use as determined by the laws of Colorado, and shall be administered by its water officials.

"IV. This decree shall not prejudice or affect the right of the State of Colorado or the State of Wyoming, or of anyone recognized by either state as duly entitled thereto, to continue to exercise the right to divert and use water from Sand Creek, sometimes spoken of as a tributary of the Laramie river, in virtue of an existing and lawful appropriation of the waters of such creek.

"V. The Clerk of this Court shall transmit to the chief magistrates of the States of Wyoming and Colorado copies of this decree duly authenticated under the seal of this Court."

The motion of Ward Goodrich et al. for leave to intervene is denied.

*George F. Guy*, Attorney General, and *Howard B. Black*, Deputy Attorney General, for the State of Wyoming, complainant.

*Duke W. Dunbar*, Attorney General, *Frank E. Hickey*, Deputy Attorney General, *John B. Barnard, Jr.*, Assistant Attorney General, and *Felix L. Sparks*, Special Assistant Attorney General, for the State of Colorado, defendant.

*James A. Greenwood* for Goodrich et al., movants.

### *Miscellaneous Orders.*

No. 835. ADAMS NEWARK THEATER CO. ET AL. v. CITY OF NEWARK ET AL. Appeal from the Supreme Court of New Jersey. The application for stay is denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Sylvan C. Balder* and *Isadore Gottlieb* for appellants. *Vincent J. Casale* for appellees. Reported below: 22 N. J. 472, 126 A. 2d 340.

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No. 607. *TAYLOR ET AL. v. UNITED STATES*. Certiorari, 352 U. S. 963, to the United States Court of Appeals for the Sixth Circuit. The motion of petitioners to remand is denied and the case is referred to the United States District Court for the Western District of Tennessee for consideration of the settlement agreement. *Hubsch v. United States*, 338 U. S. 440 and 340 U. S. 804. *Gordon Browning* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 236 F. 2d 649.

No. 150, Misc. *PROHASKA v. ILLINOIS*. On petition for writ of certiorari to the Supreme Court of Illinois. The petitioner's motion to dismiss the petition for writ of certiorari is granted. Petitioner *pro se*. *Latham Castle*, Attorney General of Illinois, for respondent. Reported below: 8 Ill. 2d 579, 134 N. E. 2d 799.

No. 676, Misc. *KALLOS ET UX. v. NEW YORK*; and  
No. 688, Misc. *PALMER v. LOONEY, WARDEN*. Motions for leave to file petitions for writs of habeas corpus denied.

*Certiorari Granted.* (See also No. 622, Misc., *supra*.)

No. 880. *UNITED STATES v. R. F. BALL CONSTRUCTION Co., INC., ET AL.* C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *A. F. Prescott* for the United States. *Jack C. Hebdon* for the United Pacific Insurance Co., respondent. Reported below: 239 F. 2d 384.

No. 777. *HARMON v. BRUCKER, SECRETARY, DEPARTMENT OF THE ARMY*. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *David I. Shapiro* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Doub*, *Samuel D. Slade* and *Bernard Cedarbaum* for respondent. Reported below: 100 U. S. App. D. C. —, 243 F. 2d 613.



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No. 512, Misc. *MILLER 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. *De Long Harris* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: — U. S. App. D. C. —, 244 F. 2d 75.

*Certiorari Denied.*

No. 792. *HEINZE, WARDEN, v. BAILLEAUX*. Supreme Court of California. Certiorari denied. *Edmund G. Brown*, Attorney General of California, and *Clarence A. Linn*, Assistant Attorney General, for petitioner. Reported below: 47 Cal. 2d 258, 302 P. 2d 801.

No. 861. *JAMES NASSER PRODUCTIONS, INC., ET AL. v. CLARKE*, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. *Adele I. Springer* for petitioners.

No. 864. *MENZIES ET AL. v. FEDERAL TRADE COMMISSION*. C. A. 4th Cir. Certiorari denied. *James W. Cassey* for petitioners. With him on the petition was *G. C. A. Anderson* for McCormick, petitioner. *Solicitor General Rankin*, *Assistant Attorney General Hansen*, *Daniel M. Friedman*, *Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 242 F. 2d 81.

No. 865. *COLLURA v. PENNSYLVANIA*. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Marjorie Hanson Matson* for petitioner.

No. 867. *UNITED STATES FOR THE USE OF MALLOY v. BOWDEN, TRUSTEE IN BANKRUPTCY, ET AL.* C. A. 9th Cir. Certiorari denied. *John E. McCall* for petitioner. Reported below: 239 F. 2d 572.

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No. 868. BEAVER PIPE TOOLS, INC., *v.* CAREY. C. A. 6th Cir. Certiorari denied. *Robert G. Day* and *H. H. Hoppe* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 240 F. 2d 843.

No. 871. WEIL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Eugene L. Bondy* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 240 F. 2d 584.

No. 877. GRAMATAN-SULLIVAN, INC., *v.* KOSLOW. C. A. 2d Cir. Certiorari denied. *Francis J. Duffy* for petitioner. *Irving Berkelhammer* for respondent. Reported below: 240 F. 2d 523.

No. 896. PARNACHER ET AL. *v.* MOUNT, EXECUTOR. Supreme Court of Oklahoma. Certiorari denied. *James W. Bounds* for petitioners. *John Blaine Gilbreath* for respondent. Reported below: 306 P. 2d 302.

No. 901. BENNETT, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY Co. Supreme Court of North Carolina. Certiorari denied. *Paul Cameron Whitlock* for petitioner. *John M. Robinson* and *W. T. Joyner* for respondent. Reported below: 245 N. C. 261, 96 S. E. 2d 31.

No. 903. INDIAN TOWING CO., INC., *v.* CRAWFORD ET AL. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch*, *René H. Himel, Jr.* and *Lansing L. Mitchell* for petitioner. *Selim B. Lemle* for respondents. Reported below: 240 F. 2d 308.

No. 581, Misc. SAVOR *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 386 Pa. 523, 126 A. 2d 444.

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No. 898. NEW YORK LIFE INSURANCE CO. *v.* ATKINSON. C. A. 10th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Earl S. MacArthur, Morrison Shafroth and Henry W. Toll* for petitioner. *Frederick P. Cranston* for respondent. Reported below: 241 F. 2d 674.

No. 8, Misc. RYBAR *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Arlo E. Smith*, Deputy Attorney General, for respondent.

No. 346, Misc. FOSTER *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County and Circuit Court of Will County, Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle*, Attorney General of Illinois, for Ragen, respondent.

No. 559, Misc. FLITCRAFT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Rankin*, Assistant Attorney General *Olney*, *Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States. Reported below: 237 F. 2d 493.

No. 575, Misc. LYDA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 583, Misc. AGNEW *v.* CITY OF COMPTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 239 F. 2d 226.

No. 584, Misc. BLOCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 2d 631.



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No. 587, Misc. THOMPSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 599, Misc. BANKS *v.* UNITED STATES. C. A. 7th 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: 239 F. 2d 409.

No. 605, Misc. TONER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 619, Misc. HUNTER *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied.

No. 621, Misc. ROBLES *v.* FOLSOM, FEDERAL SECURITY ADMINISTRATOR. C. A. 2d Cir. Certiorari denied. *Emanuel Redfield* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub and Samuel D. Slade* for respondent. Reported below: 239 F. 2d 562.

No. 630, Misc. HENRY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 2 N. Y. 2d 826, 140 N. E. 2d 750.

No. 632, Misc. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 640, Misc. LOGAN *v.* DUNCAN, CIRCUIT COURT JUDGE. Supreme Court of Oregon and Circuit Court for Marion County, Oregon. Certiorari denied.

No. 641, Misc. LEGG *v.* TENEYCKE ET AL. Supreme Court of California. Certiorari denied.

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No. 643, Misc. DENNIS *v.* MURPHY, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 644, Misc. TAYLOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 646, Misc. DiMAGGIO *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 649, Misc. BURKS *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 296 S. W. 2d 737.

No. 669, Misc. HOPKINS *v.* RAGEN, WARDEN. Circuit Court of Kankakee County, Illinois. Certiorari denied.

No. 685, Misc. WILSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 923. HICKINBOTHAM *v.* WILLIAMS, CHANCELLOR. Supreme Court of Arkansas. Certiorari denied. *Kenneth Coffelt* for petitioner. *Eugene R. Warren* for respondent. Reported below: 227 Ark. 126, 296 S. W. 2d 897.

No. 875. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* GOGGIN, TRUSTEE. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Edmund G. Brown*, Attorney General of California, *James E. Sabine*, Assistant Attorney General, and *Ernest P. Goodman* and *Eugene B. Jacobs*, Deputy Attorneys General, for petitioner. *Thomas S. Tobin* for respondent. Reported below: 245 F. 2d 44.

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*Rehearing Denied.*

No. 817. *WHITTAKER CABLE CORP. v. FEDERAL TRADE COMMISSION*, ante, p. 938. Rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

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*Decisions Per Curiam.*

No. 845. *SACK 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 jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *John P. Hannon* for appellant. *Robert Y. Thornton*, Attorney General of Oregon, and *J. Raymond Carskadon* for appellee. Reported below: 210 Ore. 552, 300 P. 2d 427.

No. 843. *MESTICE v. BOROUGH OF NEPTUNE CITY, N. J., ET AL.* Appeal from the United States Court of Appeals for the Third Circuit. *Per Curiam*: The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. Appellant *pro se*. *Joseph R. Megill* and *David Goldstein* for appellees.

No. 866. *SUN OIL CO. v. STATE MINERAL BOARD ET AL.* Appeal from the Supreme Court of Louisiana. *Per Curiam*: The appeal is dismissed for want of a substantial federal question. *Alvin O. King* and *Thomas Cooney Hall* for appellant. Reported below: 231 La. 689, 92 So. 2d 583.

No. 618, Misc. *TOUHY v. ILLINOIS*. Appeal from the Supreme Court of Illinois. *Per Curiam*: The appeal is



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dismissed for want of a substantial federal question. *Robert B. Johnstone* for appellant. Reported below: 9 Ill. 2d 462, 138 N. E. 2d 513.

No. 728. *BARTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, v. SENTNER*; and

No. 784. *SENTNER v. BARTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE*. Appeals from the United States District Court for the Eastern District of Missouri. *Per Curiam*: The judgment is affirmed. See *United States v. Witkovich*, 353 U. S. 194.

MR. JUSTICE BURTON and MR. JUSTICE CLARK dissent. They would note jurisdiction of this appeal and afford the Attorney General an opportunity to present the Government's side of this important internal security problem. *United States v. Witkovich, supra*, in which they dissented, limited § 242 (d) (3) of the Immigration and Nationality Act of 1952, 66 Stat. 211, as amended, 8 U. S. C. (Supp. IV) § 1252 (d) (3), "to authorizing all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens . . . ." It passed on clause (3) and no other. This appeal involves other clauses of § 242 (d), namely, clauses (1) and (4), neither of which was passed on in *Witkovich*. The Court, by summary affirmance of this appeal, without argument, enlarges its holding in *Witkovich* and strikes down two more clauses of § 242 (d). These two clauses are vital to the effectuation of the purpose of the Congress in controlling subversives whose ordered deportation has been forestalled by technical difficulties. For a more detailed discussion see their dissent in *Witkovich*.

*Solicitor General Rankin, Assistant Attorney General Olney and Beatrice Rosenberg* for Barton. *Sydney L. Berger* for Sentner. Reported below: 145 F. Supp. 569.

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*Miscellaneous Orders.*No. 702, Misc. *WELLER v. MARYLAND ET AL.*;No. 708, Misc. *HORNER v. SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY*;No. 712, Misc. *BURKHART v. MARYLAND ET AL.*;No. 716, Misc. *BELL v. MARYLAND ET AL.*; andNo. 734, Misc. *STONE v. TUCK, SHERIFF*. Motions for leave to file petitions for writs of habeas corpus denied.*Certiorari Granted.*

No. 668. *BEILAN v. BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA*. Supreme Court of Pennsylvania, Eastern District. Certiorari granted. *Edwin P. Rome* for petitioner. *C. Brewster Rhoads* and *Edward B. Soken* for respondent. Reported below: 386 Pa. 82, 125 A. 2d 327.

No. 885. *UNITED STATES v. MASSEL*. C. A. 1st Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. *Richard Maguire* for respondent. Reported below: 241 F. 2d 895.

*Certiorari Denied. (See also No. 845, supra.)*

No. 781. *PITTSBURGH-ERIE SAW CORP. v. SOUTHERN SAW SERVICE, INC.*; and

No. 876. *SOUTHERN SAW SERVICE, INC., v. PITTSBURGH-ERIE SAW CORP.* C. A. 5th Cir. Certiorari denied. *Edward Hoopes, III* and *M. F. Goldstein* for the Pittsburgh-Erie Saw Corporation. *Herbert H. Porter* and *Robert B. Troutman* for the Southern Saw Service, Inc. Reported below: 239 F. 2d 339.

No. 879. *ATTERBURY v. RAGEN, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied. *William R. Ming, Jr.* for petitioner. Reported below: 237 F. 2d 953.

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No. 882. ENTERPRISE INDUSTRIES, INC., *v.* TEXAS COMPANY. C. A. 2d Cir. Certiorari denied. *Wallace R. Burke* for petitioner. *Milton Handler* and *Oscar John Dorwin* for respondent. Reported below: 240 F. 2d 457.

No. 886. BURCH *v.* READING COMPANY. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter* for petitioner. *Richard P. Brown, Jr.* and *Henry R. Heebner* for respondent. Reported below: 240 F. 2d 574.

No. 889. TALLEY *v.* SEARS, ROEBUCK & Co. C. A. 5th Cir. Certiorari denied. *Cecil L. Woodgate* for petitioner. *John W. Rutland, Jr.* for respondent. Reported below: 239 F. 2d 82.

No. 890. LEBOEUF ET AL. *v.* AUSTRIAN, SURVIVING TRUSTEE. C. A. 4th Cir. Certiorari denied. *Horace R. Lamb* for petitioners. *Saul J. Lance* for respondent. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* filed a brief in opposition for the Securities and Exchange Commission. Reported below: 240 F. 2d 546.

No. 940. TENNESSEE BOARD OF EDUCATION *v.* BOOKER ET AL. C. A. 6th Cir. Certiorari denied. *Geo. F. McCannless*, Attorney General of Tennessee, *Nat Tipton*, Advocate General, and *Allison B. Humphreys*, Solicitor General, for petitioner. *Robert L. Carter* for respondents. Reported below: 240 F. 2d 689.

No. 878. HARTMAN ET AL. *v.* LAUCHLI, TRUSTEE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Raymond W. Karst* for petitioners. *Kenneth Teasdale* for respondent. Reported below: 238 F. 2d 881.



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No. 960. GRAY ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD Co. C. A. 2d Cir. Certiorari denied. *Daniel L. Stonebridge* and *Wilbur E. Dow, Jr.* for petitioners. *Cletus Keating* and *Edward L. Smith* for respondent. Reported below: 240 F. 2d 460.

No. 351, Misc. RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 454, Misc. KELLY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *John T. Duffy* for petitioner. *Latham Castle*, Attorney General of Illinois, for respondent. Reported below: 8 Ill. 2d 604, 136 N. E. 2d 785.

No. 468, Misc. YOUNG *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *J. G. Davis*, Special Assistant Attorney General of Texas, for respondent.

No. 499, Misc. ROBINSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Thomas M. Kavanagh*, Attorney General of Michigan, and *Edmund E. Shepherd*, Solicitor General, for respondent.

No. 611, Misc. HILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 240 F. 2d 680.

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No. 582, Misc. *MASHBURN v. ELLIS*, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 633, Misc. *BOWERS v. PENNSYLVANIA*. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 636, Misc. *RIDDLE v. McLEOD*, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 240 F. 2d 206.

No. 638, Misc. *CARROLL v. MURPHY*, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 650, Misc. *BALL v. WASHINGTON ET AL.* Supreme Court of Washington. Certiorari denied.

No. 653, Misc. *SHELL v. MISSOURI*. Supreme Court of Missouri. Certiorari denied.

No. 668, Misc. *LEMPIA v. HEINZE*, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 672, Misc. *COMMACK v. MICHIGAN*. Supreme Court of Michigan and Circuit Court of Jackson County, Michigan. Certiorari denied.

No. 673, Misc. *WEAVER ET AL. v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied. Reported below: 10 Ill. 2d 218, 139 N. E. 2d 749.

No. 689, Misc. *DE ANGELO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 691, Misc. *HALLEY v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 240 F. 2d 418.

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No. 699, Misc. DOUGLAS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 930. BURCH *v.* HIBERNIA BANK ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Carl Hoppe* for petitioner. *Moses Lasky* for the Hibernia Bank, and *Pierce Works* for the Richfield Oil Corporation et al., respondents. Reported below: 146 Cal. App. 2d 422, 304 P. 2d 212.

No. 596, Misc. HARLEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alfred L. Scanlan* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Robert G. May-sack* for the United States. Reported below: 100 U. S. App. D. C. —, 242 F. 2d 27.

*Rehearing Denied.*

No. 321. THOMSON *v.* TEXAS & PACIFIC RAILWAY CO., *ante*, p. 926; and

No. 824. DAVIS ET AL. *v.* FOREMAN ET AL., *ante*, p. 930. Petitions for rehearing denied.

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*Decisions Per Curiam.*

No. 818. TEAMSTERS, CHAUFFEURS, HELPERS & TAXI-CAB DRIVERS, LOCAL UNION NO. 327, ET AL. *v.* KERRIGAN IRON WORKS, INC., ET AL. On petition for writ of certiorari to the Court of Appeals of Tennessee, Middle Division. *Per Curiam*: The petition for writ of certiorari is granted and the judgment of the Court of Appeals of Tennessee is reversed. *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; *General Drivers Union v. American Tobacco Co.*, 348 U. S. 978. *L. N. D. Wells, Jr.*, *David*



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*Previant* and *H. G. B. King* for petitioners. *Cecil Sims* for the *Kerrigan Iron Works, Inc.*, respondent. Reported below: 296 S. W. 2d 379.

No. 692, Misc. *WHITE v. NEW YORK*. Appeal from the Court of Appeals of New York. *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. *Roger Hinds* for appellant. Reported below: 2 N. Y. 2d 220, 140 N. E. 2d 258.

No. 791. *DAVIS ET AL. v. SEYMOUR*. Appeal from the United States District Court for the Northern District of California. *Per Curiam*: The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

No. 823. *FEDERAL TRADE COMMISSION v. SEWELL, DOING BUSINESS AS BURNS CUBOID 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. The case is remanded with directions to affirm and enforce the order of the Federal Trade Commission. *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 113-117; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73. *Solicitor General Rankin*, *Assistant Attorney General Hansen*, *Charles H. Weston*, *Earl W. Kintner* and *Robert B. Dawkins* for petitioner. *George R. Maury* for respondent. Reported below: 240 F. 2d 228.

No. 891. *LOCAL UNION 429, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., ET AL. v. FARNSWORTH & CHAMBERS Co., INC.* On petition for writ of certiorari to the Supreme Court of Tennessee,

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Middle District. *Per Curiam*: The petition for writ of certiorari is granted and the judgment of the Supreme Court of Tennessee is reversed. *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; *Garner v. Teamsters Union*, 346 U. S. 485. *Cecil D. Branstetter* for petitioners. *Cecil Sims* for respondent. Reported below: 201 Tenn. —, 299 S. W. 2d 8.

*Miscellaneous Orders.*

No. 945. *HARGETT v. SUMMERFIELD, POSTMASTER GENERAL, ET AL.* Motion for writ of injunction and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *John R. Foley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney* for respondents. Reported below: 100 U. S. App. D. C. —, 243 F. 2d 29.

No. 11. *UNITED STATES GYPSUM CO. v. NATIONAL GYPSUM CO. ET AL.*, 352 U. S. 457. The motion of appellee, National Gypsum Company, to retax costs is denied. MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion. *Samuel I. Rosenman* and *Elmer E. Finck* for appellee-movant.

No. 561. *AUREX CORPORATION ET AL. v. BELTONE HEARING AID CO.*, 352 U. S. 953. The motion to recall notice of denial of certiorari and to amend order denying certiorari is denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion. *Frank J. Delany* and *Charles W. Rummler* for movants.

No. 657, Misc. *DOUGLAS v. LYBARGER, COMMON PLEAS JUDGE, ET AL.* Motion for leave to file petition for writ of mandamus denied.

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No. 906. PARMELEE TRANSPORTATION CO. ET AL. v. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. Appeal from and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Counsel are invited to discuss the following jurisdictional issues:

1. Whether Parmelee Transportation Co. has standing to seek review here on appeal or by writ of certiorari.

2. Whether the judgment of the Court of Appeals is "final" so as to permit review by way of appeal under 28 U. S. C. § 1254 (2). Cf. *Slaker v. O'Connor*, 278 U. S. 188, 189; *South Carolina Electric & Gas Co. v. Flemming*, 351 U. S. 901.

*Lee A. Freeman* and *Philip B. Kurland* for the Parmelee Transportation Co., appellant-petitioner. *F. D. Feeney, Jr.* and *Amos M. Mathews* for the Atchison, Topeka & Santa Fe Railway Co. et al., *Albert J. Meserow* for the Railroad Transfer Service, Inc., and *John C. Melaniphy* for the City of Chicago, appellees-respondents. Reported below: 240 F. 2d 930.

No. 720, Misc. *ERVIN v. LOONEY, WARDEN*;

No. 727, Misc. *BRANDLEY v. PENNSYLVANIA*; and

No. 730, Misc. *WILLIAMS v. RAGEN, WARDEN*. Motions for leave to file petitions for writs of habeas corpus denied.

*Probable Jurisdiction Noted.*

No. 797. *CITIES SERVICE GAS CO. v. STATE CORPORATION COMMISSION OF KANSAS ET AL.* Appeal from the Supreme Court of Kansas. Probable jurisdiction noted. *Conrad C. Mount, O. R. Stites, Joe Rolston* and *Mark H. Adams* for appellant. *Frank G. Theis, Howard T. Fleeson* and *Dale M. Stucky* for appellees. Reported below: 180 Kan. 454, 304 P. 2d 528.



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*Certiorari Granted.* (See also Nos. 818, 823 and 891, *supra*.)

No. 846. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON, ATTORNEY GENERAL. Supreme Court of Alabama. *Certiorari granted.* Robert L. Carter, Thurgood Marshall and Arthur D. Shores for petitioner. John Patterson, Attorney General of Alabama, and MacDonald Gallion, Edmon L. Rinehart and James W. Webb, Assistant Attorneys General, for respondent. Reported below: 265 Ala. 349, 91 So. 2d 214.

No. 897. GREEN ET AL. *v.* UNITED STATES. C. A. 2d Cir. *Certiorari granted.* John J. Abt for petitioners. Solicitor General Rankin, Assistant Attorney General Tompkins and Harold D. Koffsky for the United States. Reported below: 241 F. 2d 631.

No. 904. UNITED STATES *v.* DOW. C. A. 5th Cir. *Certiorari granted.* Solicitor General Rankin, Assistant Attorney General Morton and Roger P. Marquis for the United States. John C. White and Milton K. Eckert for respondent. Reported below: 238 F. 2d 898.

No. 905. CITY OF CHICAGO *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 7th Cir. *Certiorari granted.* John C. Melaniphy and Joseph F. Grossman for petitioner. J. D. Feeney, Jr. and Amos M. Mathews for the Atchison, Topeka & Santa Fe Railway Co. et al., and Albert J. Meserow for the Railroad Transfer Service, Inc., respondents. Reported below: 240 F. 2d 930.

No. 744, Misc. ALCORTA *v.* TEXAS. Motion for stay of execution of the death sentence granted. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Criminal Appeals of Texas

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granted. Petitioner *pro se*. *Will Wilson*, Attorney General of Texas, *George Blackburn*, Assistant Attorney General, and *Felix H. Garcia* for respondent.

*Certiorari Denied.* (See also No. 945 and Misc. No. 692, *supra*.)

No. 881. KEETON, TRADING AS VIRGINIA AUTO TOP Co., *v.* UNITED STATES. C. A. 4th Cir. *Certiorari* denied. *John W. Riely* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. Reported below: 238 F. 2d 878.

No. 888. FIRST NATIONAL BANK IN INDIANA, PENNSYLVANIA, *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; and

No. 975. PARNELL *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION. C. A. 3d Cir. *Certiorari* denied. *Harvey A. Miller, Jr.*, *Harvey A. Miller*, *J. Lee Miller* and *Horace Stern* for petitioner in No. 888. *Edward Dumbauld* for petitioner in No. 975. *Robert L. Kirkpatrick*, *John G. Buchanan* and *Erwin N. Griswold* for respondent. Reported below: 241 F. 2d 455.

No. 902. IVICOLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. *Certiorari* denied. *Louis Bender* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 241 F. 2d 635.

No. 912. KREY PACKING Co. *v.* UNITED STATES. C. A. 8th Cir. *Certiorari* denied. *Abraham Lowenhaupt*, *Henry C. Lowenhaupt* and *Owen T. Armstrong* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice*, *Harry Baum* and *Walter Akerman, Jr.* for the United States. Reported below: 239 F. 2d 1.

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No. 915. *ATKINS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Robert G. Maysack* for the United States. Reported below: 240 F. 2d 849.

No. 920. *BLANCHARD v. CITY OF SHREVEPORT*. Supreme Court of Louisiana. Certiorari denied. Petitioner *pro se*. *Fred Simon* for respondent.

No. 922. *LELLES v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. *Stephen V. Carey and John F. Dore* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg and Isabelle R. Cappello* for the United States. Reported below: 241 F. 2d 21.

No. 926. *EDMUNDS ET AL., DOING BUSINESS AS J. S. EDMUNDS & SONS, v. RALSTON PURINA Co.* C. A. 4th Cir. Certiorari denied. *C. T. Graydon* for petitioners. *David W. Robinson and James F. Dreher* for respondent. Reported below: 241 F. 2d 164.

No. 928. *BUER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. *Fred P. Schuman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney and Morton Hollander* for the United States. Reported below: 241 F. 2d 3.

No. 603. *VERHAAGEN ET AL. v. REEDER, CITY MANAGER OF NORFOLK, ET AL.* Supreme Court of Appeals of Virginia. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Louis B. Fine* for petitioners. *Virgil S. Gore, Jr.* for respondents.



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No. 957. *CIOFFI 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: 242 F. 2d 473.

No. 913. *AMERICAN SURETY CO. OF NEW YORK v. WEBER*. C. A. 5th Cir. Certiorari denied. *Stanley E. Loeb* for petitioner. *Arthur J. Mandell* for respondent. *Solicitor General Rankin* filed a brief for the United States, as *amicus curiae*, in opposition. Reported below: 241 F. 2d 62.

No. 617, Misc. *CARTER v. UNITED STATES*. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 651, Misc. *WILLIAMS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 239 F. 2d 748.

No. 662, Misc. *BUZZIE v. HEINZE, WARDEN*. Supreme Court of California. Certiorari denied.

No. 703, Misc. *LOPEZ v. ILLINOIS*. Supreme Court of Illinois and Criminal Court of Cook County, Illinois. Certiorari denied. Reported below: See 10 Ill. 2d 237, 139 N. E. 2d 724.

No. 705, Misc. *TUDOR v. SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY*. Supreme Court of Washington. Certiorari denied.

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No. 706, Misc. *DUNCAN v. SCHNECKLOTH*, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 711, Misc. *BAXTON v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied. Reported below: 10 Ill. 2d 295, 139 N. E. 2d 754.

No. 731, Misc. *ARCHIE v. BIBB*, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 944. *EVANS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioner. Reported below: 242 F. 2d 534.

No. 951. *SHINABERRY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. *George A. Meekison* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Paul A. Sweeney* for the United States. Reported below: 242 F. 2d 758.

No. 961. *FLYNN & EMRICH Co. v. GREENWOOD ET AL.* C. A. 4th Cir. Certiorari denied. *Charles G. Page* for petitioner. *Harold F. Watson* for respondents. Reported below: 242 F. 2d 737.

No. 908. *LEONARD v. UNITED STATES*. Court of Claims. Certiorari denied. *Richard T. Brewster*, *George Edward Leonard* and *Eberhard P. Deutsch* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 136 Ct. Cl. 686, 145 F. Supp. 758.

No. 909. *HOHENSEE ET AL. v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. *P. Bateman Ennis* for peti-

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tioners. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 243 F. 2d 367.

No. 959. *UNDERWOOD ET AL. v. KNOX GLASS BOTTLE Co. ET AL.* Supreme Court of Mississippi. Certiorari denied. *Wm. Harold Cox* and *Garner W. Green, Sr.* for petitioners. *Charles B. Snow* and *Junior O'Mara* for respondents. Reported below: — Miss. —, 91 So. 2d 843.

No. 919. *ADAMS 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: 137 Ct. Cl. 52.

No. 714, Misc. *PHILLIPS v. MAILLER ET AL.* Supreme Court of New York, Schenectady County. Certiorari denied. Reported below: 5 Misc. 2d 543.

*Rehearing Denied.*

No. 312, October Term, 1955. *UNITED STATES v. OHIO POWER Co.*, *ante*, p. 98. Motion for consideration by the full Court and petition for rehearing denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion and application.

No. 621. *PREISLER v. UNITED STATES*, 352 U. S. 990. Motion for leave to file petition for rehearing out of time denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion.



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No. 751. *MUTUAL SHOE CO. v. COMMISSIONER OF INTERNAL REVENUE*, *ante*, p. 935;

No. 813. *MILNER ET AL. v. UNITED STATES*, *ante*, p. 936;

No. 440, Misc. *JAKALSKI v. UNITED STATES*, *ante*, p. 939;

No. 523, Misc. *HOLLOMAN v. JARNAGIN, CHAIRMAN, BOARD OF VETERAN'S APPEALS*, *ante*, p. 939; and

No. 625, Misc. *MCCLURE v. HEINZE, WARDEN*, *ante*, p. 934. Petitions for rehearing denied.

No. 773. *NATIONAL HELLS CANYON ASSOCIATION, INC., ET AL. v. FEDERAL POWER COMMISSION ET AL.*, *ante*, p. 924. Motion of petitioners for leave to file supplement to petition for rehearing granted. Rehearing denied.

No. 852. *SCOTT v. RKO RADIO PICTURES*, *ante*, p. 939. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

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*Decisions Per Curiam.*

No. 666. *COSTELLO v. UNITED STATES*. Certiorari, 352 U. S. 988, to the United States Court of Appeals for the Second Circuit. *Per Curiam*: The motion for hearing is denied. The judgment is affirmed. *Achilli v. United States*, *ante*, p. 373, decided May 27, 1957. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this case. *Edward Bennett Williams, Morris Shilensky and Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 239 F. 2d 177.

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*Miscellaneous Orders.*

No. 29. *SCALES v. UNITED STATES*. Certiorari, 350 U. S. 992, to the United States Court of Appeals for the Fourth Circuit; and

No. 32. *LIGHTFOOT v. UNITED STATES*. Certiorari, 350 U. S. 992, to the United States Court of Appeals for the Seventh Circuit. No. 29, argued October 10-11, 1956; No. 32, argued October 11, 1956. These cases are restored to the docket for reargument. *Telford Taylor* for petitioner in No. 29. *John J. Abt* for petitioner in No. 32. *Solicitor General Rankin*, *Assistant Attorney General Tompkins*, *Harold D. Koffsky* and *William F. O'Donnell* for the United States. With them on the brief in No. 29 were *Kevin T. Maroney* and *Philip T. White*. *Barent Ten Eyck* filed a brief for the American Civil Liberties Union, as *amicus curiae*, urging reversal in both cases. Reported below: No. 29, 227 F. 2d 581; No. 32, 228 F. 2d 861.

No. 590. *LAMBERT v. CALIFORNIA*. Appeal from the Appellate Department of the Superior Court of California, Los Angeles County. (Probable jurisdiction noted, 352 U. S. 914.) Argued April 3, 1957. This case is restored to the docket for reargument. The Attorney General of California is invited to file a brief and to participate in the oral argument, the appellee's time to be equally divided. *Samuel C. McMorris* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for appellee.

No. —. *ONE, INCORPORATED, v. OLESEN*, POSTMASTER OF LOS ANGELES. The motion for leave to proceed *in forma pauperis* by a corporation is denied. *Eric Julber* for movant. *Solicitor General Rankin* filed a memorandum for respondent in opposition.

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No. 11, Original. UNITED STATES *v.* LOUISIANA. The motion for leave to file brief of the State of Texas, as *amicus curiae*, is granted. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Price Daniel*, Governor, *Will Wilson*, Attorney General, *James H. Rogers*, Assistant Attorney General, and *J. Chrys Dougherty* for the State of Texas, movant. *Solicitor General Rankin* filed a memorandum for the United States, plaintiff.

No. 848. UNITED STATES *v.* HVASS. Appeal from the United States District Court for the Northern District of Iowa. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Warren B. King* for appellee. Reported below: 147 F. Supp. 594.

No. 591, Misc. SHERIDAN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 620, Misc. HEARD *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 725, Misc. FAUBERT *v.* GROAT ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 748, Misc. FORSYTHE *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.



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No. 741, Misc. BRAUN *v.* BELNAP, SUPERINTENDENT, WASHINGTON STATE REFORMATORY;

No. 747, Misc. TALMAGE *v.* MARYLAND;

No. 754, Misc. JORDAN *v.* MARTIN, WARDEN;

No. 756, Misc. POWELL *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM; and

No. 757, Misc. CAFFEY *v.* NASH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 971. TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION ET AL. *v.* RANGE ET AL. On petition for writ of certiorari to the Court of Appeals of Tennessee. The respondent is directed to file a brief pursuant to Rule 24 (1). The Solicitor General is invited to file a brief expressing his views. *Norman M. Littell* and *Fredrick Bernays Wiener* for petitioners. *F. H. Parvin* for respondents. Reported below: — Tenn. App. —, 298 S. W. 2d 545.

*Certiorari Granted.*

No. 470, Misc. ASHDOWN *v.* UTAH. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Utah granted. Petitioner *pro se*. *E. R. Callister*, Attorney General of Utah, and *Walter L. Budge*, Assistant Attorney General, for respondent. Reported below: 5 Utah 2d 59, 296 P. 2d 726.

No. 916. LENG MAY MA *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *Joseph S. Hertogs* for petitioner. *Solicitor General Rankin*, Assistant Attorney General *Olney*, Beatrice Rosenberg and *Julia P. Cooper* for respondent. Reported below: 241 F. 2d 85.

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No. 921. COMMISSIONER OF INTERNAL REVENUE ET AL. v. P. G. LAKE, INC., ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, Hilbert P. Zarky, Ellis N. Slack and Melva M. Graney* for petitioners. *Harry C. Weeks* for P. G. Lake, Inc., et al., *J. P. Jackson* for O'Connor et al., *Allen E. Pye* for Wrather et ux., and *Peter B. Wells* for Weed, respondents. Reported below: 241 F. 2d 65, 69, 71, 78, 84.

No. 917. DENVER UNION STOCK YARD CO. v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION; and

No. 981. BENSON, SECRETARY OF AGRICULTURE, v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION. C. A. 10th Cir. Certiorari granted. *Winston S. Howard, Ashley Sellers, Albert L. Reeves, Jr. and Jesse E. Baskette* for petitioner in No. 917. *Robert L. Farrington, Neil Brooks* and *Donald A. Campbell* for petitioner in No. 981. *Hadlond P. Thomas* for respondent. Reported below: 241 F. 2d 192.

No. 935. FEDERAL TRADE COMMISSION v. C. E. NIEHOFF & Co. C. A. 7th Cir. Certiorari granted. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston* for petitioner. *James J. Magner* for respondent. Reported below: 241 F. 2d 37.

No. 464, Misc. CIUCCI v. ILLINOIS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Illinois granted. *Loring B. Moore, William R. Ming, Jr. and George N. Leighton* for petitioner. *Latham Castle*, Attorney General of Illinois, for respondent. Reported below: 8 Ill. 2d 619, 137 N. E. 2d 40.

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*Certiorari Denied.* (See also *Misc. Nos. 591 and 620, supra.*)

No. 215. UNITED STATES *v.* KOPPERS CO., INC., SUCCESSOR TO KOPPERS UNITED CO. ET AL. Court of Claims. *Certiorari denied.* *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Rice*, *Lee A. Jackson* and *Harry Baum* for the United States. *David W. Richmond*, *Robert N. Miller*, *Frederick O. Graves*, *E. S. Ruffin, Jr.* and *C. M. Crick* for respondent. Reported below: 133 Ct. Cl. 22, 134 F. Supp. 290.

No. 216. UNITED STATES *v.* NEWMARKET MANUFACTURING CO. C. A. 1st Cir. *Certiorari denied.* *Simon E. Sobeloff*, then Solicitor General, *Assistant Attorney General Rice*, *Lee A. Jackson* and *Harry Baum* for the United States. *Louis Eisenstein* for respondent. Reported below: 233 F. 2d 493.

No. 627. HAYES ET AL. *v.* UNITED STATES. C. A. 10th Cir. *Certiorari denied.* *Calvin L. Rampton* and *Zar E. Hayes* for Hayes, and *Bryant H. Croft* for McDonald, petitioners. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 238 F. 2d 318.

No. 820. SMITH *v.* UNITED STATES. C. A. 6th Cir. *Certiorari denied.* *David Hanover* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 239 F. 2d 168.

No. 907. IRVING *v.* UNITED STATES. C. A. 7th Cir. *Certiorari denied.* *Daniel D. Glasser* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Rice* for the United States. Reported below: 241 F. 2d 306.



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No. 910. *ARCHAWSKI ET AL. v. HANIOTI*. C. A. 2d Cir. Certiorari denied. *Harry D. Graham* for petitioners. Reported below: 239 F. 2d 806.

No. 929. *222 EAST CHESTNUT STREET CORP. v. BOARD OF APPEALS OF THE CITY OF CHICAGO ET AL.* Supreme Court of Illinois. Certiorari denied. *Joseph F. Elward* and *Edward S. Macie* for petitioner. *John C. Melaniphy* and *Sydney R. Drebin* for the City of Chicago et al., *Alban Weber* for Northwestern University et al., *Howard B. Bryant* and *John S. Miller* for the Lakefront Realty Corporation et al., and *Howard Ellis* for the Greater North Michigan Avenue Association, respondents. Reported below: 10 Ill. 2d 130, 132, 139 N. E. 2d 218, 221.

No. 943. *DAVIS v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 7th Cir. Certiorari denied. *Carl J. Batter* and *Milton E. Canter* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Rice*, *A. F. Prescott* and *Marvin W. Weinstein* for respondent. Reported below: 239 F. 2d 187.

No. 946. *INGRAM ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 241 F. 2d 708.

No. 842. *ALLIED STEVEDORING CORP. ET AL. v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Norman S. Beier* for petitioners. *Solicitor General Rankin*, *Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 241 F. 2d 925.

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No. 950. DOBY ET AL. *v.* BROWN ET AL., TRUSTEES, ET AL. Supreme Court of North Carolina. Certiorari denied. *Frank Thomas Miller, Jr.* for petitioners. *Stanton P. Williams* for respondents. Reported below: 244 N. C. 746, 94 S. E. 2d 895.

No. 989. PRENTICE, TRUSTEE, *v.* MOSKOWITZ, RECEIVER. C. A. 7th Cir. Certiorari denied. *Robert M. Curley* for petitioner. *Emil Hersh* for respondent. Reported below: 239 F. 2d 649.

No. 552, Misc. KOUGAROK DREDGING CORP. ET AL. *v.* ROYCE ET AL. C. A. 9th Cir. Certiorari denied.

No. 588, Misc. SINOR, ADMINISTRATOR, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John E. Teate* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Melvin Richter and B. Jenkins Middleton* for the United States. Reported below: 238 F. 2d 271.

No. 623, Misc. HENDRIX *v.* MICHIGAN. Circuit Court for Clinton County, Michigan. Certiorari denied.

No. 654, Misc. FERGUSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Curtis P. Mitchell and Frank D. Reeves* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney and Beatrice Rosenberg* for the United States. Reported below: 99 U. S. App. D. C. 331, 239 F. 2d 952.

No. 664, Misc. PALLADINO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

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No. 665, Misc. *FARROW v. PENNSYLVANIA*. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *James N. Lafferty* and *Victor H. Blanc* for respondent. Reported below: 387 Pa. 449, 127 A. 2d 660.

No. 666, Misc. *LA MERE v. NEW YORK*. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: See 3 App. Div. 2d 630, 158 N. Y. S. 2d 102.

No. 667, Misc. *HINES v. ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM*. Court of Criminal Appeals of Texas. Certiorari denied.

No. 671, Misc. *BERRY v. GRAY, WARDEN*. Court of Appeals of Kentucky. Certiorari denied. Reported below: 299 S. W. 2d 124.

No. 678, Misc. *BEACH v. VIRGINIA*. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 680, Misc. *STEWART v. MAYO, PRISON CUSTODIAN, ET AL.* Supreme Court of Florida. Certiorari denied.

No. 690, Misc. *MAPLES v. NASH, WARDEN*. Supreme Court of Missouri. Certiorari denied.

No. 696, Misc. *SIMMONS v. JACKSON, WARDEN*. C. A. 2d Cir. Certiorari denied.

No. 697, Misc. *STEWART v. BANNAN, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 704, Misc. *ASHLEY v. WASHINGTON ET AL.* Supreme Court of Washington. Certiorari denied.



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No. 719, Misc. *CALHOUN v. RHAY*, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 721, Misc. *ORR v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied. Reported below: 10 Ill. 2d 95, 139 N. E. 2d 212.

No. 722, Misc. *HOPE v. ELLIS*, GENERAL MANAGER, TEXAS PRISON SYSTEM. C. A. 5th Cir. Certiorari denied.

No. 724, Misc. *JANOWICZ v. MICHIGAN*. Supreme Court of Michigan. Certiorari denied.

No. 735, Misc. *FOWLER v. ILLINOIS*. Supreme Court of Illinois. Certiorari denied.

No. 740, Misc. *ROBINSON v. RANDOLPH*, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 749, Misc. *RICCI v. NEW JERSEY*. Supreme Court of New Jersey. Certiorari denied.

No. 758, Misc. *JONES v. WASHINGTON ET AL.* Supreme Court of Washington. Certiorari denied.

No. 760, Misc. *SESSIONS v. SOUTH CAROLINA*. Supreme Court of South Carolina. Certiorari denied.

No. 736, Misc. *MAHONEY ET AL. v. CALIFORNIA*. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioners. Reported below: 146 Cal. App. 2d 485, 304 P. 2d 73.

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No. 853. *WOODARD ET AL. v. ROBINSON ET AL.*, COMPOSING THE ARKANSAS PUBLIC SERVICE COMMISSION. Supreme Court of Arkansas. Certiorari denied. *James I. Teague, John E. Coates and Walter D. Hanson* for petitioners. *John R. Thompson and Claude Carpenter, Jr.* for respondents. Reported below: 227 Ark. 102, 296 S. W. 2d 672.

No. 924. *RINGELE v. TERTELING ET AL.*, DOING BUSINESS AS J. A. TERTELING & SONS. Supreme Court of Idaho. Certiorari denied. *Scott P. Crampton, James H. Hawley and Guy Cordon* for petitioner. *John W. Gaskins* for respondents. Reported below: 78 Idaho —, 305 P. 2d 314.

No. 939. *MARKHAM ET AL. v. BURCHFIELD ET AL.* Supreme Court of Texas. Certiorari denied. *Curtis E. Hill* for petitioners. *Young Frank Jungman* for respondents. Reported below: 156 Tex. —, 294 S. W. 2d 795.

No. 965. *DOLCIN CORPORATION ET AL. v. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL.* United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Sigmund Eisenstein* and *T. Bernard Eisenstein* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner and Robert B. Dawkins* for the Federal Trade Commission, respondent. Reported below: — U. S. App. D. C. —, — F. 2d —.

No. 576, Misc. *POOLE v. MISSISSIPPI.* Supreme Court of Mississippi. Certiorari denied. Petitioner *pro se. Joe T. Patterson*, Attorney General of Mississippi, and *John H. Price, Jr.*, Assistant Attorney General, for respondent. Reported below: — Miss. —, 90 So. 2d 212.

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No. 663, Misc. WHITEHEAD *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

*Rehearing Denied.*

No. 769. PENNSYLVANIA ET AL. *v.* BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, *ante*, p. 230;

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No. 822. WOLF *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 936; and

No. 887. OLAF PEDERSEN'S REDERI A/S *v.* MOTOR DISTRIBUTORS, LTD., ET AL., *ante*, p. 938. Petitions for rehearing denied.

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No. 577. ANSELL ET AL. *v.* UNITED STATES, 352 U. S. 969; and

No. 612. OLENDER *v.* UNITED STATES, 352 U. S. 982. Petitions for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications.

No. 774. BROADWELL ET AL. *v.* OHIO, *ante*, p. 911. Motion for leave to file petition for rehearing out of time denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this motion.





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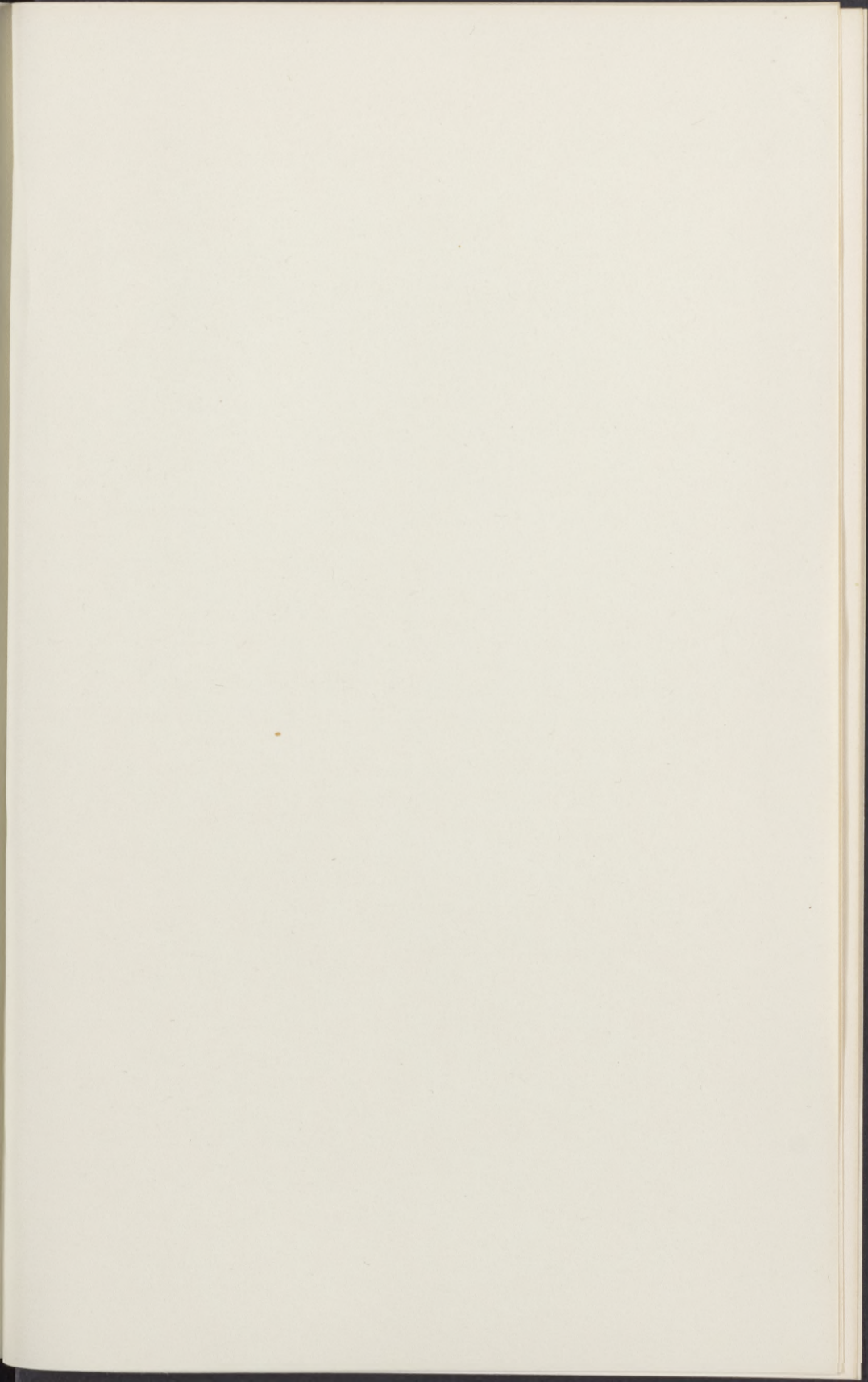
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